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IOWA.—(72) 2; (73) 5; (74) 7; (75) 9; (76, 77) 14; (78) 16; (79) 18; (80) 20; (81) 25; (82) 31; (83) 32; (84) 35; (85) 39; (86) 41; (87) 43; (88) 45; (89, 90) 48; (91) 51; (92) 54; (93) 57; (94, 95) 58; (96, 97) 59; (98) 60; (99) 61; (100) 62; (101, 102) 63; (103) 64; (104) 65; (105) 67; (106) 68; (107) 70; (108) 75; (109) 77; (110) 80; (111) 82; (112) 84; (113) 86; (114) 89; (115) 91; (116) 93; (117) 94; (118) 96; (119) 97; (120) 98; (121) 100; (122, 123) 101; (124) 104; (125, 126) 106; (127) 109; (128) 111; (129) 113; (130) 114; (131) 117; (132, 133) 119; (134) 120.

KANSAS.—(37) 1; (38) 5; (39) 7; (40) 10; (41) 13; (42) 16; (43) 19; (44) 21; (45) 23; (46) 26; (47) 27; (48) 30; (49) 33; (50) 34; (51) 37; (52) 39; (53) 42; (54) 45; (55) 49; (56) 54; (57) 57; (58) 62; (59) 68; (60) 72; (61) 78; (62) 84; (63) 88; (64)

91; (65) 93; (66) 97; (67) 100; (68) 104; (69) 105; (70) 109;
(71) 114; (72) 115; (73) 117; (74) 118; (74, 75) 121; (76) 123.

KENTUCKY.—(83, 84) 4; (85) 7; (86) 9; (87) 12; (88) 21; (89) 25;
(90) 29; (91) 34; (92) 36; (93) 40; (94) 42; (95) 44; (96) 49;
(97) 53; (98) 56; (99) 59; (100) 66; (101) 72; (102) 80; (103)
82; (104) 84; (105) 88; (106) 90; (107) 92; (108) 94; (109) 95;
(110) 96; (111) 98; (112) 99; (113) 101; (114) 102; (115) 103;
(116) 105; (117, 118) 111; (119) 115; (120) 117; (122) 121; (121)
123.

LOUISIANA.—(39 La. Ann.) 4; (40 La. Ann.) 8; (41 La. Ann.) 17;
(42 La. Ann.) 21; (43 La. Ann.) 26; (44 La. Ann.) 32; (45 La.
Ann.) 40; (46, 47 La. Ann.) 49; (48 La. Ann.) 55; (49 La. Ann.)
62; (50 La. Ann.) 69; (51 La. Ann.) 72; (52 La. Ann.) 78; (104)
81; (105) 83; (106) 87; (107) 90; (108) 92; (109) 94; (110) 98;
(111) 100; (112, 113) 104; (114) 108; (115) 112; (116) 114; (115,
117) 116; (118) 118; (119) 121.

MAINE.—(79) 1; (80) 6; (81) 10; (82) 17; (83) 23; (84) 30; (85)
35; (86) 41; (87) 47; (88) 51; (89) 56; (90) 60; (91) 64; (92)
69; (93) 74; (94) 80; (95) 85; (96) 90; (97) 94; (98) 99; (99)
105; (100) 109; (101) 115; (102) 120.

MARYLAND.—(67) 1; (68) 6; (69) 9; (70) 14; (71) 17; (72) 20;
(73) 25; (74) 28; (75) 32; (76) 35; (77) 39; (78) 44; (80) 45;
(79) 47; (81) 48; (82) 51; (83) 55; (84) 57; (85) 60; (86) 63;
(87) 67; (88) 71; (89) 73; (90) 78; (91) 80; (92) 84; (93) 86;
(94) 89; (95) 93; (96) 94; (97) 99; (98) 103; (99) 105; (100) 108;
(101) 109; (102) 111; (103) 115; (104) 118; (105) 121.

MASSACHUSETTS.—(145) 1; (146) 4; (147) 9; (148) 12; (149)
14; (150) 15; (151) 21; (152) 23; (153) 25; (154) 26; (155) 31;
(156) 32; (157) 34; (158) 35; (159) 38; (160) 39; (161) 42; (162)
44; (163) 47; (164) 49; (165) 52; (166) 55; (167) 57; (168) 60;
(169) 61; (170) 64; (171) 68; (172) 70; (173) 73; (174) 75; (175)
78; (176) 79; (177) 83; (178) 86; (179) 88; (180) 91; (181) 92;
(182) 94; (183) 97; (184) 100; (185) 102; (186) 104; (187) 105;
(188) 108; (189) 109; (190) 112; (191) 114; (192) 116; (193) 118;
(194) 120; (195) 122.

MICHIGAN.—(60, 61) 1; (62) 4; (63) 6; (64, 65) 8; (66, 67) 11; (68,
69, 75) 13; (70) 14; (71, 76) 15; (72, 73, 74) 16; (77, 78) 18; (79)
19; (80) 20; (81, 82, 83) 21; (84) 22; (85, 86, 87) 24; (88) 26;
(89) 28; (90, 91) 30; (92) 31; (93) 32; (94) 34; (95, 96) 35; (97)
37; (98) 39; (99) 41; (100) 43; (101) 45; (102) 47; (103) 50;
(104) 53; (105) 55; (106) 58; (107) 61; (108) 62; (109) 63; (110)
64; (111) 66; (112, 113) 67; (114) 68; (115) 69; (116, 117) 72;
(118) 74; (119) 75; (120) 77; (121, 122) 80; (123) 81; (124) 83;
(125) 84; (126) 86; (127) 89; (128) 92; (129) 95; (130) 97;
(131) 100; (132) 102; (133) 103; (134) 104; (135) 106; (137) 109;
(138) 110; (139) 111; (136, 140) 112; (141, 142) 113; (143) 114;
(144) 115; (145) 116; (146) 117; (147, 148) 118; (149) 119; (144,
150) 121; (146, 151) 123.

MINNESOTA.—(36) 1; (37) 5; (38) 8; (39, 40) 12; (41) 16; (42) 18;
(43) 19; (44) 20; (45) 22; (46) 24; (47) 28; (48) 31; (49) 32;
(50) 36; (51, 52) 38; (53) 39; (54) 40; (55) 43; (56) 45; (57)
47; (58) 49; (59) 50; (60) 51; (61) 52; (62) 54; (63) 56; (64)
58; (65) 60; (66) 61; (67, 68) 64; (69) 65; (70) 68; (71) 70;
(72) 71; (73) 72; (74) 73; (75) 74; (76, 77) 77; (78, 79) 79;
(80) 81; (81, 82) 83; (83) 85; (84) 87; (85) 89; (86) 91; (87)
94; (88) 97; (89) 99; (90) 101; (91) 103; (92) 104; (93) 106;

(94) 110; (95) 111; (96) 113; (97) 114; (98, 99) 116; (100) 117;
(101) 118; (98, 102) 120; (103) 123.

MISSISSIPPI.—(65) 7; (66) 14; (67) 19; (68) 24; (69) 30; (70) 35;
(71) 42; (72) 48; (73) 55; (74) 60; (75) 65; (76) 71; (77) 78;
(78) 84; (79) 89; (80) 92; (81) 95; (82) 100; (83) 102; (84) 105;
(85) 107; (86) 109; (87) 112; (88) 117; (89) 119; (86, 89, 90)
122.

MISSOURI.—(92) 1; (93) 3; (94) 4; (95) 6; (96) 9; (97) 10; (98)
14; (99) 17; (100) 18; (101) 20; (102) 22; (103) 23; (104, 105)
24; (106) 27; (107) 28; (108, 109) 32; (110, 111) 33; (112) 34;
(113, 114) 35; (115) 37; (116, 117) 38; (118) 40; (119, 120) 41;
(121) 42; (122) 43; (123) 45; (124, 125) 46; (126) 47; (127) 48;
(128) 49; (129) 50; (130) 51; (131) 52; (132) 53; (133) 54; (134)
56; (135, 136) 58; (137) 59; (138) 60; (139) 61; (140) 62; (141,
142) 64; (143) 65; (144) 66; (145) 68; (146) 69; (147, 148) 71;
(149, 150) 73; (151) 74; (152) 75; (153, 154) 77; (155) 78; (156)
79; (157) 80; (158, 159) 81; (160) 83; (161) 84; (162, 163) 85;
(164) 86; (165) 88; (166) 89; (167, 168) 90; (169) 92; (170, 171)
94; (172) 95; (173) 96; (174, 175) 97; (176) 98; (177) 99; (178,
179) 101; (180, 181, 182) 103; (183, 184, 185, 186) 105; (187) 106;
(188, 189) 107; (190, 191) 109; (192) 111; (193, 194) 112; (195,
196) 113; (197) 114; (198) 115; (199) 116; (200) 118; (201, 202)
119; (203, 204, 205) 120; (206) 121; (207, 208, 209) 123.

MONTANA.—(9) 18; (10) 24; (11) 28; (12) 33; (13) 40; (14) 43;
(15) 48; (16) 50; (17) 52; (18) 56; (19) 61; (20) 63; (21) 69;
(22) 74; (23) 75; (24) 81; (25) 87; (26) 91; (27) 94; (28) 98;
(29) 101; (30) 104; (31) 107; (32) 108; (33) 114; (34) 115; (35)
119; (36) 122.

NEBRASKA.—(22) 3; (23, 24) 8; (25) 13; (26) 18; (27) 20; (28, 29)
26; (30) 27; (31) 28; (32, 33) 29; (34) 33; (35) 37; (36) 38;
(37) 40; (38) 41; (39, 40) 42; (41) 43; (42, 43) 47; (44) 48;
(45, 46) 50; (47) 53; (47, 48) 58; (49) 59; (50) 61; (51, 52)
66; (53) 68; (54) 69; (55) 70; (56) 71; (57) 73; (58) 76; (59)
80; (60) 83; (61) 87; (62) 89; (63) 93; (64) 97; (65) 101; (66)
103; (67) 108; (68) 110; (69) 111; (70) 113; (71) 115; (72) 117;
(73) 119; (74, 75) 121.

NEVADA.—(19) 3; (20) 19; (21) 37; (22) 58; (23) 62; (24) 77;
(25) 83; (26) 99; (27) 103; (28) 113.

NEW HAMPSHIRE.—(64) 10; (62) 13; (65) 23; (66) 49; (67) 68;
(68) 73; (69) 76; (70) 85; (71) 93; (72) 101; (73) 111.

NEW JERSEY.—(43 N. J. Eq.) 3; (44 N. J. Eq.) 6; (50 N. J. L.) 7;
(51 N. J. L.; 45 N. J. Eq.) 14; (46 N. J. Eq.; 52 N. J. L.) 19;
(47 N. J. Eq.) 24; (53 N. J. L.) 26; (48 N. J. Eq.) 27; (49 N.
J. Eq.) 31; (54 N. J. L.) 33; (50 N. J. Eq.) 35; (55 N. J. L.)
39; (51 N. J. Eq.) 40; (56 N. J. L.) 44; (52 N. J. Eq.) 46; (57
N. J. L.; 53 N. J. Eq.) 51; (54 N. J. Eq.; 58 N. J. L.) 55; (59 N.
J. L.) 59; (55 N. J. Eq.) 62; (60 N. J. L.) 64; (56 N. J. Eq.) 67;
(61 N. J. L.) 68; (62 N. J. L.) 72; (57 N. J. Eq.) 73; (63 N. J.
L.) 76; (58 N. J. Eq.) 78; (64 N. J. L.) 81; (59, 60 N. J. Eq.)
83; (65 N. J. L.) 86; (61 N. J. Eq.; 66 N. J. L.) 88; (62 N. J.
Eq.) 90; (67 N. J. L.) 91; (63 N. J. Eq.) 92; (68 N. J. L.) 96;
(64 N. J. Eq.) 97; (69 N. J. L.) 101; (65 N. J. Eq.; 70 N. J. L.)
103; (66 N. J. Eq.) 105; (71 N. J. L.) 108; (67 N. J. Eq.) 110;
(68 N. J. Eq.; 72 N. J. L.) 111; (69 N. J. Eq.) 115; (73 N. J. L.;
70 N. J. Eq.) 118; (74 N. J. L.) 122.

NEW YORK.—(107) 1; (108) 2; (109) 4; (110) 6; (111) 7; (112) 8; (113) 10; (114) 11; (115) 12; (116, 117) 15; (118, 119) 16; (120) 17; (121) 18; (122) 19; (123) 20; (124, 125) 21; (126) 22; (127) 24; (128, 129) 26; (130, 131) 27; (132, 133) 28; (134) 30; (135) 31; (136) 32; (137) 33; (138) 34; (139) 36; (140) 37; (141) 38; (142) 40; (143) 42; (144) 43; (145) 45; (146) 48; (147) 49; (148) 51; (149) 52; (150) 55; (151) 56; (152) 57; (153) 60; (154) 61; (155) 63; (156) 66; (157) 68; (158, 159) 70; (160) 73; (161, 162) 76; (163, 164) 79; (165) 80; (166, 167) 82; (168) 85; (169, 170) 88; (171) 89; (172) 92; (173) 93; (174) 95; (175) 96; (176) 98; (177) 101; (178) 102; (179) 103; (180) 105; (181) 106; (182) 108; (183) 111; (184) 112; (185) 113; (186, 187) 116; (188) 117; (184, 189) 121; (190, 191) 123.

NORTH CAROLINA.—(97, 98) 2; (99, 100) 6; (101) 9; (102) 11; (103) 14; (104) 17; (105) 18; (106) 19; (107) 22; (108) 23; (109) 26; (110) 28; (111) 32; (112) 34; (113) 37; (114) 41; (115) 44; (116) 47; (117) 53; (118) 54; (119) 56; (120) 58; (121) 61; (122) 65; (123) 68; (124) 70; (125) 74; (126) 78; (127) 80; (128) 83; (129) 85; (130) 89; (131) 92; (132) 95; (133) 98; (134) 101; (135) 102; (136) 103; (137, 138) 107; (139, 140) 111; (137, 141, 142) 115; (143) 118; (144) 119; (145) 122.

NORTH DAKOTA.—(1) 26; (2) 33; (3) 44; (4) 50; (5) 57; (6, 7) 66; (8) 73; (9) 81; (10) 88; (11) 95; (12) 102; (13) 112; (14) 116.

OHIO.—(45 Ohio St.) 4; (46 Ohio St.) 15; (47 Ohio St.) 21; (48 Ohio St.) 29; (49 Ohio St.) 34; (50 Ohio St.) 40; (51 Ohio St.) 46; (52 Ohio St.) 49; (53 Ohio St.) 53; (54 Ohio St.) 56; (55, 56 Ohio St.) 60; (57 Ohio St.) 63; (58 Ohio St.) 65; (59 Ohio St.) 69; (60 Ohio St.) 71; (61 Ohio St.) 76; (62 Ohio St.) 78; (63 Ohio St.) 81; (64 Ohio St.) 83; (65 Ohio St.) 87; (66 Ohio St.) 90; (67 Ohio St.) 93; (68 Ohio St.) 96; (69 Ohio St.) 100; (70 Ohio St.) 101; (71 Ohio St.) 104; (72 Ohio St.) 106; (73 Ohio St.) 112; (74 Ohio St.) 113; (75 Ohio St.) 116; (76 Ohio St.) 118; (77 Ohio St.) 122.

OREGON.—(15) 3; (16) 8; (17) 11; (18) 17; (19) 20; (20) 23; (21) 28; (22) 29; (23) 37; (24) 41; (25) 42; (26) 46; (27) 50; (28) 52; (29) 54; (30) 60; (31) 65; (32) 67; (33) 72; (34) 75; (35) 76; (36) 78; (37) 82; (38) 84; (39) 87; (40) 91; (41) 93; (42) 95; (43) 99; (44) 102; (45) 106; (46, 47) 114; (48) 120.

PENNSYLVANIA.—(115, 116, 117 Pa. St.) 2; (118, 119 Pa. St.) 4; (120, 121 Pa. St.) 6; (122 Pa. St.) 9; (123, 124 Pa. St.) 10; (125 Pa. St.) 11; (126 Pa. St.) 12; (127 Pa. St.) 14; (128, 129 Pa. St.) 15; (130, 131 Pa. St.) 17; (132, 133, 134 Pa. St.) 19; (135, 136 Pa. St.) 20; (137, 138 Pa. St.) 21; (139, 140, 141 Pa. St.) 23; (142, 143 Pa. St.) 24; (144, 145 Pa. St.) 27; (146 Pa. St.) 28; (147, 150 Pa. St.) 30; (151 Pa. St.) 31; (148 Pa. St.) 33; (149, 152, 153 Pa. St.) 34; (154, 155 Pa. St.) 35; (156 Pa. St.) 36; (157 Pa. St.) 37; (158 Pa. St.) 38; (159 Pa. St.) 39; (160 Pa. St.) 40; (161 Pa. St.) 41; (162 Pa. St.) 42; (163 Pa. St.) 43; (164, 165 Pa. St.) 44; (166 Pa. St.) 45; (167 Pa. St.) 46; (168, 169 Pa. St.) 47; (170, 171 Pa. St.) 50; (172, 173 Pa. St.) 51; (174, 175 Pa. St.) 52; (176 Pa. St.) 53; (177 Pa. St.) 55; (178 Pa. St.) 56; (179, 180 Pa. St.) 57; (181 Pa. St.) 59; (182 Pa. St.) 61; (183, 184 Pa. St.) 63; (185 Pa. St.) 64; (186 Pa. St.) 65; (187 Pa. St.) 67; (188 Pa. St.) 68; (189 Pa. St.) 69; (190

SCHEDULE

2

Pa. St.) 70; (191 Pa. St.) 71; (192 Pa. St.) 73; (193 Pa. St.) 74; (194 Pa. St.) 75; (195 Pa. St.) 78; (196 Pa. St.) 79; (197 Pa. St.) 80; (198 Pa. St.) 82; (199 Pa. St.) 85; (195, 200 Pa. St.) 86; (201 Pa. St.) 88; (202 Pa. St.) 90; (203, 204 Pa. St.) 93; (205 Pa. St.) 97; (206 Pa. St.) 98; (207 Pa. St.) 99; (208 Pa. St.) 101; (209 Pa. St.) 103; (210 Pa. St.) 105; (211 Pa. St.) 107; (212 Pa. St.) 108; (213 Pa. St.) 110; (214 Pa. St.) 112; (215 Pa. St.) 114; (216 Pa. St.) 116; (217 Pa. St.) 118; (217, 218 Pa. St.) 120; (219, 220 Pa. St.) 123.

RHODE ISLAND.—(15) 2; (16) 27; (17) 33; (18) 49; (19) 61; (20) 78; (21) 79; (22) 84; (23) 91; (24) 96; (25) 105; (26) 106; (27) 114.

SOUTH CAROLINA.—(26) 4; (27, 28, 29) 13; (30) 14; (31, 32) 17; (33) 26; (34) 27; (35) 28; (36) 31; (37) 34; (38) 37; (39) 39; (40) 42; (41) 44; (42) 46; (43) 49; (44) 51; (45) 55; (46) 57; (47) 58; (48) 59; (49) 61; (50) 62; (51) 64; (52) 68; (53) 69; (54) 71; (55) 74; (56, 57) 76; (58) 79; (59) 82; (60, 61) 85; (62) 89; (63) 90; (64) 92; (65) 95; (66) 97; (67) 100; (68) 102; (69) 104; (70) 106; (71) 110; (73, 74) 114; (75) 117; (73, 76) 121; (77) 122.

SOUTH DAKOTA.—(1) 36; (2) 39; (3) 44; (4) 46; (5) 49; (6) 55; (7) 58; (8) 59; (9) 62; (10) 66; (11) 74; (12) 76; (13) 79; (14) 86; (15) 91; (16) 102; (17) 106; (18) 112; (19) 117.

TENNESSEE.—(85) 4; (86) 6; (87) 10; (88) 17; (89) 24; (90) 25; (91) 30; (92) 36; (93) 42; (94) 45; (95) 49; (96) 54; (97) 56; (98) 60; (99) 63; (100) 66; (101) 70; (102) 73; (103) 76; (104) 78; (105) 80; (106) 82; (107) 89; (108) 91; (109) 97; (110) 100; (111) 102; (112) 105; (113) 106; (114) 108; (115) 112; (116) 115; (117) 119; (117, 118) 121; (119) 123.

TEXAS.—(68) 2; (69; 24 Tex. App.) 5; (70; 25, 26 Tex. App.) 8; (71) 10; (27 Tex. App.) 11; (72) 13; (73, 74) 15; (75) 16; (76) 18; (77; 28 Tex. App.) 19; (78) 22; (79) 23; (29 Tex. App.) 25; (80, 81) 26; (82) 27; (30 Tex. App.) 28; (83) 29; (84) 31; (85) 34; (31 Tex. Cr. Rep.; 86) 37; (86; 32 Tex. Cr. Rep.) 40; (87; 33 Tex. Cr. Rep.) 47; (34 Tex. Cr. Rep.; 88) 53; (89, 90) 59; (35 Tex. Cr. Rep.) 60; (36 Tex. Cr. Rep.) 61; (91; 37 Tex. Cr. Rep.) 66; (38 Tex. Cr. Rep.) 70; (92) 71; (39 Tex. Cr. Rep.) 73; (40 Tex. Cr. Rep.) 76; (93) 77; (94) 86; (95) 93; (41, 42, 43 Tex. Cr. Rep.) 96; (96) 97; (44 Tex. Cr. Rep.) 100; (97) 104; (98) 107; (45, 46 Tex. Cr. Rep.) 108; (99; 47, 48, 49 Tex. Cr. Rep.) 122; (100; 50, 51 Tex. Cr. Rep.) 123.

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VERMONT.—(60) 6; (61) 15; (62) 22; (63) 25; (64) 33; (65) 36; (66) 44; (67) 48; (68) 54; (69) 60; (70) 67; (71) 76; (72) 82; (73) 87; (74) 93; (75) 98; (76) 104; (77) 107; (78) 112; (79) 118.

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VOLUME 123.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

HARRIS v. THEUS.

[149 Ala. 133, 43 South. 131.]

CONTRACTS IN RESTRAINT OF TRADE.—Contracts in general restraint of trade are void, but trade to a certain extent may be regulated and by consequence to some extent restrained, within a prescribed territory not unreasonable in extent. (p. 20.)

CONTRACTS IN RESTRAINT OF TRADE—Legality.—A contract by which one sells to another pine lease land and agrees not to engage in the turpentine business within ten miles of a certain town so long as the purchaser is engaged in business there, though in partial restraint of trade, is valid. (p. 21.)

CONTRACTS IN RESTRAINT OF TRADE—Limit as to Time. In respect to the time stipulated, a contract in partial restraint of trade is not rendered invalid by a failure to specify any limit of time for its duration. (p. 22.)

DEFINITIONS—"At."—The preposition "at," when used to denote local position, may mean "in" or "near by," according to the context, denoting usually a place conceived of as a mere point. Primarily the word "at" expresses the relations of presence, nearness in place. (p. 22.)

CONTRACTS IN RESTRAINT OF TRADE—Limit as to Place. A contract that one will not engage in the turpentine business within ten miles of a certain town so long as a certain other person operates a still "at" that town, will prevent the former from engaging in that business within such limits, although the latter's still is not within the corporate limits of the town. (p. 23.)

CONTRACTS IN RESTRAINT OF TRADE—Consideration.—A sale of a business is a sufficient consideration for a contract on the part of the seller not to engage in that business within ten miles of a certain town so long as the purchaser remained in business there. (p. 23.)

CONTRACTS IN RESTRAINT OF TRADE—Breach Stipulation for Damages—Injunction.—The fact that a contract in partial restraint of trade stipulates for a fixed sum as liquidated damages

for a breach thereof does not oust the jurisdiction of a court of chancery to enjoin such breach. (p. 23.)

CONTRACTS IN RESTRAINT OF TRADE—Injunction to Prevent Breach.—Jurisdiction of equity is generally exercised, in respect to contracts in partial restraint of trade, for the purpose of indirectly compelling their specific performance by means of an injunction preventing their violation, and it is not indispensable that the covenantee should wait until the covenantor commits a breach of the contract before invoking the aid of the chancery court. (p. 24.)

CONTRACTS IN RESTRAINT OF TRADE—Breach—Injunction—Parties.—If a petition for an injunction to prevent a breach of agreement by the defendant not to engage in a certain business in a certain town, for a certain time, alleges that the defendant and his wife design to evade such agreement by establishing the business in the name of the wife, she is a proper party defendant to the proceedings. (pp. 24, 25.)

C. D. Carmichael and W. R. Chapman, for the appellant.

W. O. Mulky, for the appellee.

• 135 DENSON, J. It may be conceded as being the general rule in all the states, as well as in England, that contracts in general restraint of trade are void as against public policy: 24 Am. & Eng. Ency. of Law, 2d ed., 842; 3 Am. & Eng. Ency. of Law, 1st ed., 882; 9 Cyc. 525; 2 Pomeroy's Equity Jurisprudence, sec. 934; *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177, 18 South. 806; *Brewer v. Marshall*, 19 N. J. Eq. 537, 97 Am. Dec. 679; *Mitchell v. Reynolds*, 1 P. Wms. 181; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 78 Am. St. Rep. 612, 43 Atl. 723, 46 L. R. A. 255. "In determining what is the public policy in this regard, we have to take into account certain contracts which restrain trade. It is of public interest that everyone may freely acquire and sell and transfer property and property rights. A tradesman, for example, who has engaged in a manufacturing business, and has purchased land, installed a ¹³⁶ plant, and acquired a trade connection and goodwill thereby, may sell his property and business, with its goodwill. It is of public interest that he should make such a sale at a fair price, and that his purchaser shall be able to obtain by his purchase that which he desired to buy. Obviously, the only practical mode of accomplishing that purpose is by the vendor's contracting for some restraint upon his acts, preventing him from engaging in the same business in competition with that which he has sold. His contract to abstain from engaging in such competitive business is a contract in restraint of trade, but one which has been rec-

ognized as not inimical to, but permitted by, public policy. Therefore, while the public interest may be that trade in general shall not be restrained, yet it also permits and favors a restraint of trade in certain cases. Contracts of this sort, which has been sustained and enforced by courts, have been generally declared to be such as restrain trade, not generally, but only partially, and no more extensively than is reasonably required to protect the purchaser in the use and enjoyment of the business purchased, and are not otherwise injurious to the public." This is the doctrine recognized in the courts of many of the states, including our own court: 9 Cyc. 529, and cases cited in note 70; 24 Am. & Eng. Ency. of Law, 2d ed., 850; *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177, 18 South. 806; *Tuscaloosa Ice Co. v. Williams*, 127 Ala. 110, 85 Am. St. Rep. 125, 28 South. 669, 50 L. R. A. 175; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 78 Am. St. Rep. 612, 43 Atl. 723, 46 L. R. A. 255.

Without indulging in comments on, or making a review of, the many cases in which contracts in partial restraint have been upheld and enforced, we will mention some of them, with a bare statement of the nature of the contract or covenant upheld: An agreement on the sale of a magazine not to publish a similar one (*Ainsworth v. Bentley*, 14 Week. Rep. 630); an agreement not to engage in the business of a gasfitter within twenty miles of a certain place (*Wood v. Whitehead*, 165 N. Y. 545, 59 N. E. 357); an agreement not to carry on the business of a soap manufacturer within forty miles of Lockport, New York, for ten years (*Ross v. Sadgbeer*, 21 137 Wend. 166); an agreement not to do business as a banker in a certain place for ten years (*Hoagland v. Segur*, 38 N. J. L. 230); an agreement not to engage in the coal or fish business for a term of ten years (*Hitchcock v. Anthony*, 83 Fed. 779, 28 C. C. A. 80); a contract by the owner of an exclusive ferry franchise between two points, on the sale of it to another, never to establish a rival ferry on his own land while the other shall maintain the one sold (*Westfall v. Mapes*, 3 Grant Cas. (Pa.) 198, 9 Cyc. 531 (second agreement held valid); 24 Am. & Eng. Ency. of Law, 2d ed., 842 (restraint of trade). Coming to our own cases: In the case of *Moore & Handley Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 13 Am. St. Rep. 23, 6 South. 41, a contract was made between the parties, by which Moore & Handley Hardware Company sold to the Towers Hardware

Company their entire stock of plow stocks and plow blades for a fixed amount, and covenanted not to handle any more plow stocks or plow blades, except railroad plows. It was held that, notwithstanding the covenant contained no express stipulation as to territory, the contract might be construed with respect to the territory over and in which the contracting parties were competitors at the time the covenant was made, which the allegations of the bill showed was all that part of Alabama lying north of the city of Birmingham; and, so construing the contract, it was there held that the covenant was a reasonable and valid one, citing numerous cases decided by the courts of other jurisdictions in support of the holding. The case of *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177, 18 South. 806, involved a contract by which a physician who had built up a practice in the city of Anniston sold his business to another physician, and covenanted not to practice his profession in that city for two years. In an able opinion by Head, J., in which the doctrine of illegality of contracts in restraint of trade is discussed and gone over, the covenant was held valid, and relief by injunction was granted the covenantee.

The sum of these cases is that though there can be no general restraint of trade, yet to a certain extent it may be regulated, and by consequence to some extent restrained, ¹³⁸ within a prescribed territory not unreasonable in extent. "To the rule that the restraint must be limited, and only so great as to afford adequate protection to the covenantee, it is a corollary that the covenant must be incidental to and in support of a contract or a sale by which the contractee acquires some interest in the business needing protection. A man cannot, for money alone, where he has no interest in the matter, procure a valid contract in restraint of trade, however limited may be the circle of its operation": 24 Am. & Eng. Ency. of Law, (e), p. 851, and cases cited in note 1 on page 852. It is on this principle, in part, that the contract in the case of *Tuscaloosa Ice Co. v. Williams*, 127 Ala. 110, 85 Am. St. Rep. 125, 28 South. 669, 50 L. R. A. 175, was held invalid as against public policy. In that case the covenant was that the covenantor, a competitor of the covenantee in the same city in the manufacture and sale of ice, for a sum to be paid, was not to run his ice machine in the city of Tuscaloosa for five years. No business or property was sold or purchased. So that case is easily distinguished from

the one at bar, and is not authority for striking down the contract we are considering. It was there said, among other things: "When the contractor surrenders his trade or profession, an equivalent is given the public, because ordinarily, as a part of the transaction, the contractee assumes and carries on the trade or profession. Nothing is abandoned, and only a transfer is accomplished. The same occupation continues. The same number of mouths are fed. And these considerations obtain where one already engaged in a business in good faith, for the purpose of enlarging and increasing his business, purchases the stock in trade or practice or plant of a rival, and incident thereto takes the covenant of the seller not to engage in the same business within the territory covered by the consolidated enterprise, and in all such cases the covenant in restraint of trade is a reasonable one and valid."

It is made to appear by the averments of the bill that crude gum is an article that is purchased by those engaged in the naval stores business, and that one engaged in the business at or near Geneva may obtain and ¹³⁹ does purchase the gum from persons within a radius of ten miles from the town of Geneva, and that leases of lands or the pine timber thereon located some distance from Geneva are made for the purpose of obtaining gum to be worked in the distillery, so that the place fixed by the covenant, within ten miles of Geneva, considered in connection with the nature of the business and the purpose of the contract, seems to afford only a fair protection to the interests of the covenantee, without being so large as to interfere with the interests of the public: *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177, 18 South. 806; *Robbins v. Webb*, 68 Ala. 393; 24 Am. & Eng. Ency. of Law, 2d ed., p. 844, and cases cited in note 3. In respect to the time stipulated, such contracts are not rendered invalid by a failure to specify any limit of time for its duration: *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177, 18 South. 806. The covenant in the case here is that the covenantor shall not engage in the business so long as Theus shall operate a turpentine still at Geneva, Alabama. Such stipulation as to time is expressly held sufficient in the following cases: *O'Neal v. Hines*, 145 Ind. 32, 43 N. E. 946; *Eisel v. Hayes*, 141 Ind. 41, 40 N. E. 119; *Gill v. Ferris*, 82 Mo. 156; 24 Am. & Eng. Ency. of Law, 847, 848; 9 Cyc. 529.

It appears, as has been observed, that the covenant is that the covenantor shall not enter into nor engage in the turpentine business at any point within ten miles of the town of Geneva so long as the covenantee shall operate turpentine still at Geneva. The bill avers that, "soon after taking possession of the property purchased from Harris, complainant erected, at considerable expense, a turpentine distillery near Geneva; said town being the shipping point of complainant." The contention of Harris (the covenantor) is that this averment does not show that complainant is operating a still "at" Geneva, that operating the still "near" Geneva does not show the operation of it "at" Geneva, and, therefore, that no breach of the covenant is shown by the bill. The proof shows that the complainant's distillery is a mile from the courthouse that is located in the town of Geneva, and is a half mile from the corporate limits; but in construing the bill on motion to dismiss, and on ¹⁴⁰ demurrer, we cannot look to the proof. So we must determine the meaning of the words "at" as used in the covenant and "near" as used in the bill. In 4 Cyc. 365 we find the word "at" defined as follows: "At. A word of somewhat indefinite meaning, whose significance is generally controlled by the context and attending circumstances, denoting the precise sense in which it is used. Used in reference to place, it often means 'in' or 'within'; but its primary sense is 'nearness' or 'proximity,' and it is commonly used as the equivalent of 'near' or 'about.' " In the case of *Rogers v. Galloway Female College*, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636, Rogers had subscribed two thousand five hundred dollars for the purpose of inducing the location, building, and maintaining of a college for the education of females at the town of Searcy. The college was erected near to, but not within the corporate limits of Searcy. The payment of the subscription was resisted for this reason. The supreme court of Arkansas held that the defense was not well made, and, in respect to the definition of "at," said, in part: "The preposition 'at,' when used to denote local position, may mean 'in' or 'near by,' according to the context, denoting usually a place conceived of as a mere point. Primarily, this word 'at' expresses the relations of presence, nearness in place": See, also, *Williams v. Ft. Worth & N. O. Ry. Co.*, 82 Tex. 553, 18 S. W. 206. *O'Conner v. Nadel*, 117 Ala. 595, 23 South. 532, was a foreclosure suit, and the property in the

mortgage was described as the property known as the "town property" of said Attalla Iron and Steel Company, at Attalla, as indicated by a certain map of the lands. It was contended that the property was described as in the town of Attalla. This court, through Haralson, J., said: "It is plain to all intents that the property mortgaged was the property that once belonged to said company at Attalla, which does not necessarily mean in, but in or near, Attalla. The preposition 'at' denotes, primarily, 'nearness, or direction towards'": Ray v. State, 50 Ala. 172. In respect to the word "near," we find that it is a relative term, its precise meaning depending on circumstances; but it has been time and again judicially held to be a synonym of "at": See the cases in note ¹⁴¹ on page 447 of 21 Am. & Eng. Ency. of Law. Upon the face of the contract and the averments of the bill we find nothing that requires it to be held that "at," as used in the contract, means within the corporate limits of Geneva, and the averment of the erection of the distillery near Geneva is sufficient.

It sufficiently appears that the covenant is based on a valuable consideration. The sale of the business is sufficient consideration for the covenant: 24 Am. & Eng. Ency. of Law, 853; McCurry v. Gibson, 108 Ala. 451, 54 Am. St. Rep. 177, 18 South. 806.

It is next insisted that, as the covenant stipulates for a fixed sum as liquidated damages for breaches of the covenant, the covenantee has a complete remedy at law, which ousts the jurisdiction of the court of chancery. In the case of McCurry v. Gibson, 108 Ala. 451, 54 Am. St. Rep. 177, 18 South. 806, the covenant provided, in terms, for a forfeiture of two hundred dollars for a failure on the part of the covenantor to comply with its terms. This court held that this was only a valid agreement for liquidated damages, and said, in respect to the insistence there made, that the equitable jurisdiction was ousted; that, while there are some cases decided by courts of last resort which hold to that view, they are opposed to the weight of authority; and that such a provision for liquidated damages does not oust the jurisdiction of the chancery court and is no bar to a decree for specific performance; citing Morris v. Lagerfelt, 103 Ala. 608, 15 South. 895. In studying the covenant in the case at bar we have found nothing to withdraw it from the influence of the ruling made in that case: 3 Pomeroy's Equity Juris-

prudence, sec. 1344. Jurisdiction of equity is generally exercised, in respect to these contracts, for the purpose of indirectly compelling their specific performance by means of an injunction preventing their violation.

It is not indispensable that the covenantee should wait until the covenantor should begin to operate a distillery before invoking the aid of the chancery court. The bill shows that W. H. Harris, in violation of the agreement, ordered shipped to Geneva a turpentine distillery, which, in order to evade the binding force of the covenant, he had billed to his wife, Maggie Harris, his corespondent; that W. H. Harris has erected said distillery, procured gum for distilling, and is making all ¹⁴² preparations to engage in the turpentine business again "in" the town of Geneva; that he has purchased barrels, wood for fuel, and mules, and is buying gum and employing laborers. To all intents and purposes these allegations show a present purpose to immediately begin the operation of the business, and are quite sufficient to set in motion the jurisdiction of equity to prevent the violation of the contract by injunctive relief. In addition to the allegations of the bill above adverted to, in respect to the operation of the distillery by W. H. Harris, it is averred in the sixth paragraph of the bill "that said W. H. Harris pretends in said matter to be acting as the agent of his wife, Maggie Harris, and pretends to be operating the said distillery in her name. But complainant avers that said Maggie Harris has no experience in the naval stores business, and has no capital invested in said business, or, if any, that it is property or money advanced to her by her husband, and that her name is being used in said business merely for the purpose of permitting the said W. H. Harris to avoid and evade the contract made with the complainant. Complainant further avers that the use of the name of Maggie or M. Harris in connection with the operation of said business was devised by the said W. H. Harris, and acquiesced in by Maggie Harris, purely for the purpose of trying to dodge said contract and defrauding complainant, and that in reality the said W. H. Harris is the only person who has any interest in said plant; or, if complainant is mistaken in this, he avers that the said Maggie Harris knew of the contract existing between the said W. H. Harris and complainant, and that she is permitting her name to be used in said business in order, as respondents properly think, to avoid said contract.

It is insisted by demurrer that the bill shows that the business sought to be enjoined belongs to W. H. Harris, and on this account that Mrs. Harris is not a proper party to the bill; further, that, if the business belonged to Mrs. Harris, then she is not a proper party. Equity abhors shams and subterfuges, and delights in looking through the mere surface and form of a transaction, and in scrutinizing closely the merits and substance. Assuming the truth of the foregoing allegations, a combination ¹⁴³ between the respondents, a common design to defeat complainant's rights under the contract and to avoid the obligations of W. H. Harris which attached to him not to enter the turpentine business, is charged. In this view Mrs. Harris is a proper party to the bill. In order that the court may properly protect and enforce the rights of the complainant, the decree under the allegations will affect her interests: 15 Am. & Eng. Ency. of Law, 611-614; Hudspeth v. Thomason, 46 Ala. 470; Moore & Handley Hardware Co. v. Towers Hardware Co., 87 Ala. 206, 13 Am. St. Rep. 23, 6 South. 41.

It follows, from the foregoing considerations, that the motion to dismiss the bill for want of equity made by W. H. Harris and the separate demurrers filed by the respondents were properly overruled.

This brings us to the consideration of the cause on the merits. Separate answers are filed by the respondents, in which the contract alleged in the bill as having been made between the complainant and W. H. Harris is admitted, and it is also admitted that a turpentine distillery has been erected in Geneva since the making of said contract, and that it was about to be put in operation at the time the bill was filed; but it is expressly denied that W. H. Harris was concerned in the erection of said distillery, or in the preparation of it for operation, either individually or as an agent for his wife. It is also denied that Mrs. Harris' name is being used in connection with the operations of the distillery, or that she acquiesced in the use of her name for the purpose of evading the covenant in the contract, and it is averred that the distillery is the property of Mrs. Harris, that it was purchased by her on her own responsibility and erected for her sole use, and that W. H. Harris is in no respect interested in or responsible for its erection or operation. The allegations in regard to the combination between the respondents for the use of the wife's name are also denied. So upon the admis-

sions made in the answer, it seems that the only questions or issues to be determined on the merits are whether or not the distillery is an enterprise of W. H. Harris, whether it belongs to him and the purchase and operation of it in his wife's name is a ¹⁴⁴ subterfuge, to enable him to violate the contract, or, if the property is not his, but is Mrs. Harris', did she erect it in good faith, to be operated for her benefit, or did she knowing that the husband was prohibited by his covenant from operating the distillery, enter into a combination with him in the purchase and the erection of the still in her name to evade and "dodge" the contract? These issues are the substance of the allegations upon which the prayer for relief is based. The evidence has been carefully considered, and from the legal evidence in the case, if it be granted that the legal title to the distillery, as between the respondents, is in Mrs. Harris, yet we are of the opinion that the evidence supports the conclusion that the purchase, erection, and operation of the still was instigated by Mr. Harris, and the use of the wife's name was resorted to by and with the consent of Mrs. Harris, all for the purpose of trying to evade the obligations of the covenant entered into by the husband. This is the effect of the chancellor's decree, and is the substance of at least one of the alternatives upon which the prayer for relief is based.

But it is insisted that the proof fails to show a violation of the contract, in that it is not shown that the complainant's distillery is located about a mile from the county courthouse in Geneva, and about a half mile outside of the corporate limits of the town; that Geneva is his shipping point for all the products of his enterprise. Construing the word "at" in the light of the circumstances shown by the evidence, and on the considerations heretofore adverted to in respect to this question and the authorities cited, we are of the opinion that this insistence is not well taken. We concur with the chancellor that the complainant has made a case entitling him to the relief prayed for, and the decree must be affirmed.

Tyson, C. J., and Haralson and Simpson, JJ., concur.

Contracts in Restraint of Trade are not necessarily void by reason of universality of time or space; their validity depends upon the conditions of each case, and the test of reasonableness is the test of validity: *Oakdale Mfg. Co. v. Garsh*, 18 B. L. 484, 49 Am. St. Rep.

784; Cowan v. Fairbrother, 118 N. C. 406, 54 Am. St. Rep. 733; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 78 Am. St. Rep. 612. Contracts in partial restraint of trade are valid if founded upon a good consideration, and if they afford only reasonable protection to the interests of the parties in whose favor the restraint is imposed: Union Strawboard Co. v. Bonfield, 193 Ill. 420, 86 Am. St. Rep. 346; Tuscaloosa Ice Mfg. Co. v. Williams, 127 Ala. 110, 85 Am. St. Rep. 125; Pohlman v. Dawson, 63 Kan. 471, 88 Am. St. Rep. 249; Lanzit v. Sefton Mfg. Co., 184 Ill. 326, 75 Am. St. Rep. 171; Harding v. American Glucose Co., 182 Ill. 551, 74 Am. St. Rep. 189, and note. For recent cases illustrating these principles, see Swigert v. Tilden, 121 Iowa, 650, 100 Am. St. Rep. 374; Getz v. Federal Salt Co., 147 Cal. 115, 109 Am. St. Rep. 114.

CHRISTIAN CHURCH v. SOMMER.

[149 Ala. 145, 43 South. 8.]

INJUNCTION—Trespass Against Church Property.—An injunction will lie against strangers to a church organization, to prevent them from forcibly entering the church edifice, changing the locks thereon, and the threatened disturbance of and interference with the rights of the church trustees in their management, control and possession of the church property, and of peaceful and orderly worship in the church building. (p. 28.)

INJUNCTION—Trespass Against Church Property.—An injunction will lie to restrain a threatened trespass against church property, when the wrongful act, if committed, would work irreparable injury which could not be atoned for in damages in a court of law. (p. 28.)

Cooper & Foster, for the appellant.

O. R. Hundley, for the appellees.

¹⁴⁸ McCLELLAN, J. Appeal from granting motion to dismiss for want of equity and sustaining demurrers to the bill. An incorporated church is composed of two distinct elements, viz.: The church proper, as distinguished from the entry created by the act of incorporation; and the corporation itself, which has relation only to the temporalities of the institution. The purpose of the incorporation of a church is to acquire and care for the property thereof: Hundley v. Collins, 131 Ala. 234, 90 Am. St. Rep. 33, 32 South. 575. As regards the purely ecclesiastical or spiritual feature of the church, the civil courts have steadily asserted their utter want of jurisdiction to hear and determine any controversy pertaining thereto: State v. Bibb St. Church, 84 Ala. 23, 4 South. 40; Hundley v. Collins, 131

Ala. 234, 90 Am. St. Rep. 33, 32 South. 575. On the other hand the civil courts have, without hesitation, exercised their jurisdiction to protect the temporalities of the church. The court of chancery should and does exert its powers, in a proper case, to prevent the perversion of the trust estate from the charitable use of which it is devoted. When an estate is warrantably brought into a court of equity for its action, that court takes cognizance of the use to be conserved, and will send its process to protect the proper use. Equity favors charities, and possesses inherent jurisdiction to deal therewith: *Williams v. Pearson*, 38 Ala. 299; *Brundage v. Deardorf* (C. C.), 55 Fed. 839, 92 Fed. 214, 34 C. C. A. 304; *Fulbright v. Higginbotham*, 133 Mo. 668, 34 S. W. 875; *Prickett v. Wells*, 117 Mo. 502, 24 S. W. 52; *Iglehart v. Rowe* (Ky.), 47 S. W. 575; 1 High on Injunctions, sec. 305.

The bill here, presenting the complaint of the corporation and its trustees, rests its right to injunctive relief upon the action of strangers; three of the respondents having renounced their membership in the church about two years before the bill was filed, and the other two being nonresidents of this state, temporarily within it. This action is averred to be that of forcibly entering the church edifice, changing the locks thereon, and the threatened disturbance of and interference with the ¹⁴⁹ rights of these trustees in their management, control and possession of the church property, and of the peaceable and orderly worship of God in the church building. The motion and demurrers go to the points, namely, that complainants have an adequate and complete remedy at law, and that the bill invokes the interposition of a civil court in an ecclesiastical controversy. The latter contention is not well taken, for the reason that the wrong asserted and the remedy sought relate to the property of the church, and to the use vel non of the property for the charitable purpose evident. It is well settled that equity will restrain a threatened trespass, if the probable injury resulting from the wrongful act, if committed, cannot be atoned for in damages in a court of law. The remedy at law is inadequate, and the injury irreparable, whenever the injury is of a peculiar nature, so that compensation cannot be had: *Deegan v. Neville*, 127 Ala. 471, 85 Am. St. Rep. 137, 29 South. 173.

We are of the opinion that this bill has equity. Church edifices are a different class of property from that usually sought to be protected against trespassers. There are two distinguishing characteristics: The use to which the church building is devoted; and the want of commercial purpose in the possession thereof by the church. The church building is acquired and maintained for the worship of God. It is obvious that a trespass against such property—a trespass the result of which is to interfere with and disturb if not defeat, such worship in the church building—involves the use, resting upon the property right, and, if committed, would work irreparable injury; the reason being that a violation of the right and privilege to peaceably worship in the place therefor is wholly incapable of compensation in damages. There is no standard for or method of ascertainment of such damages and yet the member, corporation and trustee have a right to the benefit of the use arising from the possession of such trust estate, and, in the protection of that right against strangers, the powers of a court of equity may be invoked. Besides, the undisturbed control, management and possession of the property itself must be protected against invasion by strangers, since, without the power of control ¹⁵⁰ and management, the use would be vain—the great purpose jeopardized.

It results from these conclusions that the motion to dismiss and the demurrers should have been overruled. A decree is here entered, reversing the action of the lower court, overruling the motion to dismiss and demurrers as well.

Tyson, C. J., and Dowdell and Anderson, JJ., concur.

The Jurisdiction of Civil Courts Over Church Controversies is discussed in the notes to *Morris St. Baptist Church v. Dart*, 100 Am. St. Rep. 734; *Kearnes v. Hawley*, 68 Am. St. Rep. 864.

SAVAGE v. BRADLEY.

[149 Ala. 169, 43 South. 20.]

COTENANCY—Redemption by Cotenant—Effect of.—A cotenant cannot, by redeeming from a mortgage sale, invest himself with an absolute indefeasible title to the joint property. Such act of redemption inures to the benefit of all of the cotenants, provided within a reasonable time they elect to contribute and reinstate their title. (p. 30.)

COTENANCY—Redemption by Cotenant—Effect of—Laches. If a cotenant has redeemed from a mortgage of the joint property, two years thereafter, under ordinary circumstances, by analogy to the statutory right of redemption, is the limit of time in which the other cotenants may exercise the right of election to contribute and reinstate their title, and a longer delay constitutes laches. (p. 32.)

EQUITY—Considering Pleadings as Amended.—The presumption of amendments to a bill in equity does not authorize the retention thereof against a motion to dismiss, when to indulge such presumption would permit of amendments by alleging new and independent facts to those stated in bill. (p. 32.)

Hamilton, Crumpton, Stallworth & Burnett and J. A. Stallworth, for the appellant.

J. F. Jones and M. A. Rabb, for the appellee.

172 McCLELLAN, J. This appeal results from a decree overruling motion to dismiss for want of equity and demurrers to the bill. As a general rule, a cotenant cannot, by his own act, prejudice in any degree the title or right of his fellows. A joint tenancy is, as to the common property, a relation in the nature, if not in fact, of trust and confidence; and from this relation presumptions of the utmost favor to all joint owners arise, to the end that the title and rights of each in the joint estate may be preserved unimpaired: Freeman on Cotenancy, secs. 166, 172; Brittin v. Handy, 20 Ark. 381, 73 Am. Dec. 497. Certainly one cotenant may at forced sale buy the estate, and thereby in severalty become the owner; but he cannot by redeeming from mortgage sale invest himself with an absolute, indefeasible title to the joint property. In such latter case the nonredeeming cotenants have the right, which is only an equity, to elect within a reasonable time to contribute their proportion of the outlay made by the redemptioner in effecting the redemption and to rehabilitate their title. This act of redemption is well declared to inure to the benefit of all his cotenants, provided within a reasonable time they elect to con-

tribute and reinstate their title: *Lehman-Durr & Co. v. Moore*, 93 Ala. 186, 9 South. 590; *Brittin v. Handy*, 20 Ark. 381, 73 Am. Dec. 497, and note; 17 Ency. of Law, p. 679, div. 8.

The bill here is well filed within this principle, and enjoys its favor, unless, as is contended by appellants, under their motion to dismiss for want of equity, the laches of the appellees denies them its protection. In other words, we are confronted in this case with the question: Have the complaining cotenants asserted within a reasonable time their election to take the benefit of the statutory redemption of the common estate by their fellow? The appellants insist that two years from redemption is the reasonable limit for election by cotenants, and invoke an analogy in the rule applied to the mortgagor's election to disaffirm, where the mortgagee, ¹⁷³ without contractual permission, purchases at his own sale. The appellees, on the other hand, insist that ten years is the reasonable limit for such election, and offer an analogy in the statute of limitations of that period. In view of the relation involved, we are not prepared to hold that any inexorable rule can or ought to be declared, since in the very nature of the relation the conduct and condition of the co-owners might materially change the standard. However, we are of the opinion, and so hold, that in ordinary cases, such as this is, by analogy to the terms fixed for the exercise of the statutory right of redemption, two years is the limit of time within which election by a cotenant should be made in order to avail himself of the redemptioner's act. To extend the time, in ordinary cases, to ten years, would be to put within the power of a non-redeeming co-owner a wholly unreasonable option, and also fix for too long a period a condition upon title well calculated to impair confidence in its extent and duration. The status of the title and rights of the redemptioner and his fellow-tenants is, in some respects, analogous to that existing when the mortgagee without stipulation to that effect in the instrument purchases at his own sale; and in ordinary cases of this character this court has many times declared two years as the reasonable time within which to disaffirm the sale. These two analogies afford, we think, firm ground upon which to found the conclusion above announced.

It appears from the bill here that the sale under the power in the mortgage was had on January 15, 1895, and

that Farnham and others, strangers, became the purchasers; that on December 13, 1895, Mrs. Watson, cotenant of complainants, redeemed from the purchaser at the tax and mortgage sale, and took quitclaim conveyance from them to herself. The bill was filed May 10, 1905. Applying the two-year limitation after redemption for the election by complainants, it follows that the laches chargeable to them deprives the bill of any equity. The other relief sought is contingent upon the rights above determined, and no special consideration need be given that phase of the cause, nor is it necessary to pass upon the demurrers interposed.

174 In response to the insistence of appellees that, on motion to dismiss, the bill will be taken as amended to the effect that complainants were infants incapable of electing to reinstate their title, we may refer to the following cases, which adjudge that the presumption of amendment does not authorize the retention of a bill, against motion to dismiss, when to do so amendments of new and independent facts are to be taken as already made: *Blackburn v. Fitzgerald*, 130 Ala. 584, 30 South. 568; *Seals v. Robinson*, 75 Ala. 363; *Tait v. American Mortgage Co.*, 132 Ala. 193, 31 South. 623.

The motion to dismiss the bill for want of equity, improperly overruled below, will be here sustained, and the bill dismissed, but without prejudice.

Reversed and rendered.

Tyson, C. J., and Dowdell and Anderson, JJ., concur.

A Cotenant may Redeem the entire premises from a sale thereof under foreclosure: *Harden v. Collins*, 138 Ala. 399, 100 Am. St. Rep. 42, and cases cited in the cross-reference note thereto; *Wettlaufer v. Ames*, 133 Mich. 201, 103 Am. St. Rep. 449. He then becomes substituted to the place of the mortgagee, and is entitled to hold the land as if the mortgage existed, until the other owners pay him their shares of the encumbrance: See the note to *American Bonding Co. v. National etc. Bank*, 99 Am. St. Rep. 532; *Rippe v. Badger*, 125 Iowa, 725, 106 Am. St. Rep. 336. The general rule is well understood, however, that when a tenant in common discharges an outstanding lien on the property, the discharge inures to the benefit of all the cotenants if they choose to avail themselves thereof by reimbursing him, and he derives no exclusive right against them except to use the discharge as a basis to enforce contribution against them: See the note to *Hoyt v. Lightbody*, 116 Am. St. Rep. 367.

CITY COUNCIL OF MONTGOMERY v. WEST.

[149 Ala. 311, 42 South. 1000.]

MUNICIPAL CORPORATIONS—Ordinances—Arbitrary Power.—A municipal ordinance providing that “no person shall set up or operate a steam engine, planing-mill or planing machine, foundry, blacksmith-shop, cotton-gin, bakery, an establishment for boiling soap, or any similar establishment within the city without first obtaining the consent of the council,” is void, in not prescribing a general uniform rule of action, and as permitting an opportunity for the exercise of an arbitrary discrimination in favor of a few. (p. 34.)

MUNICIPAL CORPORATIONS—Ordinances—Arbitrary Power.—An ordinance which invests a city council or board of trustees with a discretion which is purely arbitrary, and which may be exercised in the interest of a favored few, is unreasonable and void. (pp. 34, 35.)

C. P. McIntyre and Hill, Hill & Whiting, for the appellant.

Steiner, Crum & Weil, for the appellee.

³¹³ HARALSON, J. Section 295, for the alleged violation of which the defendant was arrested, tried by the recorder of the city, and fined, the validity of which ordinance, on appeal from the city court, we are to consider, reads: “No person shall set up or operate a steam engine, a planing-mill or planing machine, foundry, blacksmith-shop, cotton-gin, bakery, an establishment for boiling soap, or any similar establishment within the city, without first obtaining the consent of the council”; providing a penalty for anyone violating the ordinance.

Defendant assails the validity of the ordinance, on the ground that it does not prescribe “a general, uniform rule, condition or regulation, to which all citizens similarly situated may conform,” but reserves to the city council the right to grant or withhold the privilege as may suit its pleasure, and admits of the opportunity for the exercise of an arbitrary discrimination, and because it is contrary to the fourteenth amendment of the constitution of the United States.

The ground on which the municipality seeks to uphold the ordinance, is, quoting from brief of its counsel, that section 2 of the charter prescribes that the “city council may do and perform any other acts incident to bodies cor-

porate.” Section 6: “The city has power to suppress all nuisances in the manner directed by the city council at the expense of the person causing the same or upon whose premises the said nuisance is found, on public or private property.”

The last of these—the sixth—seems to be the only one which approaches the delegated power under which the ordinance in question can rest. Certainly, it cannot rest in said section 2.

³¹⁴ “It is the policy of the law to require municipal corporations to act strictly within their delegated powers, and no power can be exercised when it is not clearly comprehended within the words of the act conferring it, or derived therefrom by necessary implication”: *Norris v. Oakman*, 138 Ala. 411, 35 South. 450; *New Decatur v. Berry*, 90 Ala. 432, 24 Am. St. Rep. 827, 7 South. 838; 1 *Dillon on Municipal Corporations*, sec. 89; 15 Am. & Eng. Ency. of Law, 1st ed., 1041.

“A stationary steam engine is not of itself a nuisance, even if erected and used in the midst of a populous city, unless it interferes with the safety or convenience of the public in the use of the streets”: *Mayor v. Radecke*, 40 Md. 217, 33 Am. Rep. 239.

In *Smith on the Modern Law of Municipal Corporations*, section 526, in defining conditions to be considered in determining the validity of an ordinance, it is laid down, that the ordinance “must be impartial and general in its operation. So far as it restricts the absolute dominion of the owner over its property, it should furnish a uniform rule of action, and its application cannot be left to the arbitrary will of the governing authorities.” The citations to support the text, are very numerous. Again, the same author in section 530, observes: “Ordinances which invest a city council, or a board of trustees, or officers, with a discretion which is purely arbitrary, and which may be exercised in the interest of a favored few, are unreasonable and invalid.”

In *City of Richmond v. Dudley*, 129 Ind. 112, 28 Am. St. Rep. 180, 28 N. E. 312, 13 L. R. A. 587, after reviewing the authorities on the subject, it was held to be well established therefrom, “that municipal ordinances, placing restrictions upon lawful conduct, or the lawful use of property, must, in order to be valid, specify the rules and con-

ditions to be observed in such conduct of business; and must admit of the exercise of the privilege by all citizens alike who will comply with such rules and conditions; and must not admit of the exercise, or of an opportunity for the exercise, or any arbitrary discrimination by the municipal authorities between citizens who will so comply." To the same effect is *State* ³¹⁵ v. *Tenant*, 110 N. C. 609, 28 Am. St. Rep. 715, 14 S. E. 387, 15 L. R. A. 423.

So, it has been held, that an ordinance was invalid which made it unlawful to maintain a slaughter-house, "except permission be granted by the council of the city of New Orleans," as it made the owner's right to maintain the business dependent upon the arbitrary will of an individual or a body of individuals acting for the city; that the city has no governmental or special power to prevent anyone who complies with the law regulating such business from engaging in any lawful business he prefers, and the ordinance in question would enable the city to allow the favored suitor to establish a monopoly: *Barthet v. City of New Orleans* (C. C.), 24 Fed. 563. So, of an ordinance of the city of New Orleans forbidding the keeping of dairies within certain limits except by permission of the city council: (*State v. Mahner*, 43 La. Ann. 496, 9 South. 480); and an ordinance of the city of Newton to exercise a discretion in granting or refusing a permit for the erection of buildings within a fire district: *Newton v. Belger*, 143 Mass. 598, 10 N. E. 464.

An elaborate discussion of the principle will be found in the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. ed. 220, to the same effect as the authorities *supra*.

The question came before our court in the case of *Town of Greensboro v. Ehrenreich*, 80 Ala. 579, 60 Am. Rep. 130, 2 South. 725, in respect to an ordinance to prevent the introduction of infectious or contagious diseases and preserve the health of the inhabitants, making it unlawful for any person "to import, sell or otherwise deal in second-hand or cast-off garments, blankets, bedding or bedclothes." It was there said: "Municipal authorities having power to abate nuisances cannot absolutely prohibit a lawful business not necessarily a nuisance, but may abate it when so carried on as to constitute a nuisance. They cannot, under the claim of exercising the police power, substantially pro-

hibit a lawful trade, unless it is so conducted as to be injurious or dangerous to the public health. . . . We cannot regard ³¹⁶ it a legitimate exercise of the power conferred by the act of incorporation."

From the foregoing, it will appear that the city court committed no error in sustaining the demurrer to the complaint.

Affirmed.

Tyson, C. J., and Simpson and Denson, JJ., concur.

**MUNICIPAL ORDINANCES—TEST OF VALIDITY AS DENYING
EQUAL PROTECTION OF THE LAWS.**

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II. General Principles Involved, 37.

III. Illustrations.

**a. Where Arbitrary Discretion was Vested in City Council or
Some Board or Officer of the Municipality, 38.**

b. Miscellaneous Cases, 48.

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I. Scope.

We do not discuss in this note what constitutes the police power, or the right of a municipality to abate nuisances. These are fully treated in the note to *Booth v. People*, 78 Am. St. Rep. 270. We here consider only the limitation to which the power is subject when it is used arbitrarily or against common right—that is, denies to one citizen, or class of citizens, what is permitted to others, or imposes burdens upon one person or class of persons to which others similarly situated are not subject. While this limitation of the police power, as well as some others, is classed by text-writers as an element of unreasonableness, in many of the cases where ordinances have been held void as unreasonable, the holding was based on the fact that in their operation and effect they went beyond the mere abuse of discretionary power and contravened some principle of public policy; or because of the abuse of such discretionary power they were oppressive. But the questions involved in this class of limitations are not properly within the scope of this note, for it is plain that the vice of an ordinance which is not uniform and general in its operation is not unreasonableness, but want of legislative power, and that the ordinance contravenes the fourteenth amendment of the constitution guaranteeing to the citizen the equal protection of the law. As a law which is arbitrary, however, is also unreasonable, and as many of the cases in which ordinances attacked as unreasonable have also been declared arbitrary, it will be well to examine in connection with this note the note to *Ward v. Mayor and Alderman of Greeneville*, 35 Am. Rep. 702, and the

note to *Robinson v. Mayor of Franklin*, 34 Am. Dec. 627, where many illustrations will be found which throw some light on the question we now have under consideration. As to the extent to which the police power can be exercised in preventing the keeping of explosives, consult the note appended to *City of Crowley v. Ellsworth*, 108 Am. St. Rep. 356.

II. General Principles Involved.

It is elementary, of course, that all laws are subject to the limitations imposed by the constitution, and as a municipal ordinance is merely a by-law of the municipal corporation, it is generally conceded that the constitutional limitations with reference to general laws, apply with equal force to the laws of a municipality. Hence, it is a generally recognized principle that municipal ordinances must be uniform and of general operation within the city limits, and any unnecessary discrimination between persons, classes or locations will invalidate them. But though there is no question as to the soundness of this rule, or the harmony of the courts in sanctioning it, still it must not be understood as completely depriving a legislative body of the power to discriminate, but only to make special or unwarranted discriminations; for whenever such discriminations are promotive of the public good, the power of such bodies to so discriminate has always been upheld. Thus the validity of laws which require that persons who follow certain occupations, such as lawyers, physicians, druggists, engineers, pilots, etc., should possess certain qualifications, is unquestioned, because such discrimination prevents the evils which would inevitably follow from ignorance and incompetency. In determining, therefore, whether an ordinance is tainted with the vice of being arbitrary or discriminative in the sense of denying the equal protection of the laws, Judge Dillon, in his work on *Municipal Corporation*, fourth edition, volume 1, section 327, lays down the rule that "the court will have regard to all the circumstances of the particular city or corporation, the objects sought to be attained, and the necessity which exists for the ordinance," and this doctrine has been generally approved by the courts: *Toledo St. Ry. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Dec. 611; *Hawes v. Chicago*, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 225; *McFarlane v. Chicago*, 185 Ill. 242, 57 N. E. 12; *Zumault v. Kansas City etc. Air Line*, 71 Mo. App. 670; *Long v. Jersey City*, 37 N. J. L. 348. Most of the cases which have arisen, wherein the subject considered in this note has been under review, were where the ordinance vested in the city council, or in some board or officers of the city, arbitrary discretion in reference to its enforcement. In this class of cases the question also arises whether a city council can thus delegate to others any of its delegated powers. In some jurisdictions a municipal corporation is said to be a body of special and limited jurisdiction, which derives its powers solely from its

charter or organic law, and that a city council has no judicial or quasi-judicial powers, but legislative only, and that discretionary power granted to one person or body cannot by that person or body be delegated to others. This rule is forcibly stated in *State v. Fiske*, 9 R. I. 94, and is recognized in *Eden v. People*, 161 Ill. 296, 52 Am. St. Rep. 365, 43 N. E. 1108, 32 L. R. A. 659; *Evansville v. Miller*, 146 Ind. 613, 45 N. E. 1054, 38 L. R. A. 161; *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105; *Quientini v. St. Louis Bay*, 64 Miss. 483, 60 Am. Rep. 62; *City of St. Paul v. Laidler*, 2 Minn. 190, 72 Am. Dec. 89; *Trenton v. Clayton*, 50 Mo. App. 535; *Hutton v. Cambden*, 39 N. J. L. 122, 23 Am. Rep. 203; *Hudson v. Thorne*, 7 Paige (N. Y.), 261; *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636. In *Horr and Bemis on Municipal Police Ordinances*, section 263, the author says: "No discretionary power should be vested in officials whose duty it is to execute the provisions of ordinances—the ordinance itself should specify every condition of the license and the officer should be merely intrusted with the duty of issuing licenses to all who comply with the prescribed conditions." And in *Smith on Modern Law of Municipal Corporations*, section 256, the doctrine is thus stated: "An ordinance must be impartial and general in its operation. So far as it restricts the absolute dominion of the owner over his property, it should furnish a uniform rule of action, and its application cannot be left to the arbitrary will of the governing authorities." And again, in section 520, the same author says: "Ordinances which invest a city council or a board of trustees or officers with a discretion which is purely arbitrary, and which may be exercised in the interest of a favored few, are unreasonable and void." But, as we shall hereafter see, there is considerable conflict of authority as to the validity of ordinances of this class. And as the question whether an ordinance is invalid because arbitrary and discriminative depends, as we have seen, upon the peculiar circumstances and condition of each case, it is impossible to lay down any fast rule for the government of all cases arising out of the frequent exercise of the police power. The only safe way of determining how the general principles involved should be applied is by resort to the individual cases which have arisen, and see what tests have been adopted by the different courts in their application of the governing principles. We will therefore give numerous instances of cases where municipal ordinances have been attacked as failing to prescribe a general and uniform rule of action, both when the power to discriminate was left to others, as well as miscellaneous cases where the provisions of the ordinance itself were claimed to violate common right.

III. Illustrations.

a. **When Arbitrary Discretion was Vested in City Council or Some Board or Officer of the Municipality.**—In *City Council of Montgomery*

v. West, 139 Ala. 311, ante, p. 33, 42 South. 1000, 9 L. R. A., N. S., 659, an ordinance was declared invalid which prohibited any person from setting up or operating a steam engine, planing-mill or planing machine, foundry, blacksmith-shop, cotton-gin, bakery, an establishment for boiling soap, or any similar establishment within the city without first obtaining the consent of the city council. The reason given for the decision in this case was that it admitted the opportunity for the exercise of an arbitrary discrimination by the city council: In re Yick Wo, 68 Cal. 294, 58 Am. Rep. 12, 9 Pac. 139. An ordinance of the city of San Francisco made it unlawful for any person to "carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone." The validity of this ordinance was upheld by the supreme court of California, the court considering that it did not vest in the board of supervisors an unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, but one which could be properly exercised under the circumstances of this case with a view to the protection of the public against damage by fire. But on appeal to the supreme court of the United States (118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. ed. 220), this decision was reversed and the ordinance declared void as conferring upon the municipal authorities an arbitrary power to give or withhold consent to the carrying on of a legitimate business in buildings not made of brick or stone. The supreme court of the United States in this case seems to recognize, however, that a discretionary power might properly be left to the governing authorities to be exercised under the circumstances of each particular case, for, speaking of the decision of the supreme court of California in the case, Justice Mathews said: "We are not able to concur in that interpretation of the power conferred upon the supervisors. . . . There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confined to their discretion in the mere legal sense of

the term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint." Evidently the test adopted by the supreme court of the United States in this case was whether the power of the city to delegate the arbitrary power to issue permits to engage in business is an arbitrary one not subject to review, or whether such power depends upon the performance of conditions by the applicant who has the right to have a refusal reviewed by mandamus. The court was also clearly of opinion that the real purpose of the ordinance was to discriminate against the Chinese, as nearly all of the laundries in wooden buildings were conducted by this race. Only on this theory can this decision be sustained for in a later case (*Fischer v. St. Louis*, 194 U. S. 361, 24 Sup. Ct. Rep. 673, 48 L. ed. 1018), this question was again before the supreme court of the United States on appeal from the supreme court of Missouri (167 Mo. 654, 99 Am. St. Rep. 614, 67 S. W. 872, 64 L. R. A. 679). Here the ordinance prohibited the establishment or maintenance of cow stables and dairy-houses within the corporate limits of St. Louis without the consent of the city council. The ordinance was upheld by the supreme court of Missouri, although the court admitted that the city council could if it so chose, discriminate in favor of some and against others. And this decision was affirmed by the supreme court of the United States, Mr. Justice Brown, speaking for the court, saying: "We do not regard the fact that permission to keep cattle may be granted by the municipal assembly as impairing, in any degree, the validity of the ordinance, or as denying to the disfavored dairy-keepers the equal protection of the laws. Such discrimination might well be made where one person desired to keep two cows and another fifty; where one desired to establish a stable in the heart of the city, and another in the suburbs, or where one was known to keep his stable in a filthy condition, and another had established a reputation for good order and cleanliness. Such distinctions are constantly made the basis for licensing one person to sell intoxicating liquors, and denying it to others. The question in each case is whether the establishing of a dairy or cow-stable is likely, in the hands of the applicant, to be a nuisance or not to the neighborhood, and to imperil or conduce to the health of its customers. As the dispensing power must be vested in some one, it is not easy to see why it may not be properly delegated to the municipal assembly which enacted the ordinance. Of course, cases may be imagined where the power to issue permits may be abused, and the permission accorded to social or political favorites and denied to others, who, for reasons totally disconnected with the merits of the case, are distasteful to the licensing power. No such complaint, however, is made to the practical application of the law in this case and we are led to infer that none such exists. We have no criticism to make of the principle of granting a license to one and denying it to an-

other, and are bound to assume that the discrimination is made in the interest of the public, and upon conditions applying to the health and comfort of the neighborhood." And to the same effect is the case of *Scheffé v. St. Louis*, 194 U. S. 373, 24 Sup. Ct. Rep. 676, 48 L. ed. 1024, which also went up from Missouri and is reported in 167 Mo. 666, 67 S. W. 1100. Neither of these cases alludes to the ruling in *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. ed. 220, though they apparently overrule it, unless we consider the *Yick Wo* case as falling within that class to which Justice Brown alludes when he spoke of cases which "may be imagined" where the delegated discretion might be abused, but the right to exercise arbitrary discretion being once admitted, it is difficult to see how its abuse is to be corrected by the courts, or how it is to be determined. To our mind the unsoundness of Mr. Justice Brown's views, instead of being palliated, is emphasized by his reference to the mode in which the discretion had in fact been exercised; for if that be the test, the validity of an ordinance depends not on the powers apparently conferred, but on the wisdom and justice of the persons exercising them, and the same ordinance may at first be held valid, then invalid, and again valid, each holding being dependent on the persons in power in the municipality, and requiring to be changed when succeeding changes of administration bring into power persons more or less worthy of their trusts.

The validity of ordinances requiring those wishing to engage in the retail liquor business to first obtain consent of certain municipal officers, have been generally upheld: *Re Guerrero*, 69 Cal. 88, 10 Pac. 261; *Re Christensen*, 85 Cal. 208, 24 Pac. 7; *State v. Mottle*, 48 La. Ann. 728, 19 South. 748; *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. Rep. 13, 34 L. ed. 620. But the discrimination permitted in these cases is clearly allowed in the interest of public policy, and this principle has been extended in cases of persons desiring to open poolrooms: *Goytino v. McAlleer* (Col. App.), 88 Pac. 991; *Concord v. Morgan*, 74 N. H. 32, 64 Atl. 725. Perhaps the cases referring to applications to keep places for the sale of intoxicants or rooms in which games may be played, with which gambling may be, and usually is, an incident, may be justified upon the ground that the businesses seeking to be licensed are not those in which any person has an absolute right to engage, and therefore, no one has a constitutional right to receive the license nor to object that it is withheld from him by caprice or favoritism. In *May v. People*, 1 Colo. App. 157, 27 Pac. 1010, the ordinance prohibited the storing of any green or dry hides or pelts within the city without permission of the city council. In declaring the ordinance void because discriminative, the court said: "This ordinance does not purport to declare the storing of hides and pelts within the city limits a nuisance, but does assume that the city council may prohibit by declining to grant permission, or may grant permission, as their inclination

may prompt. They may go so far as to say that one individual may exercise the privilege, and that another equally respectable shall not. True, it is admitted in the stipulation that such business may become a nuisance; so also may many other vocations and trades, but yet they are not a nuisance per se. A livery-stable, a slaughter-house, a butcher-shop, a boarding-house, a hotel, chemical works, refinery and smelter, a sugar refinery, a railroad, enterprises requiring large smokestacks, a private barn where a number of horses are kept and cared for, a theater for the resort of all classes, a blacksmith-shop, a foundry—all such may become a nuisance, and are as easily susceptible of becoming a nuisance as it is admitted that of storing hides and pelts could be."

In *Walsh v. City of Denver*, 11 Colo. App. 523, 53 Pac. 458, an ordinance was held invalid which required the approval of the health committee of an application for a butcher's license before it could be considered by the fire and police board. "The business or occupation of the plaintiff," said the court, "is conceded to have been a lawful one, and he was entitled, therefore, to the privilege of carrying it on, subject only to such restrictions as the city had the authority to impose, and such as were imposed upon all others engaged in the same occupation. This ordinance upon its face violates this requirement. It seems intended to confer, and did confer, upon the fire and police board, and upon the health commissioner; not a discretion to be exercised upon a consideration of the circumstances of each particular case as applied to general regulations and requirements in reference to all engaged in the same business, but a naked, arbitrary power to grant or withhold licenses without assigning any reason whatever therefor. It was a discretion which was purely arbitrary, and acknowledged neither guidance nor restraint. . . . This is not only in contravention of the general rule of law that, when power is conferred upon a municipal corporation to regulate any calling or business, they are powerless to delegate a discretionary authority to others, or to an individual, but is also violative of the constitution of the state and of the United States."

In *Fitts v. City of Atlanta*, 121 Ga. 567, 104 Am. St. Rep. 167, 47 S. E. 793, 67 L. R. A. 803, an ordinance declaring it unlawful to hold public meetings in the streets without the consent of the municipal authorities was held not unconstitutional as making an arbitrary discrimination of some persons. While in *Re Frazee*, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72. An ordinance was declared void which prohibited any person or persons, association or organization from marching, parading, riding or driving through the public streets of the city with musical instruments, banners, flags, torches, or while singing or shouting, without first having obtained the consent of the mayor or common council—funeral and military processions excepted—because it left the power of permitting or restraining such processions to an unregulated official discretion, and

hence did not operate uniformly and impartially. "Whatever regulation is made," said the court, "must operate uniformly—under the same conditions. . . . The law must be impartial and general, or it is no law." Ordinances similar to the above and evidently directed against the Salvation Army and like religious processions have also been declared invalid for the same reason: *Rich v. Naperville*, 42 Ill. App. 222; *Chicago v. Fratter*, 136 Ill. 430, 26 N. E. 359; *Anderson v. City of Wellington*, 40 Kan. 173, 10 Am. St. Rep. 175, 19 Pac. 719, 2 L. R. A. 110; *State v. Dering*, 84 Wis. 585, 54 N. W. 1104, 19 L. R. A. 858. In the *Anderson* case (40 Kan. 173, 10 Am. St. Rep. 175, 19 Pac. 719, 2 L. R. A. 110), the ordinance made no exception in favor of political or other organizations, but prohibited all persons, societies, or organizations from parading the public streets, shouting, singing or beating drums, or playing upon musical instruments, or doing any other act intended or calculated to attract or call together unusual crowds on the streets, without first getting permission from the mayor. In deciding that the ordinance was void because of the power vested in the mayor for the exercise of arbitrary discretion, this court said: "The ordinance is framed on the theory that an unusual crowd or congregation of people upon one of the public streets of a city is either of itself a disturbance of the public peace, or that it threatens the good order of the community. A crowd of people is one of the most ordinary incidents of everyday life in a city of considerable size in this country. A fire, a runaway, an unusual sight, collects a crowd as if by magic; and it is not a fair estimate of the character and habits of the American people to assume that the public peace is threatened when numbers of them congregate. . . . Public parades of this character are not unlawful in their intent, purpose and result; they are not mala in se. If they are to be mala prohibita, it ought to be by some general law, and not by local regulation."

In *McGregor v. Village of Lovington*, 48 Ill. App. 211, an ordinance prohibiting all persons, except police officers, from carrying dangerous weapons concealed without the written permission of the president of the board of trustees was declared void because it vested power in such president for the exercise of arbitrary discretion—as to who should and who should not carry arms concealed. And in *Town of State Center v. Barenstein*, 66 Iowa, 249, 23 N. W. 652, an ordinance which provided that persons engaged in peddling goods from house to house should pay a license of "not less than one nor more than twenty dollars" for a fixed time in the discretion of the mayor, was held to be invalid because the mayor was thereby given the power to arbitrarily fix the license anywhere from one to twenty dollars. In *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 68 Am. St. Rep. 155, 51 N. E. 758, 42 L. R. A. 696, the ordinance forbade all persons to take any omnibus or heavy vehicle or any traffic vehicle upon certain boulevards therein named, except private

wagons conveying families, "or upon special permission of this board." It was held to be invalid because it did not affect all persons alike who use traffic vehicles, but, as said the court, "only persons driving traffic vehicles upon the boulevards without the permission of the board of trustees. . . . Ordinances which thus invest a city council or a board of trustees with a discretion which is purely arbitrary, and which may be exercised in the interest of a favored few, are unreasonable and invalid." In *Bills v. City of Goshen*, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 261, an ordinance fixing the amount of tax on theaters, roller-skating rinks, etc., at such sum of money as the council should determine in each particular case was declared void, because giving power to discriminate "between persons engaged in like business." In *City of Richmond v. Dudley*, 129 Ind. 112, 28 Am. St. Rep. 180, 28 N. E. 312, 13 L. R. A. 587, the ordinance prohibited the keeping of certain inflammable or explosive oils within the limits of the municipality, but reserved to the common council the right to grant permission to keep such oils in such locations and buildings, and to such persons, as it deemed suitable and proper, and to revoke such permission at any time. It was declared invalid because it enabled the city council to arbitrarily control business, without any fixed or known rules. "Municipal ordinances," said the court, "placing restrictions upon lawful conduct, or the lawful use of property, must, in order to be valid, specify the rules and conditions to be observed in such conduct or business; and must admit of the exercise of the privilege by all citizens alike who will comply with such rules and conditions; and must not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination by the municipal authorities between citizens who will comply." The doctrine announced in this case was subsequently indorsed by the court in *Elkhart v. Murray*, 165 Ind. 304, 112 Am. St. Rep. 228, 75 N. E. 593, 1 L. R. A., N. S., 940, and is also approved in *City Council of Montgomery v. West*, 149 Ala. 311, ante, p. 33, 42 South. 1000, 9 L. R. A., N. S., 659. In the former case the ordinance made it unlawful to run street-cars not equipped with a designated fender or one equally as good, "to be approved by the common council or its street committee," and it was held invalid by reason of the quoted provision. (For full discussion of the right of municipal corporation to make and enforce regulations respecting street railways, see the monographic note attached to *People v. Detroit United Railway*, 104 Am. St. Rep. 636.)

In *State v. Mahner*, 43 La. Ann. 496, 9 South. 480, one section of the ordinance prohibited dairies within certain designated limits of the city of New Orleans, but gave the city council authority to grant permission to carry them on within the prohibited limits. Another section prohibited any new dairies to be established keeping more than two cows. The first section was declared invalid be-

cause it gave the city council opportunity for the exercise of purely arbitrary power, and the second section, because it was not general in its operation among the class it was intended to affect. The ruling in this case seems squarely opposed to the decision of the supreme court of the United States in *St. Louis v. Fischer*, 194 U. S. 361, 24 Sup. Ct. Rep. 673, 48 L. ed. 1018. In *State v. Dubarry*, 44 La. Ann. 1117, 11 South. 718, an ordinance which made it unlawful for any person to set up or establish a private market for the sale of meats, fresh fish, and vegetables without permission of the city council was held invalid because the discretion thus vested in the city council was in no way regulated, but afforded opportunity for its arbitrary exercise. And where an ordinance prohibited the sale of fresh meats without a license obtained by "suitable persons" at any place in the city except the stalls of a public market, it was declared void, for failure to provide a general rule applying equally to all. "Permission to sell," said the court, "might be granted only to political partisans, or personal friends, and there could be no redress for such an exercise of power": *City of St. Paul v. Laidler*, 2 Minn. 190, 72 Am. Dec. 89. The case of *Mayor v. Radecke*, 49 Md. 217, 33 Am. Rep. 239, discusses at length the topic now under consideration. It is regarded as a leading case, and is generally referred to in other cases where ordinances have been attacked as invalid because not prescribing a uniform rule of action, but vesting in some of the city authorities the opportunity for the exercise of arbitrary discretion. In that case the ordinance prohibited any person from putting up a steam engine in the city of Baltimore without the consent of the Mayor and common council, and allowing the revocation of such permits and compelling the removal of such engines on six months' notice under a prescribed penalty. It was held void as being unreasonable and arbitrary, the court saying: "It commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the city of Baltimore to cease to do so, and by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his actions. It lays down no rule by which its impartial execution can be secured, or partiality and oppression prevented. . . . When we remember that this action or nonaction may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to everyone who gives to the subject a moment's

consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void." Judge Sawyer, in the *Wo Lu Case*, 26 Fed. 471, in referring to the above language of the supreme court of Maryland, said: "And it makes no difference that the arbitrary discretion is reserved to a board instead of a single individual. Indeed, when the power is reserved to a board, there is a divided responsibility, and each member is less sensitive to its pressure upon his individual conscience": In *re Nightingale*, 11 Pick. (Mass.) 168. An ordinance of the city of Boston providing that no inhabitant of the city, or of any town in the vicinity, not offering for sale the produce of his own farm should, without permission of the clerk of the market, occupy any stand for the purpose of vending any commodity in certain streets, which by the ordinance were a part of the market, was held not to be void on the ground of being partial and not operating uniformly, the court being of opinion that the partial operation of an ordinance was no objection if it did not infringe private rights. But in *City of Newton v. Belgar*, 143 Mass. 598, 10 N. E. 464, an ordinance which prohibited the erection or alteration of buildings other than dwelling-houses in the city without first obtaining written consent from the board of aldermen, was held invalid as imposing unauthorized restrictions upon the right of a citizen to the use of his property and afforded opportunity for the exercise of arbitrary discretion. "It does not merely forbid the erection of any building which is hazardous and which exposes other persons or property to danger. . . . On the contrary, it gives the power, by refusing a permit, to prevent the erection of any building, except a dwelling-house, for any reason which may be satisfactory to them. Under the ordinance they may refuse a permit, because in their opinion it is desirable that certain parts of the city shall be used for handsome dwelling-houses, and that all buildings for the purpose of trade shall be excluded, though in no sense dangerous." While in *Quincy v. Kennard*, 151 Mass. 563, 24 N. E. 860, the right of reservation of arbitrary discretion is clearly recognized. In this case the board of health passed an order forbidding within the limits of the town "the exercise of the trade or employment of keeping swine, which is a nuisance dangerous to the public health, attended by noisome and injurious odors, and is otherwise injurious to the estates of the inhabitants of Quincy—without a permit in writing first obtained from the board of health." Said Holmes, J., speaking for the court: "We are at a loss to see how it affects the validity of the order, that the board expressly reserved to themselves a power to do what they could have done, even if the prohibition had been absolute, or how the defendants are put in a worse condition by the order contemplating the possibility that the board of health may grant them a written permit, than if it had excluded that possibility." In *State v. Kantler*, 33

Minn. 69, 21 N. W. 856, an ordinance prohibiting the sale of liquor without a license except as to certain districts of the city to be "designated by the Mayor" was held invalid.

In *Trenton v. Clayton*, 50 Mo. App. 535, an ordinance which fixed the license of peddlers at not less than two nor more than ten dollars, and also required that all applications for license should be made to the mayor, who should determine upon and collect the fee, was declared void as giving the mayor opportunity to exercise gross favoritism. And to same effect is *Neagle v. Centralia*, 81 Ill. App. 334.

In *City of Centralia v. Smith*, 103 Mo. App. 438, 77 S. W. 488, an ordinance forbidding the explosion of firecrackers in the city without the written consent of the mayor was upheld as a valid exercise of the police power, notwithstanding the delegation of legislative power to the mayor. In *State v. Tenant*, 110 N. C. 609, 28 Am. St. Rep. 715, 14 S. E. 387, 15 L. R. A. 423, the ordinance prohibited the erection of any building or the adding to or improving of any building already erected within the limits of the city, without having first applied to and obtained the permission of the aldermen. It was held void as restricting the right of enjoyment of property upon the arbitrary will of the governing authorities, and failing to furnish a uniform rule of action. "What is there in the ordinance under consideration," said the court, "to prevent the aldermen, if they are so inclined, from prohibiting the construction of any houses, in a defined boundary, except costly dwellings, and thereby enhancing the value of the property in which they have a personal interest? We have no idea that any such purpose exists, but we cannot sanction the enforcement of an ordinance by means of which the aldermen may at any time, not only entertain, but act upon an improper motive."

In *Mayor of Hudson v. Thorne*, 7 Paige (N. Y.), 261, the city of Hudson, under the power in its charter authorizing it to adopt regulations for the government of fires, had passed an ordinance forbidding the erection of any wooden or frame barn, stable or haypress within certain limits of the city, except of certain dimensions, without permission of the common council, and a resolution by it that such building was not dangerous in causing fires. The defendant, without such permission, commenced the erection of a building within the prohibited limits, which was to be occupied for storing and pressing hay, and a bill to restrain him from erecting the building was dismissed, the chancellor saying: "If the manufacture of pressed hay within the compact parts of the city is dangerous in causing or promoting fires, the common council have the power, expressly given by their charter, to prevent the carrying on of such manufacture; but, as all by-laws must be reasonable, the common council cannot make a by-law which shall permit one person to carry on the dangerous business and prohibit another, who has an equal right, from

pursuing the same business. Neither have they the right to permit the dangerous manufacture to be carried on in buildings already erected, and to prohibit these defendants, whose building was destroyed by an incendiary, from rebuilding the same for the purpose of carrying on a manufacture which is permitted to others."

In *Boyle v. Board of Aldermen*, 117 Ky. 199, 111 Am. St. Rep. 240, 77 S. W. 669, the city was enjoined from enforcing an ordinance which made it unlawful to erect any buildings within the city limits which would be greatly injurious to adjacent property, and destroy the convenience, comfort, peace and reasonable enjoyment of life of adjacent residents, without the consent of the city council. The ordinance in this case was sought to be enforced against the erection of a negro Baptist church. "It must not be overlooked," said the court, that, even if the ordinance on its face is valid, a discriminatory execution of it would be violative of both the federal and state constitutions, and subversive of justice as well. But in *Ex parte Moynier*, 65 Cal. 33, 2 Pac. 728, an ordinance was held not violative of the fourteenth amendment of the constitution which declared it unlawful for any person to establish, maintain or carry on the business of a public laundry or washhouse where clothes were cleaned for hire within certain named limits, without first obtaining a certificate from the health officer that the premises were sufficiently drained, and that the business could be carried on without injury to the sanitary conditions of the neighborhood, and a certificate from the board of fire wardens that the heating apparatus was in good condition, and their use not dangerous to surrounding property, and providing further, that no person or persons owning or engaged in such laundries should wash or iron clothes between the hours of 10 o'clock in the evening and 6 o'clock in the morning. In *Barthet v. City of New Orleans*, 24 Fed. 563, it was held that where the limits in which slaughtering cattle had been fixed by the city, an ordinance which required the consent of the city council to be given a party before he proceed with such business within said limits was in contravention of the constitution, and therefore void, because the right of the city to grant permission would carry with it the right to deny permission within said limits, and thus afford it an opportunity to permit favored suitors to establish a monopoly.

b. *Miscellaneous Cases.*—In *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642, it is said that an ordinance will not be pronounced invalid by the courts as being discriminative and unequal in its operation except in a plain case, and this rule has been very generally adhered to by the supreme court of this state. Thus, in *County of Amador v. Kennedy*, 70 Cal. 458, 11 Pac. 757, an ordinance fixing a different license for selling liquor at a wayside tavern or watering-place from that for the business carried on at city was upheld as not discriminating, but justified by the difference in the amount of sales and profits realized by those pursuing such occupation in the respective

locations. And a similar doctrine is recognized in *People v. Thurber*, 13 Ill. 554, and *City of East St. Louis v. Wehrung*, 46 Ill. 392. But in *Lassen County v. Cone*, 72 Cal. 387, 14 Pac. 160, an ordinance was declared invalid as not being uniform in its operation, which levied a tax upon all sheep pastured in the county, but exempted from the payment thereof those persons who listed their sheep as taxable property in the county and paid taxes on them as such. Said the court: "It seems clear to us that this ordinance cannot be regarded as a police regulation, and that so far as the defendant is concerned, it is a discrimination against him upon his property as a citizen of this state, which is not applied to others of his class, and that it grants an immunity to the same class of persons in Lassen county which is not given to the defendant as one of that class." And in *Ex parte Mirande*, 73 Cal. 365, 14 Pac. 838, the court was of opinion that an ordinance imposing a license on sheep-raisers, and making the license and fixing it differently according to the amount of sheep in possession of or under control of those taxed, could not be "deemed unequal because reaching one occupation only, if it reached all who follow that." In *Foster v. Board of Police Commissioners*, 102 Cal. 483, 41 Am. St. Rep. 194, 37 Pac. 763, an ordinance was held not void as discriminative which prohibited the granting of a license to sell liquor at retail except upon certain conditions specified therein, and that persons who have been, or should thereafter be, guilty of certain acts should be excluded from the benefit of the ordinance. In *Ex parte Bohen*, 115 Cal. 372, 47 Pac. 56, 36 L. R. A. 618, an ordinance of the city and county of San Francisco made it unlawful for any person to purchase or sell any land within the county for the purpose of interring any human body therein, but permitted interments in plats or lots belonging to persons, associations, or corporations, for their families or members. It was held invalid because assuming to limit the privilege of burial to one class of citizens, and denying it to another class within the same district, the court holding that any restriction of the right of the individual by virtue of the police power must extend to all individuals who might exercise the right. And the ruling in this case was followed later in *Los Angeles v. Hollywood Cemetery Assn.*, 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153, where a county ordinance was declared invalid, which made it unlawful to establish, extend or enlarge any cemetery within the limits of the county without permission of the supervisors, but which impliedly permitted burials in cemeteries already established without restriction, on the ground that it was unequal in its operation and discriminated in favor of a class of persons within the same district. In *Ex parte Lemon*, 143 Cal. 558, 77 Pac. 455, 65 L. R. A. 946, an ordinance was upheld which imposed a lower license upon hotels and boarding-houses where the meals were wholly cooked and served by the proprietor and his family,

than upon other hotels and boarding-houses. The reason for this decision is thus given by the court: "We must, however, judge of the reasonableness of the ordinance in question by what we know of the general conditions, and not hold it void simply because in some exceptional case it may result in imposing unequal burdens. . . . The classification here adopted is probably no more likely to practically result in unfair discrimination between those similarly situated as to amount of business than a classification according to the number of rooms in a hotel, or the number of employes in a laundry; and the ordinary effect of the enforcement of the provision as it stands will be that those doing the greater amount of business will pay the higher tax fixed thereby." The supreme court of California seems to have gone further in upholding ordinances which were attacked as not being uniform in their operation than the courts of any other state. In fact, this court in several cases has said that the constitutional provision guaranteeing equal protection of the law has no application to municipal ordinances. Thus, in a very recent case, *Re Thizhuzza* (Cal.), 81 Pac. 957, an ordinance was declared valid which provided that the city should have exclusive charge of the removal of garbage, and provided a different charge for garbage removed from a private dwelling from that removed from any shop, store, or business house. Speaking of the contention that the ordinance was unequal in its operation, and therefore in contravention of the fourteenth amendment of the federal constitution, the court said: "This provision of the constitution has no application to the ordinances of the character of the city in question. In *Hellman v. Shoulters*, 114 Cal. 146, 44 Pac. 915, 45 Pac. 1057, it is said: 'There is no constitutional provision which expressly requires the uniform operation of municipal ordinances. Nevertheless, when they unjustly discriminate, they are sometimes declared unreasonable and therefore void.' A law is general which applies to all of a class, the classification being a proper one, and the requirement of the constitutional provision in question is satisfied if it applies to all the class alike." Quoting from *People v. Judge*, Twelfth District, 17 Cal. 547, the court continues: "The word 'uniform' in the constitution does not mean universal. The section intends simply that the effect of general laws shall be the same to and upon all persons who stand in the same relation to the law; that is, all the facts of whose cases are substantially the same." In *City Council of Augusta v. Clark*, 124 Ga. 254, 52 S. E. 881, the ordinance imposed a business tax of three hundred and fifty dollars upon a certain class of persons to which plaintiffs belonged; such class being described in the ordinance as follows: "Money-lender: A money-lender as contemplated by this ordinance is one who carries on the business of lending his own or other people's money, and not a stock and bond broker, pawnbroker, chartered bank, negotiator of loans on realty, real estate agent, or firm of such agents, or dealers in bonds or stocks,

as herein provided, but who carries on the business of lending money on personal security or personal property, other than stocks and bonds, shall also be deemed a money-lender." It was contended that this ordinance was void because it discriminated against one class of money-lenders in favor of negotiators of loans on real estate, the license of the latter being only fifty dollars. In upholding the validity of the ordinance the court said: "The constitution recognizes the propriety of classifying subjects for taxation other than property, and leaves the matter of classification to the determination of the taxing power—whether it be the General Assembly or one of the subordinate public corporations created by it. The classification of occupations for taxation must not be purely arbitrary, but must be founded upon some valid or sufficient reason. Whether there is a reason for the classification is a question primarily intrusted to the judgment of the taxing power, but is subject to be reviewed by the courts; and whenever the classification is shown to be unreasonable and arbitrary, the courts will interfere and prevent injustice from resulting from such classification." In *City of Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196, the ordinance designated a particular building for the slaughtering of all animals intended for sale or consumption, and gave the owners of such building the exclusive right for a specified period to have all such animals slaughtered at their establishment. It was held partial and void, the court saying: "All by-laws should be general in their operation, and should bear equally upon all the inhabitants of the municipality. When privileges are granted by an ordinance, they should be open to the engagement of all, upon the same terms and conditions. That the common council had the right, under the large powers conferred by the charter, to so regulate the business of slaughtering animals, as to prohibit its exercise, except in a particular portion of the city, leaving all persons free to erect slaughtering-houses, and to exercise the calling at the place designated, cannot be controverted. But an ordinance confining such a business to a small lot, or even a particular block of ground, is unreasonable and tends to create a monopoly. It can hardly be said that only a tract of one acre can be selected in a large city like Chicago, where it would not be unhealthy or offensive, and that it would be unhealthy or offensive on all of the lands adjoining or in its vicinity, or in other portions of the city." And in a somewhat similar case—*Tugman v. Chicago*, 78 Ill. 405—the ordinance prohibited, after a certain date, the erection or operation of slaughter-houses within a designated portion of the city of Chicago "in any building not now used for such purpose." It was held invalid as discriminative and not uniform in its operation. "If the health or comfort of the city," said the court, "required the prohibition of new slaughter-houses within a designated part of the city, the same reason would surely demand that old ones should be discontinued. If one of the citizens of Chicago is per-

mitted to engage in the business of slaughtering animals in a certain locality, an ordinance which would prevent, under a penalty, another from engaging in the same business, would not only be unreasonable, and for that reason void, but its direct tendency would be to create a monopoly, which the law will not tolerate. The fact that certain persons were engaged in the business within the district designated in the ordinance, at the time of its adoption, gave them no right to monopolize the business, nor would such fact authorize the board of health to provide that such persons might continue the avocation, while others should be deprived of a like privilege, who should engage in the business at a later period. A regulation of this character, to be binding upon the citizen, must not only be general, but it should be uniform in its operation." In *Village of Braceville v. Doherty*, 30 Ill. App. 645, an ordinance was declared partial and invalid which imposed a license upon nonresident peddlers only. And to same effect is *Mayor v. Althrop*, 5 Cold. (Tenn.) 554. And in *re Frank*, 52 Cal. 606, 28 Am. Rep. 642, an ordinance prohibiting the sale by anyone of any goods in the city without a license, other than goods or domestic products, unless such goods were in the city or in transitu, was declared to be discriminative and void.

In *Lake View v. Tate*, 130 Ill. 247, 22 N. E. 791, 6 L. R. A. 268, the municipality had passed an ordinance for the purpose of regulating the speed of railroad trains and dividing the city into two districts therefor, and providing that no train should run within the limits of one of the designated districts at a greater speed than ten miles per hour, but made no restriction upon the speed in the other designated district. There were two railroads running through the city, one in each district, both districts being in thickly settled portions of the city. The ordinance was declared invalid as unwarrantably discriminative. In *Chicago v. The Gunning System*, 114 Ill. App. 377, 70 L. R. A. 230 (affirmed, 214 Ill. 628, 73 N. E. 1035), the ordinance provided that no sign or billboard should be erected upon or along any boulevard or pleasure driveway, or in any street where three-fourths of the buildings were devoted to residence purposes only, unless by the consent of three-fourths of the residents and property owners on both sides of the street. It was held void as discriminating between the owners of real estate in different parts of the city. An ordinance requiring that bicycles in the street after dark should carry lights was held not invalid, on the ground of not having a uniform operation, because it applied only to bicycles, and not to other silently running vehicles: *City of Des Moines v. Kellar*, 116 Iowa, 648, 93 Am. St. Rep. 268, 88 N. W. 827, 57 L. R. A. 243. In *Crowley v. Ellsworth*, 114 La. 308, 108 Am. St. Rep. 353, 38 South. 199, 69 L. R. A. 276, the ordinance made it unlawful for any person, firm or corporation to keep on its premises or in storage tanks within the city limits at any time more than two bar-

rels of gasoline, coal-oil or other refined oils of an explosive nature. It was contended by the defendant that the ordinance was unequal in its operation, because it was confined exclusively to refined oils, which were handled alone by him, and did not include crude oils which were handled by others. The ordinance was sustained upon the ground that every presumption in favor of the fairness of an ordinance must be indulged, and that the evidence failed to show that crude oils were equally as explosive as refined oils.

In *City of Shreveport v. Dantes*, 118 La. 113, 42 South. 716, an ordinance prohibited any persons selling articles of any kind from any stand, tray, vehicle or other container of goods of a similar nature, to stop on any alley, street or sidewalk, or other place of the city, except he be actively engaged in making a sale of an article. This ordinance was held not to be discriminative, because it related to all hucksters, "to persons and things as a class, and not to persons and things of a class." But in *City of Shreveport v. Levy*, 26 La. Am. 671, 21 Am. Rep. 553, an ordinance was declared discriminating and invalid which forbade the sale of goods on Sunday, but excepted from its operation those keeping their business places closed on Saturday, because it gave to Jews a privilege denied to others. In *City of Detroit v. Fort Wayne & B. I. Ry. Co.*, 95 Mich. 456, 35 Am. St. Rep. 580, 54 N. W. 958, 20 L. R. A. 79, the court had before it for review the validity of an ordinance requiring a street railroad to sell tickets at the rate of eight tickets for a quarter to all applying therefor on each of its cars, and to be good for transportation over its entire route, or any portion thereof, traveling continuously, either way, between certain hours. The street railway company contended that as there were other street railroad companies in Detroit, not regulated by this ordinance, or any other, that the ordinance was unequal in its operation and therefore void. The ordinance was upheld, but upon the ground, however, that the ordinance under which the company began operations reserved to the common council the right to make such further regulations and rules as might from time to time be deemed necessary to protect the interest, safety and welfare or accommodation of the public in relation to such railway. The general rule that ordinances should be general and impartial in their application was fully admitted by the court, but said it: "Ordinances, however, containing grants, are of necessity several and independent of each other. The conditions imposed and requirements exacted are necessarily different, depending upon many and varied considerations and circumstances. These ordinances are adapted to these varying considerations and circumstances." And the same principle is recognized in *Richmond R. R. Co. v. Richmond*, 96 U. S. 521, 24 L. ed. 734, though in this case an ordinance prohibiting the use of engines of the plaintiff railroad company on one part of the streets of the city was held not to deny the company the equal protection of the laws. No other railroad

company, however, ran its locomotives on the prohibited street. In *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, the act upon the court was one enacted by the legislature and not a municipal ordinance, but the case contains an exhaustive review of how far the police power can be exercised under the guise of protecting the public health without being invalid because arbitrary and denying equal protection of the laws. In this case the act prohibited the manufacture of cigars on any floor in any tenement house occupied for a house or residence, and applied to cities having over five hundred thousand population. Speaking of the invalidity of the act because of its partiality and discrimination, Judge Earl said: "Under the guise of promoting the public health, it might as well have banished cigar-making from all the cities of the state, or confined it to a single city or town, or have placed under a similar ban the trade of a baker, of a tailor, of a shoemaker, of a wood-carver, or of any other of the innocuous trades carried on by artisans in their own home. The power would have been the same, and its existence, so far as it concerns fundamental, constitutional rights, could have been justified by the same arguments. Such legislation may invade one class of rights to-day and another to-morrow, and if it can be sanctioned under the constitution, while far removed, in time we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions." This language of Justice Earl might be often read with profit by the law-making bodies of most American cities, for a tendency to exercise the police power arbitrarily and without reference to individual rights is not unusual among the governing authorities in many municipalities.

The recent case of *Town of Fulton v. Norteman*, 60 W. Va. 562, 55 S. E. 658, 9 L. R. A., N. S., 1196, affords another excellent illustration of an ordinance held to be invalid because against common right. This case evidently received very careful consideration by the court, and we shall quote from the opinion somewhat at length. The defendant was convicted on a charge of having violated an ordinance, the material sections of which were as follows:

"Section 1. It shall be unlawful for any person to bring into the town the carcass or dead body (or any portion thereof) of any animal intended for burial, cremation or manufacture into fertilizer of any kind.

"Sec. 2. It shall be unlawful for any person to bury, cremate or manufacture into fertilizer, or to cause to be buried, cremated or manufactured into fertilizer within the said town, any carcass or

dead body mentioned in section one of this ordinance, or any portion of such body.

"Sec. 3. It shall be unlawful for any person to receive within the town any carcass or dead body mentioned in section one of this ordinance, or any portion of such carcass."

The case was heard on an agreed statement of facts which admitted that defendant had brought into the town in violation of the ordinance portions of a carcass or carcasses of dead animals intended for manufacture. That defendant was in the employ of a butcher's association, which operated a fertilizer plant in the town, and that dead bodies of animals were used as a necessary ingredient in said fertilizer, and that in order to reach said plant it was necessary for defendant to pass into said town. In declaring the ordinance invalid as against common right, the court said: "In presenting the case, counsel for the plaintiff in error discuss, at considerable length, the law relating to the powers of municipal corporations to abate nuisances and the requisites of procedure in the exercise of such power; but the consideration of the validity of this ordinance does not seem to involve extensively legal principles of that kind. The ostensible purpose of the ordinance is not to suppress the business of manufacturing fertilizer in the town, nor does it provide for the abatement of the fertilizer plant, which, the agreed statement of facts shows, is in operation in the town. Furthermore, the ordinance is not sufficiently broad, either in the terms used or in the spirit thereof, to prevent or abate, as a nuisance, the transportation of carcasses of dead animals along the streets. It merely inhibits the bringing into the town of such carcasses from beyond its limits, and the burial, cremation and manufacture into fertilizer of carcasses brought in from the outside. The most that can be said of it is, that it inhibits the bringing in of such articles for any of the three purposes named, and this inhibition extends to citizens and residents as well as to nonresidents. Limited and restrained in its operation to this extent, its object can hardly be said to be the suppression of any business as a nuisance. It might be better described, as regards its object, as an ordinance passed, under the general power, given in the charter, to prevent injury or annoyance to the public or individuals from anything dangerous, offensive, or unwholesome, for the purpose of curtailing or limiting a practice which the council deems offensive and unwholesome. It does not prohibit generally the bringing in of the carcasses of dead animals. They may be hauled through the streets from one side of the town to another and deposited beyond its limits, or brought in for any purpose other than those of burying, cremating, and manufacturing them into fertilizer. Owing to the peculiarity of this ordinance, in respect to the object thereof, as indicated by its terms, the determination of the question presented necessitates a rather extensive inquiry into, and careful considera-

tion of the legal principles involved. The decisions are uniform to the effect that ordinances must not be oppressive, nor in restraint of trade, nor against common right. They must be impartial and general in operation. A further restriction is that the vesting in an officer or tribunal of power to act arbitrarily or capriciously, in giving or withholding permission to use property in any lawful manner, or to carry on a business or occupation, is not within the competency of a municipal corporation, although it may have the power of regulating the use of the property or the pursuit of such business or occupation: Smith on Municipal Corporations, sec. 526; 21 Am. & Eng. Ency. of Law, 983, 988. Most of these limitations are generally specified by the courts and law-writers as mere elements of unreasonableness; but, in the final disposition of most of the cases arising under ordinances which are held to be void, the conclusions are that the ordinances, in their operation and effect, go entirely beyond mere abuse of discretionary power and violate some legal right, or contravene some principle of public policy. . . . In determining whether an ordinance is violative of any of the principles hereinbefore adverted to, it is always permissible, and sometimes necessary, to view it in connection with the conditions under which it is intended to, and must, operate. In other words, the facts are to be considered as well as the terms of the ordinances. . . . The ordinance under which this conviction was obtained, on its face, bears some relation to the subjects of protection to health and immunity from injury, annoyance, and offensiveness; but its effect is limited to three subjects—burial of carcasses, cremation thereof, and manufacture thereof into fertilizer. These must be regarded as its primary objects. The bringing in of carcasses for such purposes is a mere preliminary incident of their burial, cremation, or manufacture into fertilizer. Bringing them in for other purposes is not inhibited. Prevention of the conveyance thereof along the streets, and consequent noxiousness of the air and offensiveness to sight and smell, is not, therefore, the main purpose. Both residents and nonresidents having slaughter-houses and butcher-shops within the town are at liberty, not only to convey their offal along any street thereof, but also to cremate or convert the same into fertilizer. For aught that appears here, all the slaughter-houses and butcher-shops of the neighboring city of Wheeling might be removed into Fulton, and the output of fertilizer from the plant immensely increased, and the streets more heavily burdened with the offensive materials. Or, by removing their plant beyond the corporate line, all the offal of Wheeling might pass through the streets of Fulton without violation of this ordinance. While thus operating almost solely and directly upon the manufacture of fertilizer from these materials, that business is not forbidden. It remains a lawful business in the town, a source of profit and means of livelihood to residents and nonresidents who care to engage in it. Foul, nauseating and unwholesome though it

is, the offal from slaughter-houses and butcher-shops, by reason of the power to convert it into fertilizer, is valuable to its owners. Passing through the industrial plant and the marts of trade, yielding wages to labor and profit to capital, it becomes a power in the realms of agriculture and horticulture. Though it is such an article, as, like the livery-stable, hogpen and many other useful concerns, may be subject to municipal control, under the police power, it is an article, known to commerce and industry as a thing of value, in which all persons have an equal right to deal and trade, which cannot be denied the privileges of a lawful market therefor on account of the locality of its production, and the owner of which cannot be cut off from such privileges because of his place of habitation, he being a citizen of the state or nation, or a foreign country whose citizens or subjects have, by treaty stipulation, the rights and privileges of citizens of this country, respecting industry and trade. Municipal corporations can no more discriminate against it, on account of the place of its production, than they can against second-hand clothing merely because it comes beyond the corporate limits or between residents and nonresident peddlers, or between livery-stables within the town. So long as the manufacture of fertilizer is recognized and permitted by the authorities of Fulton as a lawful business, affording a market for offal, or a place in which it is lawful to convert it into fertilizer, the privilege of the market or industry must be equally open to materials used therein without regard to the place of this production. To hold otherwise would be to ignore the legal principles adverted to in this opinion. The fact that it is, in some degree, protection of health, and diminutive of offensiveness, cannot save it. If it were free from the vices imputed to it, this might bring it within the power of the corporate authorities. But there are two requisites to its validity: It must be promotive of the purpose for which the power is delegated or inherently possessed, and free from any of those things the presence of which vitiates an ordinance."

IV. Conclusion.

While none of the foregoing cases deny that the right of use and occupation is a vested right which cannot be arbitrarily or capriciously destroyed at the uncontrolled will of local authorities, or that the power to regulate or prohibit must be uniform and of general application to all of the same class; still it is apparent from some of the foregoing illustrations that in certain cases such right seems to have been treated as a mere privilege which could be not only regulated but prohibited in the discretion of a municipal assembly. This latter class of cases evidently proceed upon the theory that the possibility of the abuse of legislative power does not deprive it of its existence, and they even concede the right of a common council to vest in some of the boards or officers of the munic-

ipality the opportunity to exercise arbitrary discretion in the application of an ordinance. Unfortunately the decisions have furnished no uniform tests for determining when a municipal ordinance is invalid, because denying to a citizen that great principle conferred by the constitution which has been defined as "the right to pursue any lawful business or vocation in any manner not inconsistent with the general rights of others, which may insure their prosperity, or develop their faculties so as to give them their highest enjoyment." We can only conclude that whether an ordinance is void because denying equal protection of the laws must depend upon the peculiar circumstances of each case. But as the distinctions drawn in many of the cases of this class which have arisen are so close, we are forced to the further conclusion that the decision in any given case would seem to rest rather in the discretion of the courts themselves than upon any generally accepted rule which they would feel bound to follow.

C. W. ZIMMERMAN MANUFACTURING COMPANY v. DAFFIN.

[149 Ala. 380, 42 South. 58.] .

SALE OF STANDING TIMBER—Time Limit to Remove—Title.—Under a conveyance of certain standing timber to be cut and removed within two years from the date of the conveyance, the legal title to the timber passes to the grantee, and he may cut and remove it after the time limit has expired, but in so doing he is liable to his grantor in trespass quare clausum for the actual damages to the possession. (p. 65.)

LIFE TENANCY—Action for Conversion of Trees.—A life tenant cannot maintain trover for the conversion of standing trees, nor trespass de bonis for the taking of them from the estate. (p. 65.)

LIFE TENANCY—Trespass for Removal of Standing Timber. A life tenant may maintain trespass quare clausum fregit for the cutting and removing of standing timber from the property, and recover such actual damages as he may sustain to his possession. (p. 66.)

Wilson & Aldridge, Stephens & Lyon, R. W. Stoutz and G. L. and H. T. Smith, for the appellant.

A. L. McLeod and W. D. Dunn, for the appellee.

383 DENSON, J. The complaint contains three counts. The first is trover for the conversion of a lot of timber alleged to have been cut from certain lands described in the

count. The second count is in trespass, and counts for recovery on the cutting of timber by the defendant on the lands described in the first count of the complaint. The third count is for trespass on the same lands, without any averment particularizing the acts of trespass. The controversy in the case grew out of the purchase and sale of growing pine timber on land of which Bettie Daffin was the owner at the time of the purchase and sale. On the eleventh day of November, 1901, Bettie Daffin and her husband sold to the defendant (appellant) "all the pine timber, twelve inches in diameter and up," then standing and being on certain lands described in a conveyance which they on the same day executed to the defendant, and which is in the following language:

"State of Alabama,
Clarke County.

"Know all men by these presents, that, for and in consideration of nine hundred and sixty dollars, we do, grant, bargain, sell and convey unto the C. W. Zimmerman Mfg. Co. all the pine timber, twelve inches in diameter and up, now standing and being on the following described lands, situated in Clarke county, Alabama, to-wit: Northeast quarter of northeast quarter, south half of northeast quarter, north half of southeast quarter, section 20, west half of northwest quarter, section 21, township 8 north, range 3 east. To have and to hold to C. W. Zimmerman Mfg. Co., their successors and assigns, forever. And we covenant with the C. W. Zimmerman Mfg. Co., that we are seized in fee of the said premises, and that we will warrant and defend the same to the said C. W. Zimmerman Mfg. Co. against the lawful claims of all persons whomsoever. For the same consideration we do grant to C. W. Zimmerman Mfg. Co. free rights of way over and across any lands owned by us for all railroads, dirt roads, and log ditches, which it may desire to construct.

³⁸⁴ "The said C. W. Zimmerman & Co. is allowed two years from this date within which to cut and remove the timber herein above conveyed.

"Witness our hands and seals this the 11th day of November, 1901.

"W. W. DAFFIN. [L. S.]
"BETTIE DAFFIN. [L. S.]"

Mrs. Daffin died, leaving surviving her several children and her husband. The husband is the sole plaintiff in this case. The timber was cut on the land after the expiration of the time limit specified in the contract, and after the death of Mrs. Daffin.

The first contention of the appellant requires us to construe the contract of sale and determine the interest of the parties in the timber. The plaintiff's contention is that the defendant (grantee in the conveyance), not having cut and removed the timber within the time limit fixed in the second paragraph of the sale contract, forfeited its title to the timber; and this contention prevailed in the trial court. The defendant's contention is that the conveyance is absolute, carrying and vesting the title to the timber in the grantee, and that the time limit for cutting and removing simply limits its right of the use of the soil for keeping and maintaining the trees or timber on it.

The precise question has never been before this court for consideration. But such contracts have been frequently considered and construed by the courts of other states, and the decisions are not by any means harmonious. In 28 American and English Encyclopedia of Law, second edition, page 541, we find this statement in respect to such contracts: "Contracts for the sale of standing trees to be removed within a specified time has generally been construed by the courts as sales of only so many trees as the vendee might cut and remove within the time designated; the balance remaining the property of the vendor." Many cases are cited in note 9 to support the statement. The note includes cases from the courts of Georgia, Maine, Massachusetts, Michigan, Minnesota, New York, Ohio, Vermont, and Wisconsin. There is this further statement of the law in the encyclopedia above quoted from: ³⁸⁵ "Such a sale may, however, be regarded as absolute, and the agreement to remove as a covenant, in which case the timber remains the property of the purchaser, although not removed within the time provided for, and for the failure to remove the vendor may bring an action on the covenant. A wrongful taking of the timber by the vendor would in such a case constitute a conversion, for which the purchaser would have a right of action." In support of this statement the decisions of the courts of Alabama, Indiana, Michigan, and Massachusetts

are cited in note 1. In addition to the cases cited in the encyclopedia, we have found and examined many others.

To review all the cases would extend this opinion to very great length, but in reading the different cases it has been found that each of them turned upon the terms of the particular contract then under consideration. In the case of *Mengal Box Co. v. Moore & McFerrin*, 114 Tenn. 596, 87 S. W. 415, Judge Wilkes reviews many of the cases and announces the ruling made in each of them. The conclusion reached by Judge Wilkes in that case, that the time limit of five years fixed in the contract he was construing defeated the title of the grantee if the trees were not cut within the limit, cannot aid us here, because the peculiar terms of that contract are entirely different from those of the one we have in hand. In the case of *Hodges v. Buell*, 134 Mich. 162, 95 N. W. 1078, the supreme court of Michigan had under consideration a deed to land with this reservation in it: "First party (grantor) reserves all saw timber on said land, with right to enter upon and remove same within two years; also right to build roads across and cross said land within two years from date." After reviewing many cases, especially the Michigan cases, the court held that the title to the timber standing at the expiration of the time limit and that was cut after the time limit passed to the grantee in the conveyance. But we do not consider that case as one deciding the question we have in hand, because of the difference in the contracts, and it is referred to particularly for the reason that it is one in which the cases have been reviewed and ³⁸⁶ in which the variant rulings are set forth. Suffice it to say there are cases which hold that the title under such contracts remains in the grantee after the time limit has passed, though without legal right on his part to enter within the close of the grantor to take and remove the trees: *Holt v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119; *Irons v. Webb*, 41 N. J. L. 203, 32 Am. Rep. 193; *Bennett v. Victor Lumber Co.*, 28 Pa. Super. Ct. 495. And, on the other hand, there are cases holding that the title of the grantee terminates with his right of entry: *Saltonstall v. Little*, 90 Pa. 422, 35 Am. Rep. 683; *Golden v. Glock*, 57 Wis. 118, 46 Am. Rep. 32, 15 N. W. 12; *Boisaubin v. Reed*, 2 Keyes, 323; *MaComber v. Detroit etc. R. R. Co.*, 108 Mich. 491, 62 Am. St. Rep. 713, 66 N. W. 376, 32 L. R. A. 102; *Baxter v. Mattox*, 106 Ga. 344, 32 S. E. 94; *Chest-*

nut v. Green, 120 Ky. 385, 86 S. W. 1122; Williams v. Flood, 63 Mich. 487, 30 N. W. 93.

In this jurisdiction the case nearest in point is that of Magnetic Ore Co. v. Marbury Lumber Co., 104 Ala. 465, 53 Am. St. Rep. 73, 16 South. 632, 27 L. R. A. 434. A careful reading of that case would seem to lead to the conclusion that our court is committed to the proposition that by the failure to remove the timber within the time limit the purchaser does not, under a deed like the one here involved, forfeit his right and title to the timber. The facts of that case, briefly stated, are: The Louisville and Nashville Railroad Company in 1881, by deed of conveyance regularly executed, sold and conveyed absolutely the "saw timber" growing on certain lands to the Marbury Lumber Company. No time limit was fixed in the conveyance for the cutting and removal of the timber. In 1886 the railroad company by deed of conveyance sold and conveyed the lands to De Bardeleben, with this provision or reservation: "But it is understood and agreed that the timber, with right of way to reach same, has been sold." In February, 1888, De Bardeleben conveyed the land to the Magnetic Ore Company. The contention of the ore company in that suit with respect to the title of the lumber company to the timber was that, "as the deed of conveyance for the 'saw timber' did not specify any time within which the timber was to be cut and removed, the law supplies a provision ³⁸⁷ to the effect that it was to be cut and removed within a reasonable time, and that the lumber company having failed to do this within a reasonable time, the right to the saw timber was forfeited, and became the property of the ore company." The court, in respect to the contention, through Coleman, J., said: "There ought to be some cogent reasons compelling such a conclusion, or decisions to that effect which have established a rule of property, before we should adopt it as law." And in the very conclusion of the opinion the court said: "Complainant's whole case, as we construe the bill and brief of counsel, is rested upon the proposition that, as defendant failed to cut and remove the timber within a reasonable time, he thereby forfeited whatever of property interest he purchased and acquired by the deed of conveyance from the owner, and the saw timber, by reason of the forfeiture, became vested in the complainant, although it was expressly reserved from the sale to De Bardeleben in the deed to com-

plainant (the ore company). We do not assent to the proposition." A fair résumé of the holding in the case is that, when standing timber is sold and conveyed and no time fixed for the removal of the timber, the purchaser has a reasonable time within which to enter and cut the timber and remove it, and if he fails to act within a reasonable time, he thereby forfeits the right to enter the premises, and would be liable in an action *quare clausum*, but would not be liable *de bonis* or for the conversion of the timber: *Holt v. Stratton Mills*, 54 N. H. 109, 29 Am. Rep. 119.

It is insisted by appellee that the case is not applicable, for the reason that no time limit is expressed in the deed involved there. But this court has held that when there is a conveyance of land, and a reservation of growing trees, and no time is fixed for their removal, a reasonable time only is allowed in which the entry can be made for the purpose of taking the trees off the land: *Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776. And it was said by the supreme court of Tennessee, speaking in respect to such contracts where no time limit is fixed: "Under such contracts, after the expiration of such period, the same question would be presented as ³⁸⁸ with trees remaining after the lapse of a fixed period in contracts containing a limitation as to time. For the first class of contracts the law does for the parties what they have done for themselves in the other class: *Carson v. Three States Lumber Co.* (Tenn.), 91 S. W. 53. Without the last paragraph in the deed involved in this controversy, manifestly the deed would be an absolute conveyance of the title to the timber to the grantee; and it would come directly within the influence of the ruling made in the case of *Magnetic Ore Co. v. Marbury Lumber Co.*, 104 Ala. 465, 53 Am. St. Rep. 73, 16 South. 632, 27 L. R. A. 434. The question is, then, What effect on the title has the last paragraph of the deed—the time limit? What is its field of operation?

To adopt the insistence of the appellee, plaintiff below, would give the paragraph the effect of a condition or proviso to the granting clause of the deed, and, although the grantee paid full value for the trees, yet, by its failure to cut and remove the trees within the two years, a forfeiture of the title would be worked. "A deed will not be construed to create an estate on condition, unless language is used which, according to the rules of law, *ex proprio vigore*, im-

ports a condition, or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated. Conditions are not to be raised readily by inference or argument": 2 Devlin on Deeds, sec. 970; Elyton Land Co. v. South etc. R. R., 100 Ala. 396, 14 South. 207; Rawson v. Inhabitants etc., 7 Allen, 125, 83 Am. Dec. 670; Hoyt v. Kimball, 49 N. H. 322; Thornton v. Trammell, 39 Ga. 202. It is a general principle and rule that conditions subsequent are not favored in law, and must be strictly construed, "because they tend to destroy estates, and a vigorous exaction of them is a species of summum jus, and in many cases hardly reconcilable with conscience": 4 Kent's Commentaries, 129; Thornton v. Trammell, 39 Ga. 202. "And, if it be doubtful whether a clause in a deed imports a condition or a covenant, the latter construction will be adopted": Hoyt v. Kimball, 49 N. H. 322, and authorities there cited. In applying rules of construction, the language employed in the instrument, the circumstances under which the contract was made, and the purpose for which it was made, are to be taken into consideration. ³⁸⁹ "The operative words in the conveyance express the intention to sell and convey the standing timber as timber attached to and a part of the freehold, by which a present title was to pass, and cannot be construed into an executory agreement to sell and convey the timber when it should be thereafter severed. The deed conveyed an interest in the land, and is such as the statute of frauds requires to be in writing to be valid": Heflin v. Bingham, 56 Ala. 566, 28 Am. Rep. 776; Magnetic Ore Co. v. Marbury Lumber Co., 104 Ala. 465, 53 Am. St. Rep. 73, 16 South. 632, 27 L. R. A. 434; Rothschild v. Bay City Lumber Co., 139 Ala. 571, 36 South. 785; Owens v. Lewis, 46 Ind. 488, 15 Am. Rep. 295; Neils Lumber Co. v. Hines, 93 Minn. 505, 101 N. W. 959; Slocumb v. Seymour, 36 N. J. L. 138, 13 Am. Rep. 432. When conveyed, it was an interest in lands, and did not cease to be thereafter until severance.

If the limitation as to time of cutting and removal should be construed as a covenant on the part of the purchaser that it would cut and remove the timber in the time specified, the title to the timber would remain in the purchaser after the time limited had expired, and he could still enter upon the premises and remove the same at his pleasure, being liable to the vendor for such damages as he should cause in

so doing. The vendor would also have a right of action against the vendee for a breach of the covenant in not performing the covenant as agreed; or it may be that the vendor would be entitled to remove the timber after the time limit himself, but not to appropriate it to his own use. In the case of *Walker v. Johnson*, 116 Ill. App. 145, in construing a contract similar to the one here under consideration, the Illinois court held that the time-limit clause should be treated as a covenant, and not a condition to base a forfeiture upon. On the other hand, the supreme court of Michigan, in the case of *Williams v. Flood*, 63 Mich. 487, 30 N. W. 93, held to the other view. But there is some difference in the terms of the contract construed by the Michigan case and the present contract. Furthermore, the Michigan court does not discuss or apply the rule of construction in respect to conditions subsequent ³⁹⁰ referred to above, and the case seems to have been determined on the doctrine *ab inconvenienti*.

If, in the present case, the intention of the grantors that the title to the timber should revert to them on failure of the grantee to cut and remove it within the time specified, it would have been an easy matter to have expressed it in the deed; but on the face of the instrument it is at least a question of doubt as to whether the limitation is a condition subsequent of the contract of sale or a covenant, and, following the trend of the authorities above referred to in respect to the construction to be adopted when such question is doubtful, and in the light of the ruling in the case of *Magnetic Ore Co. v. Marbury Lumber Co.*, 104 Ala. 465, 53 Am. St. Rep. 73, 16 South. 632, 27 L. R. A. 434, we hold that the clause or paragraph in the deed in respect to the time for cutting and removing the timber is a covenant, and does not operate a forfeiture of the title on the failure of the vendee to cut and remove the timber within the time specified: *Magnetic Ore Co. v. Marbury Lumber Co.*, 104 Ala. 465, 53 Am. St. Rep. 73, 16 South. 632, 27 L. R. A. 434; *Howard v. Lincoln*, 13 Me. 22; *Goodwin v. Hubbard*, 47 Me. 595; *Knotts v. Hydrick*, 12 Rich. 314; *Halstead v. Jessup*, 150 Ind. 85, 49 N. E. 821. It follows that the court erred in declining to admit the deed as evidence at the time it was first offered, and this error was not cured by the subsequent admission of the deed by the court because the limitation put upon the

deed by the court was improper, and not in harmony with the construction here given the deed.

It also follows that charge 1, requested by the defendant, should have been given. The foregoing makes it unnecessary to consider charges 2, 3, and 4, refused to the defendant. Charge 5, refused to the defendant, is bad in form and was properly refused. Charge 6, requested by the defendant, should have been given.

Refused charges 7 and 8 involved the question of plaintiff's right to maintain the suit on any count of the complaint; he being only a life tenant. A life tenant cannot maintain trover for the conversion of trees, nor trespass de bonis for the taking of them. This results from the nature of his interest in the premises, but he may maintain trespass quare clausum fregit: 18 Am. & Eng. Ency. of Law, 450, 453; 15 Ency. of Pl. & Pr. ³⁹¹ 519, 520; 1 Washburn on Real Property, sec. 303; Garnett Smelting & D. Co. v. Watts, 140 Ala. 449, 457, South. 201; Alexander v. Fisher, 7 Ala. 514. Under the construction we have placed on the deed, the plaintiff may maintain trespass quare clausum against the grantee who enters after the time limit, and recover for such actual damages as he may sustain to his possession. But the undisputed proof in the case shows that no appreciable damage was done the soil or to plaintiff's possession; hence charge 7, which asserts that the defendant could not recover more than nominal damages, should have been given. The eighth charge precludes the plaintiff from a recovery of nominal damages, and was properly refused.

It is unnecessary to consider the oral charge of the court in respect to the measure of damages, further than to say that it is erroneous.

Reversed and remanded.

Tyson, C. J., and Haralson and Simpson, JJ., concur.

Under a Deed to the Standing Timber on separate tracts of land, providing that it shall remain in force as to each separate tract until one year after the vendee begins to cut timber thereon, he is required to begin cutting within a reasonable time, notwithstanding the deed grants a right of way unlimited as to time over all the separate tracts for the removal of timber therefrom: Hall v. Eastman, 89 Miss. 588, 119 Am. St. Rep. 709.

Standing Timber is an interest in land that may be acquired by deed, and the fact that the deed contains a provision that the timber must be removed within a definite time does not prevent the title thereto from vesting in the grantee: Mee v. Benedict, 98 Mich. 260,

39 Am. St. Rep. 543. See, too, *Magnetic Ore Co. v. Markbury Lumber Co.*, 104 Ala. 465, 53 Am. St. Rep. 73.

Where a Deed of Land Reserved the Timber, the grantee stipulating that the grantor should have two years to remove it, it was held that he might remove it after that time: *Irons v. Webb*, 12 Vroom, 203, 32 Am. Rep. 193. See, also, *Hoit v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119; *Saltonstall v. Little*, 90 Pa. 422, 35 Am. Rep. 683.

HERVEY v. HART.

[149 Ala. 604, 42 South. 1013.]

INNKEEPERS—Duty as to Furnishing Accommodations.—

In the absence of a special contract an innkeeper has the sole right to select the apartment for a guest, and, if he finds it expedient, to change the apartment and assign the guest another, without becoming a trespasser in making the change, but if, having the necessary convenience, he puts the guest out of the apartment assigned to him, and refuses to afford him reasonable accommodations, he is liable to an action for damages. (p. 68.)

NEW TRIAL—Practice on Appeal.—The appellate court will not reverse a judgment granting a motion for a new trial unless the evidence plainly and palpably supports the verdict. (pp. 68, 69.)

Erwin & McAleer, for the appellant.

G. L. and H. T. Smith, for the appellee.

606 HARALSON, J. Our statutes on the liability of innkeepers provide that "in the absence of a special contract as is authorized by the succeeding section (2540), the right of guests and the liability of the keeper remain as at common law": Code 1896, sec. 2539.

The succeeding section authorizes a special contract in writing between an inn or hotel keeper and guest, by which the liabilities of the parties may be regulated. It is unnecessary to set out this section, as there is no pretense that there was any such contract between the plaintiff and defendants in this case. In *Beale v. Posey*, 72 Ala. 323, construing these sections, the court said: "The purpose of the statute is, to confer on the keeper of the unlicensed house of public entertainment the liability of receiving only such guests or boarders as may enter into a special contract with him. But if the keeper of such house does not enter into a special contract with the guest, furnishing him a mem-

orandum thereof in print or in writing, limiting his liability, the common law intervenes, and from that the measure of his liability must be ascertained: *Lanier v. Youngblood*, 73 Ala. 587.

⁶⁰⁷ In *Doyle v. Walker*, 26 U. C. J. B. 502, it was held, as the common law on the subject, that the innkeeper has the right, and the sole right, to select the apartment for a guest, and if he finds it expedient, to change the apartment and assign the guest another, without becoming a trespasser in making the change. If, having the necessary convenience, he refuses to afford reasonable accommodations, he is liable to an action for damages: 16 Am. & Eng. Ency. of Law, 2d ed., 524, 525.

The plaintiff in this case, the appellee here, sued the defendants, who are appellants, to recover damages for the alleged reason that he was put out of the room to which he had been assigned by defendants in their hotel, and was refused proper accommodations in said hotel. The jury found for defendants, and the court, on motion of the plaintiff, set aside the verdict and granted a new trial. The grounds of the motion were: "1. Because the verdict was not supported by the evidence, as applied to the law as charged by the court; 2. Because the jury in rendition of the verdict, ignored the law as charged by the court; 3. Because the verdict is not supported by the evidence."

The well-established rule in this court, as to granting new trials is, "that this court will not revise a judgment granting the motion, unless the evidence plainly and palpably supports the verdict": *Merrill v. Brantley*, 133 Ala. 537, 31 South. 847; *Smith v. Tombigbee & N. R. Co.*, 141 Ala. 332, 37 South. 389.

The theory of the plaintiff relied on for a recovery is clearly stated in the complaint, upon which, issue being taken, the case was tried. The plaintiff's evidence tended to support the complaint, but the evidence of the defendants was not entirely consonant therewith. In some of its more important phases it conflicted, and different inferences might have been well drawn therefrom. It would be useless to review the evidence on each side, to do which would require time and labor. We have carefully read the evidence in consultation, and conclude that while it might justify, yet it does not "plainly and palpably support the verdict," without which condition we cannot, consistently

with the ⁶⁰⁸ rule of the court above announced, reverse the judgment granting the motion for a new trial.

Under the averments of the complaint, the defendant was not liable, if he offered plaintiff proper accommodations in lieu of the room previously assigned to him.

The ruling on the motion for a new trial must be affirmed.

Tyson, C. J., and Simpson and Denson, JJ., concur.

Guests at a Hotel, and Persons Entering It with the bona fide intention of becoming guests, cannot lawfully be prevented from going in, nor can they lawfully be put out by force after entrance, provided they are able and willing to pay the charges and are not objectionable in their conduct or character: *State v. Steele*, 106 N. C. 766, 19 Am. St. Rep. 573. As to who are guests, see the note to *Tulane Hotel Co. v. Holhohan*, 105 Am. St. Rep. 932.

FIELDER v. TIPTON.

[149 Ala. 608, 42 South. 985.]

BICYCLES—Use of Sidewalk—Negligence.—A bicycle is a vehicle and its proper place is upon the highway or the street proper, and not upon the sidewalk, and the riding of a bicycle upon the sidewalk is negligence per se. (pp. 70, 71.)

BICYCLES—Use of Sidewalk—Liability for Personal Injury. One riding a bicycle upon a sidewalk is liable in damages to a pedestrian who is injured thereby while in the proper exercise of his rights in coming upon, or walking along the sidewalk, although there is no ordinance prohibiting the riding of bicycles thereon. (pp. 71, 72.)

R. E. Gordon, for the appellant.

Rickarby & Dunlap and W. S. Anderson, for the appellee.

¶⁶¹⁰ **SIMPSON, J.** This was an action for damages on account of injuries claimed to have been received by the plaintiff (appellee) on a sidewalk in Mobile, from being run against by the defendant (appellant) while riding on a bicycle along said sidewalk. The assignments of error are to the rulings of the court on demurrers to counts of the complaint and to giving and refusing charges.

The third count of the complaint, as amended, avers that complainant was on the sidewalk as a pedestrian, and that

the defendant, riding on a bicycle, ran the same on and against her, thereby causing the injury and that "defendant was riding his said bicycle thereon at the time when he ran into her." The demurrer to this count alleges as grounds: (1) That it does not allege any facts which would constitute negligence; (2) does not show that defendant was negligently riding his bicycle; (3) does not allege that the injury was due to the negligence of the defendant; (4) that it is not negligent per se to ride a bicycle on the sidewalk. The argument of appellant to show that the court erred in overruling the demurrer to the third count of the complaint as amended is that, as there was no ordinance of the city prohibiting persons from riding on the sidewalk in question, the defendant had the right to be there, and consequently that it was necessary to allege some other act of negligence than the mere riding of the bicycle on the sidewalk. The case of *Lee v. City of Port Huron*, 128 Mich. 533, 87 N. W. 637, 55 L. R. A. 308, was a case in which a bicycle rider sued for damages for injuries received on account of a defect in the sidewalk; and the court said that the riding of a bicycle on the sidewalk is not an unlawful act at common law, and that one riding on a sidewalk "with care, under authority of a municipal ordinance," may recover for injuries resulting from the want of repair of the sidewalk; but the court intimates that such want of repair must be such as would render it not reasonably suited for the uses for which sidewalks are constructed, to wit, for pedestrians, and that he could not recover for any other, such as a crack between the planks of a plank sidewalk. The case of *Purple v. Greenfield*, 138 Mass. 1, was one in which the plaintiff stepped back to avoid a boy riding on a velocipede, and fell into a cellar window hole, and the court say: "We cannot lay it down as a universal proposition that any and every use of any kind of velocipede upon the sidewalk is unlawful."

On the other hand, the authorities sustain the proposition that a bicycle is a "vehicle," and that its proper place is upon the highway, or the street proper, and not upon the sidewalk: *Elliott on Roads and Streets*, 2d ed., sec. 852, p. 927; *Clementson on Road Rights and Liabilities of Wheelmen*, pp. 90, 94, secs. 99, 103; *Davis v. Petrino-vich*, 112 Ala. 654, 21 South. 344, 36 L. R. A. 615. It has also been held that, even without a statute, one who rides a

bicycle at night without a light or other signal on a public thoroughfare is guilty of negligence: *Cook v. Fogarty*, 103 Iowa, 500, 72 N. W. 677, 39 L. R. A. 488. In a case wherein the supreme court of Indiana held that one who rudely and recklessly ran a bicycle against another who was standing on the sidewalk was guilty of an assault and battery, regardless of his intent, the court remarks that the bicycle is a vehicle, and its use on a public sidewalk is unlawful; also that "sidewalks are intended for the use of pedestrians, and not for the use of persons in vehicles. . . . It would be a palpable contradiction to affirm that footmen have the exclusive right to the use of the sidewalks, and yet concede that persons not traveling as pedestrians may ⁶¹² also rightfully use them: *Mercer v. Corbin*, 117 Ind. 450, 10 Am. St. Rep. 76, 20 N. E. 132, 3 L. R. A. 221. In a case which was very maturely considered, and in which a number of authorities are cited, the supreme court of New Jersey has held that a person who was kicked by a horse which was being led along the sidewalk was entitled to recover, without regard to the fact as to whether the horse was known to be vicious, on the ground that the party defendant had no right to lead the horse along the sidewalks, and the cases therein cited sustain the proposition that it is not necessary to allege any special negligence other than the mere fact of leading the horse on the sidewalk: *Healey v. Ballantine*, 66 N. J. L. 339, 49 Atl. 511. Messrs. Shearman and Redfield, in their work on Negligence, third edition, section 310, in referring to the case of a person traveling on the wrong side of a road, say: "He assumes the risk of all experiments in this direction, and is bound to use more care, and to keep a better lookout for approaching vehicles, than would otherwise be required of him; while those who pass him on their proper side of the road have a right to presume that no greater caution or skill will be required on their part than would be necessary if he were on his own side of the road. By an unnecessary deviation from his proper side of the road, he takes the risk of the consequences which may arise from his inability to get out of the way of another traveler approaching on the right side of the road."

In the light of these authorities, and in accordance with the reason of the law, we think it is clear that the pedestrian has a right to the uninterrupted use of the sidewalk,

and is not required to exercise any more care in walking thereon than such as is necessary to avoid injuries from other pedestrians walking thereon; the question of the repair of the sidewalk not being involved. On the other hand, the person riding a bicycle has no right to the use of the sidewalk, and while it may be true that such use is tolerated by the failure to affix a penalty thereto, yet, when a person rides a bicycle on a sidewalk, he is invading the part of the street set apart for the use of pedestrians, and takes upon himself ⁸¹³ the risk of injuring them, so as to be responsible to any pedestrian who is injured, while in the proper exercise of his rights in coming upon or walking along the sidewalk. Consequently the allegations of the third count of the complaint as amended were sufficient, and the court committed no error in overruling the demurrer.

Without entering into the question as to whether the city has the right to allow bicycles to be ridden on the sidewalks, the ordinance introduced in evidence does not definitely authorize the riding of a bicycle on any sidewalk, except between the hours of 12 o'clock midnight and 7 A. M. The defendant himself testified that he was traveling at the rate of four or four and one-half miles per hour; that "he was familiar with the oyster-shop from which plaintiff stepped, and knew that persons were constantly going in and out, as he passed along there four times every day"; also, that it was impossible for him to turn in time to have avoided striking her after he saw her. Under the rules above laid down, the court would have been justified in giving the general charge in favor of the plaintiff. Hence the defendant was not injured by any charge given by the court.

The judgment of the court is affirmed.

Tyson, C. J., and Haralson and Denson, JJ., concur.

Bicycles are Vehicles, and entitled to the use of the road, but have no lawful right to the use of sidewalks: *Holland v. Barch*, 120 Ind. 46, 16 Am. St. Rep. 307; *Knouff v. Logansport*, 26 Ind. App. 202, 84 Am. St. Rep. 292. And the act of a person in riding his bicycle against a pedestrian on a town sidewalk, in such a rude and reckless manner as to show a disregard of consequences, is an actionable assault and battery: *Mercer v. Corbin*, 117 Ind. 450, 10 Am. St. Rep. 76.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

PEOPLE v. McGINNIS.

[234 Ill. 68, 84 N. E. 687.]

MURDER—Self-defense.—In a case of homicide all that is necessary for the accused to show to make out a case of self-defense is that the conduct of his assailant induced in him a reasonable and well-grounded belief that he was at the time of the killing in apparent danger of losing his life or suffering great bodily harm, and he is not required to show that he acted as a man of "ordinary judgment and courage would have acted under the circumstances." (p. 79.)

MURDER—Self-defense.—In a prosecution for murder the question whether the accused fired the fatal shot while acting under the fears of a reasonable person or those of a coward is not a question for the court, but for the jury, and an instruction which intimates to the jury that the accused was a coward, and in consequence of such cowardice fired the fatal shot is error. (pp. 79, 80.)

MURDER—Self-defense—Instructions.—In a prosecution for murder it is error for the court in its instructions to refer to the defense set up by the accused as "what is claimed to be this self-defense." (p. 80.)

MURDER—Conduct of Accused During Trial.—In a prosecution for murder, where the evidence is close, it is error for the court to instruct the jury that it has a right to take into consideration the demeanor and conduct of the accused "during the trial" when passing upon the weight which should be given to his testimony as a witness in his own behalf. (p. 80.)

CRIMINAL LAW—Former Acquittal.—The question of former acquittal cannot be raised by a motion in arrest of judgment. (p. 81.)

CRIMINAL LAW—Former Acquittal—Entry of Nolle Prosequi.—If an indictment contains several counts for murder and one for manslaughter, and the prosecution enters a nolle prosequi as to the manslaughter count, but the jury find the accused guilty of manslaughter under the murder counts, he cannot, on motion in arrest of judgment, set up the defense that the nolle prosequi was equivalent to a verdict of not guilty of manslaughter, and amounted to a former acquittal on that charge. (pp. 81, 82.)

Neece & Elting, C. W. Warner and W. H. Hartzell, for the plaintiff in error.

W. H. Stead, attorney general, G. V. Helfrich and D. E. Mack, for the people.

⁶⁹ HAND, C. J. The plaintiff in error, Joseph McGinnis, at the October term, 1907, of the Hancock county circuit court, was indicted by the grand jury of said county for the unlawful killing of Bradford Huston. The indictment contained five counts. The first, second, third and fifth charged murder, and the fourth, manslaughter. The defendant entered a plea of not guilty. After the evidence was all in the state's attorney, by leave of court, entered a nolle prosequi to the fourth count, and the jury returned a verdict of manslaughter upon the remaining counts of the indictment, upon which verdict the court, after overruling motions for a new trial and in arrest of judgment, sentenced the defendant to the penitentiary, and a writ of error has been sued out by him from this court.

It appears from the record that the plaintiff in error was an unmarried man, about fifty-seven years of age. He had been admitted to the bar of this state and had served one or more terms as a justice of the peace in Hancock county. Some two years before the killing of Huston he ⁷⁰ had assisted the state's attorney of Hancock county to prosecute Huston upon a criminal charge, upon which Huston was convicted and incarcerated in the penitentiary. Huston, after his arrest and conviction, entertained a violent hatred toward the plaintiff in error, and frequently threatened to kill him, some of which threats were communicated to the plaintiff in error prior to the killing of Huston. Huston was a man of violent temper and of bad character, and while the plaintiff in error at times used intoxicating liquors to excess, he was, even when intoxicated, peaceable and quiet. On the afternoon of Sunday, May 12, 1907, the plaintiff in error went to the house of Joseph Dodds, in LaHarpe, in Hancock county. He there met Dodds, who lived alone, and a number of other men, including Bradford Huston. They all drank intoxicating liquors while at Dodds' house to some extent, and all became more or less under the influence of intoxicating liquors. While at Dodds' house Bradford Huston said it would be a good time for him to settle with McGinnis. Dodds remon-

strated against Huston having any trouble with McGinnis, and they had no quarrel at Dodds', but after some talk they took a drink, shook hands and agreed to be friends. Early in the afternoon Huston went to a livery-stable to get a rig to take Mrs. Nelson and her three children, who lived about sixty feet from the house of Dodds, to Stronghurst, a village situated some sixteen miles from LaHarpe, where the husband of Mrs. Nelson was at work. After Huston left Dodds' house plaintiff in error went to the house of Mrs. Nelson, of which he had charge for her landlord, to get the key to that house or another house which he had charge of in that vicinity. The boy of Mrs. Nelson, who was ten years old, got the plaintiff in error a drink from the well, and the plaintiff in error then went into the house, which was a small three-room house, and sat down in a rocking-chair in the main room, near the west door, and was talking to Mrs. Nelson and her children. After he had been in the house a few minutes ⁷¹ Huston returned with a horse and buggy, in company with a man by the name of Shaw, who had been at Dodds' house early in the day, drinking with Dodds, McGinnis, Huston and others. Huston tied the horse and he and Shaw went to the house of Mrs. Nelson. Huston entered the house, Shaw remaining near the door, outside. There is no conflict in the evidence up to the time Huston entered the house of Mrs. Nelson. Shaw was not called as a witness, and the only eye-witnesses to what took place in Mrs. Nelson's house after Huston entered, who testified as witnesses upon the trial, were Mrs. Nelson, Horace Nelson and the plaintiff in error. Within a few minutes after Huston entered the house of Mrs. Nelson the plaintiff in error fired two shots from a 32-caliber revolver at him, one of which entered his body a little to the left and immediately above the navel and passed diagonally through his body and lodged in his back, after passing through the lower part of his right kidney. The other shot did not take effect. After the shooting Huston left the house and was taken downtown by Shaw and a man by the name of Wallace to a livery-stable, where he died from the effect of the revolver shot, about 4 o'clock of the same afternoon. Immediately after the shooting plaintiff in error went downtown and admitted the shooting and gave himself up to an officer.

If the testimony of Mrs. Nelson and the boy, Horace, is to be believed, the shooting of Huston was without excuse and wholly unjustifiable. On the other hand, if the testimony of plaintiff in error is to be believed, he acted in self-defense and was justified in taking the life of Huston. In that state of the record the plaintiff in error was entitled to have the jury correctly instructed as to the law of self-defense.

It is assigned as error that the court erred in giving to the jury, upon behalf of the people, upon the subject of self-defense, the eleventh, thirteenth and fourteenth instructions, which read as follows:

72 "11. The court instructs the jury that although you may believe, from the evidence, that the defendant, McGinnis, honestly believed that his life was in danger or that he was in danger of suffering great bodily injury, and that, acting under such belief, he slew the deceased, Bradford Huston, yet if you further believe, from the evidence, beyond a reasonable doubt, that there was no reasonable grounds for such belief and no such apparent danger as would have led a reasonable man of ordinary judgment and courage under the same circumstances to apprehend such danger, then you should find the defendant guilty."

"13. In considering whether the killing was justifiable on the ground that the killing was in self-defense, the jury should consider all the circumstances attending the killing, the conduct of the parties at the time and immediately prior thereto, and the degree of force used by the prisoner in making what is claimed to be this self-defense, as bearing upon the question whether the shots, if fired, were actually fired in self-defense or whether they were fired in carrying out an unlawful purpose; and if the jury believe, from the evidence, that the force used was unreasonable in amount and character, and such as a reasonable mind would have so considered, under the circumstances, it is proper for the jury to consider that fact in determining whether the killing was in self-defense.

"14. The court instructs the jury that if a man kills another through mere cowardice, or under circumstances which are not, in the opinion of the jury, sufficient to induce a reasonable and well grounded belief of danger to life or of great bodily harm in the mind of an ordinarily courage-

ous man, the law will not justify the killing on the ground of self-defense."

The criticism made upon the eleventh and fourteenth instructions is, that they require the jury to believe that the plaintiff in error acted as a man of "ordinary judgment and courage" and as an "ordinarily courageous man" at the time ⁷³ he shot Huston before he could avail himself of the right of self-defense, although he "honestly believed that his life was in danger or that he was in danger of suffering great bodily injury, and that, acting under such belief, he slew the deceased, Bradford Huston"; and the further criticism is made upon instruction No. 14 that it characterizes the conduct of plaintiff in error in shooting Huston as an act of cowardice; and the criticism made upon instruction No. 13 is, that it characterizes the defense of the plaintiff in error as "what is claimed to be this self-defense."

Section 148 of the Criminal Code of this state declares that before a defendant can avail himself of the right of self-defense as a justification for the taking of human life, "it must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge." In some jurisdictions it is held that where a man acts upon appearances he does so at his peril, and that the circumstances must have been such as would induce a reasonably cautious man to believe that he was in imminent peril and that it was necessary for him to kill his assailant in order to save himself from death or great bodily harm; while in other jurisdictions it is held that the circumstances must be viewed from the standpoint of the defendant alone, and that he will be justified or excused in killing his assailant if they were sufficient to induce in him an honest and reasonable belief that he was in danger of losing his life or suffering great bodily harm: 21 Cyc. 817.

Campbell v. People, 16 Ill. 17, 61 Am. Dec. 49, is a leading case upon the right of self-defense in this state. Judge Caton, in that case, on page 19, said: "If the defendant was pursued or assaulted by the deceased in such a way as to induce in him a reasonable and well-grounded belief that he was actually in danger of losing his life or suffering great bodily harm, when acting under the influence of such

reasonable apprehension ⁷⁴ he was justified in defending himself, whether the danger was real or only apparent. . . . Men, when threatened with danger, are obliged to judge from appearances, and determine by the actual state of things, from the circumstances surrounding them, at least as much as if placed in other and less exciting positions; and it would be monstrous to say that if they act from real and honest conviction, induced by reasonable evidence, they shall be held responsible, criminally, for a mistake in the extent of the actual danger, where other reasonable and judicious men would have been alike mistaken."

In *Schnier v. People*, 23 Ill. 17, on page 28, Judge Walker said: "It is not to be expected nor can it be required of men menaced with apparent, imminent and unavoidable danger, that they will act with that deliberation and cool circumspection that men do under ordinary circumstances. They cannot be expected to resort to and fully test every means that may remotely promise safety, but at the same time they must be held to employ all means for their escape that to a reasonable understanding would seem to promise safety, before they can be justified in slaying their antagonist. But if the danger seems to be so imminent and pressing as to a reasonable mind would seem, under the circumstances, to afford no other mode of escape, then the slaying would be justified, although the danger was only apparent."

The doctrine above announced has been approved by this court in *Maher v. People*, 24 Ill. 241, where, on page 243, it was said: "If the danger was apparently so imminent and pressing that a reasonable and prudent man would suppose that it was necessary to take the life of his assailant to preserve his own or to avoid the infliction of a grievous bodily injury, then the killing would be justifiable"; also in *Adams v. People*, 47 Ill. 376, *Davis v. People*, 88 Ill. 350, *Steinmeyer v. People*, 95 Ill. 383, *Kinney v. People*, 108 Ill. 519, *Walker v. People*, 133 Ill. 110, 24 N. E. 124, and in many other cases. ⁷⁵ And in the late case of *Mackin v. People*, 214 Ill. 232, 73 N. E. 344, on page 235, the court said: "Since the decision in *Campbell v. People*, 16 Ill. 17, it has been held in this state that where a party is assailed in such a manner as to induce in him a reasonable and well-grounded belief that he is actually in danger of losing his life or suffering great bodily harm, he will,

when acting under such apprehension, be justified in defending himself, even to the extent of taking the life of his assailant, whether the danger is real or only apparent."

We think the law is well settled in this state that where a man is assailed and he takes his assailant's life, in order to make out a case of self-defense, all that is necessary for him to show, as was said in the Mackin case, is, that there was by the conduct of his assailant induced in him a reasonable and well-grounded belief that he was at the time of the killing in apparent danger of losing his life or suffering great bodily harm—that is, that he had in him, by the conduct of his assailant, in the language of the statute, incited the fears of a reasonable person—and that he is not required to show, in order to make out a case of self-defense, in the language of said instructions, or either of them, that he acted, under the circumstances, as would have acted a man of "ordinary judgment and courage," or as an "ordinarily courageous man" would have acted under the same circumstances. We find nothing in the statute of this state or in the decisions of this court that makes it necessary that a man should be a reasonably brave or courageous man before he can avail himself of the right of self-defense. The right of self-defense is vouchsafed by the law to the timid as well as to the courageous. All that a man who has taken his assailant's life is bound to show in order to excuse himself is, that he did what a reasonable person would have been justified in doing under the same circumstances.

The eleventh and fourteenth instructions, we think, therefore, in the particular pointed out, were erroneous, and placed upon the plaintiff in error a burden, before he could⁷⁶ be held to have acted in self-defense in taking Huston's life, greater than the law imposed upon him.

We think, also, instructions Nos. 11 and 14 are subject to the criticism that they might have led the jury to believe that although the plaintiff in error, by the conduct of Bradford Huston, had induced in him a well-grounded belief that he was in imminent danger of losing his life or suffering great bodily harm at the time he fired the fatal shot, in the opinion of the court that fear was inspired in the mind of a coward, and was not the fear of a reasonable person. The question whether the plaintiff in error fired the fatal shot while acting under the fears of a reasonable

person or those of a coward was not a question for the court but a question for the jury, and the court should have given to the jury no instructions which could have intimated to them that the plaintiff in error was a coward, and in consequence of such cowardice fired the fatal shot.

We are also of the opinion that instruction 13 was rendered bad by reason of the reference contained therein to the defense interposed by the plaintiff in error as "what is claimed to be this self-defense." The case was very close upon the facts, and for the court to refer to the defense interposed by the plaintiff in error as a "claimed" defense might have had the effect to induce the jury to believe that the court looked upon the defense interposed by the plaintiff in error as a defense without merit and one which should be disregarded by the jury.

It is also assigned as error that the court erred in giving to the jury the people's fifteenth instruction. That instruction informed the jury that they might take into consideration the demeanor and conduct of the defendant "during the trial" in passing upon the credit which should be given the plaintiff in error as a witness in his own behalf. An instruction in that form was held to be reversible error in *Purdy v. People*, 140 Ill. 46, 29 N. E. 700, and in *Vale v. People*, 161 Ill. 309, 43 N. E. 1091. In a case where the evidence of guilt was clear⁷⁷ and there was but little, if any, conflict in the evidence and the testimony of the defendant was not vital to his defense, an instruction in the form of the people's fifteenth instruction might not require a reversal of the judgment of conviction. In a case, however, where the evidence stands as the evidence does in this case, the jury, for the reasons given in the *Purdy* case (140 Ill. 46, 29 N. E. 700), ought not to be instructed that they have the right to take into consideration the demeanor and conduct of the defendant "during the trial," when passing upon the weight which should be given to his testimony as a witness. The giving of plaintiff's fifteenth instruction, under the evidence disclosed in this case, was reversible error.

There is one other question which arises upon this record which may arise on another trial, and we therefore deem it proper to consider and dispose of the same.

After the evidence was closed, the state's attorney, by permission of the court, entered a nolle prosequi as to the

fourth count of the indictment—that is, the count of the indictment charging manslaughter—and it was contended upon the motion in arrest of judgment that the disposition of the fourth count by the court was equivalent to a verdict of not guilty of the charge of manslaughter, and as the jury found the defendant guilty of manslaughter the court could not render a valid judgment of conviction upon the verdict, as the record showed the defendant had been previously acquitted upon the record of the crime of manslaughter. We do not agree with this contention for two reasons: First, under the authority of *Dalton v. People*, 224 Ill. 333, 79 N. E. 669, the question of former acquittal could not be raised by a motion in arrest of judgment. In that case the indictment contained four counts. The court, at the close of the evidence, instructed the jury to find the defendant not guilty upon the first and third counts of the indictment. No verdict was rendered at the time the instruction was given, but the direction was taken as a withdrawal of the first and third ⁷⁸ counts, and the trial proceeded. The defendant was convicted upon the second and fourth counts of the indictment, and it was contended, upon motion in arrest of judgment, that the instruction of the court to find the defendant not guilty upon the first and third counts of the indictment amounted to an acquittal of the defendant of the offense charged in the second and fourth counts of the indictment, and that the defendant having been once in jeopardy on that charge could not be again tried and convicted. The court, on page 338, said: “No question of that kind was raised until the motion in arrest of judgment, and while a former acquittal may be proved under the plea of not guilty (*Hankins v. People*, 106 Ill. 628), it would be a new practice to allow a defendant to await the verdict, and then, by a motion in arrest of judgment, say, in effect, that he was not bound to make answer to the indictment because he had previously been tried and acquitted of the same offense. Even if the defense could be made in that way, there was no acquittal of the charge contained in the second count. There was no verdict until the final one by which defendant was found guilty.” And secondly, the entry of the *nolle prosequi* as to the fourth count of the indictment was not equivalent to a verdict of not guilty of the crime of manslaughter upon the other counts of the indictment. By the verdict of the

jury the defendant was acquitted of the crime of murder. He may, however, upon the cause being redocketed in the circuit court, be again put upon trial upon the remaining counts of the indictment for the crime of manslaughter.

The judgment of the circuit court of Hancock county will be reversed for the errors hereinbefore pointed out and the cause will be remanded to that court for a new trial.

The Law of Self-defense is discussed in the notes to *State v. Gordon*, 109 Am. St. Rep. 804; *State v. Sumner*, 74 Am. St. Rep. 717.

PEOPLE v. McBRIDE.

[234 Ill. 146, 84 N. E. 865.]

CONSTITUTIONAL LAW—Presumption as to Validity of Statute.—The constitutionality of an act of the legislature is presumed, and all doubts and uncertainties arising either from the language of the constitution or the act must be resolved in favor of the validity of the act, and the court will only assume to declare it void in case of a clear conflict with the constitution. (p. 87.)

CONSTITUTIONAL LAW—Construction of Statutes.—It is the duty of a court, in construing a statute, to uphold its constitutionality and validity if this can reasonably be done, and if its construction is doubtful, the doubt must be resolved in favor of the law. (p. 87.)

CONSTITUTIONAL LAW.—Courts do not Entertain objections to the constitutionality of a statute unless the objection is made by one whose rights have been in some way affected. (p. 88.)

CONSTITUTIONAL LAW—Statutes.—Plurality of Title is not an objection to a statute which deals with but one subject, and if there is but one subject in the act and the title expresses more than one, the subject expressed in the title and not embraced in the act may be regarded as surplusage. (p. 88.)

CONSTITUTIONAL LAW—Statutes—More than One Subject. The constitutional requirement that no act shall embrace more than one "subject" does not mean one provision, and any number of provisions may be contained in an act, however diverse they may be, so long as they are not inconsistent with or foreign to the general subject, and may be considered in furtherance thereof. (p. 88.)

CONSTITUTIONAL LAW—Statutes—More than One Subject. A constitutional requirement that an act shall embrace but one subject is merely intended to prevent incorporating into an act matters not related to the subject of legislation, and of which the title gives no hint, and such prohibition is directed against the act itself, and not against its title. (p. 88.)

CONSTITUTIONAL LAW—Local Option Law—More than One Subject.—A statute which merely enables particular communities to determine by popular vote whether sales of liquor may be

licensed or not, and if certain territory is made anti-saloon territory, prescribing methods for restoring it to its former condition so that the question of license shall be left to municipal authorities, is not void as embracing more than one subject. (p. 89.)

CONSTITUTIONAL LAW—Title to Statutes.—If a statute embraces some matter not expressed in its title, it is unconstitutional and void only as to that part, unless the provisions are so connected together in subject matter, meaning, or purpose that it cannot be presumed that the legislature would have passed, or the people have voted for, the one without the other. (p. 89.)

CONSTITUTIONAL LAW—Title to Statutes.—If the title of an act fairly indicates the general subject, and reasonably covers all the provisions of the act, and is not calculated to mislead the legislature or the people, it is a sufficient compliance with the constitutional requirement that the subject of the act must be stated in its title. (p. 90.)

CONSTITUTIONAL LAW.—Titles of Statutes need be neither an abstract, a synopsis, nor an index of their contents. (p. 90.)

CONSTITUTIONAL LAW—Titles to Statutes.—In determining whether a provision is embraced within the title of an act, a liberal construction is to be given to the constitution, and, unless the act contains matter having no proper connection or relation to the title, it is valid, and the constitution is obeyed if all the provisions relate to one subject indicated in the title, and are parts of, or incident to, or reasonably connected with it. (pp. 89, 90.)

CONSTITUTIONAL LAW—Title to Statute.—In determining whether the subject matter of a statute is sufficiently stated in its title, it makes no difference whether the statute is to become operative with or without a vote of the people. (p. 90.)

CONSTITUTIONAL LAW—Local Option Laws—Elections.—A local option law providing for an election and making a person who forges a signature to a petition guilty of forgery, and one who swears falsely in verifying such petition guilty of perjury, is not void as creating new crimes. (p. 90.)

CONSTITUTIONAL LAW—Local Option Laws.—A local option law specifying what shall be included in the term "intoxicating liquors," and providing that it shall not be necessary to a prosecution under the act to state the kind of liquor sold, nor the name of any person to whom it is sold, is not unconstitutional, but any prosecution under the act must be for selling intoxicating liquor, and it is necessary to allege such a sale. (p. 91.)

CONSTITUTIONAL LAW—Rules of Evidence.—The legislature may prescribe that a fact shall be prima facie evidence of a certain other fact, if it has a tendency to prove such other fact. The fact upon which the presumption is to rest must have some fair relation to, or some natural connection with, the fact to be proved, and the existence of the established fact must reasonably tend to raise an inference of the main fact. (p. 92.)

INTOXICATING LIQUOR—Evidence.—The issue of an internal revenue special stamp or receipt for the sale of liquor to a person engaged in business, and the posting thereof in his place of business, tend to prove that such person is engaged in the sale of liquor at that place, but this merely establishes a presumption, and does not change the fundamental rule as to the burden of proof and quantum of evidence necessary to a conviction in a criminal case. (p. 92.)

LOCAL OPTION LAWS—Elections—Notice.—The question of the validity of a provision of a local option law providing that a failure to give notice of the election as specified in the act shall not affect the validity of the vote, can only arise in case no notice of the election is given. (p. 92.)

LOCAL OPTION LAWS—Suspension of Operation of License Ordinances.—A provision in a local option statute that during the time any territory is anti-saloon territory the operation of ordinances relating to sales of liquor and dramshop licenses therein shall be suspended, so far as inconsistent with the statute, does not render the statute void. (p. 93.)

CONSTITUTIONAL LAW—Local Option Laws—Refunding Unearned Licenses.—A provision in a local option law requiring a municipality to refund the unearned portion of license fees received by it in certain cases is not unconstitutional as having the effect of compelling the municipality to incur a debt against its will. (p. 93.)

MUNICIPAL CORPORATIONS are Creatures of the legislature, and their powers and privileges may be changed, modified, or taken away at any time by a general law. (p. 93.)

LOCAL OPTION LAW—Title—Definitions.—The fact that a local option law defines certain words and phrases used in it and explains their meaning as they are employed therein does not leave it open to the constitutional objection that it gives new and unusual definitions to such words, and gives no hint or suggestion of that fact in the title. (p. 94.)

LOCAL OPTION LAWS—Definition of Intoxicating Liquor.—A local option law is not invalid on the ground that in defining the term "intoxicating liquors" it does not state how much water may be mingled with such liquors and still leave them intoxicating liquors. (p. 94.)

LOCAL OPTION LAWS—Sales of Liquor by Druggists.—The fact that a local option law exempts from its provisions the sale of liquor by druggists for certain purposes, under certain prescribed conditions, is not open to the constitutional objection that it provides for regulating the sale of intoxicating liquor by druggists, and that the title does not mention such regulation. (p. 94.)

LOCAL OPTION LAWS—Refunding Unearned License Fees. A provision in a local option law requiring the refunding of unearned license fees for selling liquor by a municipality in certain cases does not render the law void, as giving voters outside the city the right to determine the use of money within the city. Such voters merely determine whether territory shall be anti-saloon territory, and do not make the law or determine whether the license fee shall be refunded or not. (p. 95.)

LOCAL OPTION LAWS—Title of Act—Popular Vote.—The title of a local option law stating that it is an act for the creation of anti-saloon territory by popular vote, is not misleading, though the body of the law provides that a majority of the legal voters balloting upon the proposition shall govern, as such an election is by popular vote. (p. 95.)

LOCAL OPTION LAWS—Amendment by Reference to Title Only.—A local option law, the only effect of which is to withdraw certain specified territory from the operation of existing laws by which the sale of liquor is licensed, regulated, or prohibited, and which adopts the provisions of the general election laws, and adds

to existing laws certain conditions under which druggists may sell liquor in anti-saloon territory, and not purporting to amend or revive any law, is not void as an attempt to revive or amend a law by reference to the title only. (p. 96.)

LOCAL OPTION LAWS—Interstate Commerce.—A local option law providing for the creation of anti-saloon territory, and prohibiting the taking of orders or the making of agreements in anti-saloon territory for the sale or delivery of intoxicating liquor, does not violate the interstate commerce clause of the national constitution. (p. 96.)

LOCAL OPTION LAWS—When General Laws.—The legislature may enact a local option law which will become operative by a vote of the people of the district to be affected, provided the law contains an entire and perfect declaration of the legislative will. The law must be complete when it leaves the legislature, and require nothing to perfect it except the decision that it shall be operative in a certain district. (p. 97.)

CONSTITUTIONAL LAW—Equal Protection of Law—Local Option Laws.—The offense of selling liquor in violation of a local option law providing for the creation of anti-saloon territory within which the sale of intoxicating liquor shall be prohibited is not identical with the offense created by another statute prohibiting the sale of such liquor in less quantity than one gallon, or in any quantity to be drunk in the premises, and therefore the local option law may impose a different penalty for its violation without denying to one the equal protection of the law, and the fact that one charged with violating the law may take a change of venue to a county where it is not in force does not affect its validity, as such change would not affect the degree of punishment. (p. 98.)

INTOXICATING LIQUORS—Licenses.—Police Power.—A license to sell liquor is not a contract, and creates no vested rights, but is a mere temporary permit to do what would otherwise be an offense against the law, and a statute may end the license, though paid for, and deprive the holder thereof of the right to continue the use of his bar fixtures for the sale of liquor, though he cannot put them to any other use. (p. 98.)

H. C. Homer, J. M. Graham, R. M. Potts and A. Adams, for the plaintiff in error.

W. H. Stead, attorney general, J. B. Simpson, state's attorney, E. A. Scrogin, Church & McMurdy and J. C. Fitch, for the defendant in error.

¹⁶³ **CARTWRIGHT, J.** John W. McBride, plaintiff in error, obtained a license from the village of Coulterville, in Randolph county, to keep a dramshop and sell intoxicating liquors therein from April 30, 1907, to May 1, 1908. An election was held in Coulterville precinct, which included the village of Coulterville, on November 5, 1907, under the provisions of an act entitled "An act to provide for the creation by popular vote of anti-saloon territory within which the sale of intoxicating liquor and the licensing of

such sale shall be prohibited and for ¹⁶⁴ the abolition by like means of territory so created," in force July 1, 1907: Laws 1907, p. 297. The vote was in favor of making the precinct anti-saloon territory, and the result of the election was duly declared. On December 7, 1907, the state's attorney filed in the county court an information containing two counts, charging plaintiff in error with selling intoxicating liquor within said precinct. Plaintiff in error demurred to the information and moved to quash it on the ground that said act was in conflict with the constitution, and therefore null and void, and in the motion twenty-five specifications were made. The court denied the motion, and the defendant having waived a jury, there was a trial by the court. It was proved that the plaintiff in error, on December 6, 1907, opened his dramshop and sold a glass of whisky, which was drank there by the purchaser. Plaintiff in error offered in evidence an ordinance of the village of Coulterville providing for the issuing of licenses to keep dramshops, and his license issued under the ordinance, and also an internal revenue receipt, called a United States stamp for special tax. He testified that at the time the glass of whisky was sold the unearned portion of his license fee had not been repaid or tendered to him by the board of trustees of the village; that the village of Coulterville contains about two hundred acres and is included in the precinct of Coulterville, which embraces two and one-half townships. He was found guilty by the court and fined fifty dollars. The validity of said act was the matter in dispute, and a writ of error was sued out from this court to bring the record here for review.

The sole question to be determined is whether the act under which plaintiff in error was prosecuted is in conflict with provisions of the constitution, and is thereby rendered null and void. The assignment of errors upon the record includes twenty-five grounds upon which it is alleged that the act violates the constitution, and the argument in support of the assignment of errors contains eleven main subdivisions, ¹⁶⁵ under which there are very numerous sub-headings or specifications, covering all the gradations from important to insignificant and from serious and substantial to shadowy and tenuous. If it should appear that some of them scarcely deserve a place in an opinion of this court, the fact that they are mentioned and discussed results from

an effort to cover, in some form, every question that is raised by the learned counsel for plaintiff in error.

The rule of law is, that an investigation like this, concerning the constitutionality of an act of the legislature, begins with the presumption that the act is valid. All doubts or uncertainties arising either from the language of the constitution or the act must be resolved in favor of the validity of the act, and the court will only assume to declare it void in case of a clear conflict with the constitution. The duty of the court is to so construe acts of the legislature as to uphold their constitutionality and validity if it can reasonably be done, and if their construction is doubtful, the doubt will be resolved in favor of the law: *People v. Thompson*, 155 Ill. 451, 40 N. E. 307; *People v. Hutchinson*, 172 Ill. 486, 50 N. E. 599, 40 L. R. A. 770; *City of Chicago v. Manhattan Cement Works*, 178 Ill. 372, 69 Am. St. Rep. 321, 53 N. E. 68, 45 L. R. A. 848; *Arms v. Ayer*, 192 Ill. 601, 85 Am. St. Rep. 357, 61 N. E. 851, 58 L. R. A. 277.

Most of the objections to this act relate to matters which did not arise upon the trial of plaintiff in error and concern alleged rights of which he was not deprived in any manner. Among those questions are the propositions that the act creates new criminal offenses of forgery and perjury; that it changes the quantum of evidence necessary to convict, by making a United States special tax stamp *prima facie* evidence; that it regulates sales by druggists; that it conflicts with the commerce clause of the federal constitution, and that it creates debts of municipalities without their consent. Plaintiff in error was not prosecuted for perjury or forgery; the tax stamp or receipt was not offered in evidence against him; he did not sell as a druggist and was not engaged in interstate commerce. Counsel dispute the validity of various ¹⁶⁶ other provisions by which plaintiff in error was not injuriously affected unless such provisions are void, and their invalidity renders the whole act void. Courts do not entertain objections to the constitutionality of an act unless the objection is made by one whose rights have been in some way affected, and the plaintiff in error is only entitled to a consideration of most of the questions raised by his counsel so far as they may affect the validity of the act as a whole.

Following the course of the argument of counsel for the plaintiff in error, the first proposition met with is, that the

act and the title embrace more than one subject, in violation of the provision of section 13 of article 4 of the constitution that "no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." Counsel say that bringing anti-saloon territory into existence and wiping it out of existence are ideas as wide apart as the poles, and that the title covers these opposite ideas. The objection would properly be made to the body of the act, and not to the title. Plurality of title is not an objection to an act which deals with but one subject. If there is but one subject in the act and the title expresses more than one, the subject expressed in the title and not embraced in the act would be regarded as surplusage. If the subject is not expressed in the title or if the act embraces more than one subject the act will be void, and in this act the creation and abolition of anti-saloon territory is expressed in the title and covered by the body. In deciding the question whether the act embraces more than one subject we are to be governed by certain well established rules. The only purpose of the provision of the constitution is to prevent the joining in one act of incongruous and unrelated matters, and the word "subject" is not synonymous with "provision." Any number of provisions may be contained in an act, however ¹⁶⁷ diverse they may be, so long as they are not inconsistent with or foreign to the general subject and may be considered in furtherance of such subject. The requirement that an act shall embrace but one subject is not intended to hamper the legislature or embarrass honest legislation, but it is intended to prevent incorporating in an act matters not related to the subject of legislation and of which the title gives no hint. An act may contain many provisions and details for the accomplishment of the legislative purpose, and if they legitimately tend to effectuate that object the act is not contrary to the constitutional provision: *Town of Manchester v. People*, 178 Ill. 285, 52 N. E. 964; *Meul v. People*, 198 Ill. 258, 64 N. E. 1106. The constitutional prohibition against more than one subject not being directed against the title but against the act itself, the question now being considered is to be determined by the body of the act, and there is in the act but one general

subject. That subject is the determination by the legal voters of a certain district whether the sale of intoxicating liquors shall be prohibited therein. The act merely enables particular communities to determine by popular vote whether sales of liquor may be licensed or not, and if certain territory is made anti-saloon territory, the act also prescribes methods for restoring it to its former condition, so that the question of license shall be left to municipal authorities.

It is next claimed that the provision in question is violated by the creation of two new criminal offenses of which the title gives no hint, and which, aside from the act, would not be crimes. Section 4 of the act provides for filing a petition, with a verified statement that the signatures are genuine and covering other matters relating to the petitioners, and it provides that whoever, in making the sworn statement, shall knowingly, willfully and corruptly swear falsely shall be deemed guilty of perjury, and whoever forges the signature of any person upon any petition or statement provided for in the act shall be deemed guilty of ¹⁶⁸ forgery. These are two of the objections which do not concern the plaintiff in error unless their invalidity would affect the whole act, and the rule is, that if an act embraces some matter not expressed in the title, it is unconstitutional and void only as to that part, unless the provisions are so connected together in subject matter, meaning or purpose that it cannot be presumed that the legislature would have passed or the people have voted for the one without the other. The constitutional provision is, that if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed. If the title of an act fairly indicates the general subject, and reasonably covers all the provisions of the act, and is not calculated to mislead the legislature or the people, it is a sufficient compliance with the constitutional requirement. The generality or comprehensiveness of the title is no objection, provided the title is not misleading or deceptive and fairly directs the mind to the subject legislated upon. It is not required that the title should be either an abstract, a synopsis or an index of the contents of the act. If such were the case the title would have to be as comprehensive as the act itself, and that is not the object of the constitution. In determining whether a provision is

embraced within the title of an act a liberal construction is to be given to the constitution, and unless the act contains matters having no proper connection or relation to the title it will not be void as to such matters. The constitution is obeyed if all the provisions relate to one subject indicated in the title, and are parts of it or incident to it or reasonably connected with it: *Burke v. Monroe County*, 77 Ill. 610; *People v. Nelson*, 133 Ill. 565, 27 N. E. 217; *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454, 29 L. R. A. 79; *Hudnall v. Ham*, 172 Ill. 76, 49 N. E. 985. It is contended that there is some difference in the rule between an act which is submitted to popular vote and one which becomes operative without such a vote, but we can see no reason or foundation for such a distinction. Presumably the same motive ¹⁶⁹ which influenced the legislator in voting for the act would influence the elector in voting for it, and a title which would direct the mind of a legislator to the general subject of an act would also fairly direct the mind of the voter to the same subject. The rules stated lead to the conclusion that the act is not void nor the title defective by reason of the provisions respecting perjury and forgery. The sworn statement provided by the act is a part of the machinery for carrying into effect the object of the act, and the petition is declared to be a public document. It is a matter where the law requires an oath, but, whether a false oath would be perjury without this act or not, the provision is only a proper and legitimate safeguard of the election. In election laws generally it is usual, and has never been regarded as illegal, to prescribe regulations and safeguards of the election and to inflict severe punishments for false oaths, changing ballots, practicing fraud upon electors, or doing other things destructive of the object of the act. It is urged that to declare the forgery a criminal offense is to introduce a new crime, for the reason that the act does not include the intent to defraud or deceive. The answer is, that the term itself embraces a fraudulent intent. It includes the making of a false written instrument for the purpose of fraud and deceit. But if the act does create a new offense the provision is within the general purpose of the act. The legislature and the people who adopt the act would naturally expect to find in the body of an act providing for an election the punishment of offenses such as are customarily included in election laws.

Counsel rely upon the decision in the case of *Milne v. People*, 224 Ill. 125, 79 N. E. 631, as sustaining their position, but they misapprehend the nature of that decision. The title of the act then considered included only the punishment of crimes against children, and therefore indicated nothing except the punishment of existing crimes if committed against children, but in the body of the act the legislature attempted to create ¹⁷⁰ a new and hitherto unknown felony of which the title gave no hint.

The next specification is, that this act changes the well-established fundamental rule as to the burden of proof and quantum of evidence necessary to a conviction in a criminal case. The act provides that it shall not be necessary to state the kind of liquor sold nor the name of any person to whom it was sold, and counsel say that it does not require a statement that the liquor was intoxicating. In that conclusion they are clearly wrong. Any prosecution under the act would be for selling intoxicating liquor, and it would be necessary to allege such a sale. Under the same head, objection is made to the provision that the issuance of an internal revenue special stamp or receipt by the United States shall be prima facie evidence of the sale of intoxicating liquor by the person to whom it is issued at his place of business where the stamp or receipt is posted. The act provides that intoxicating liquor shall include all distilled, spirituous, vinous, fermented and malt liquors, and it permits a charge of selling intoxicating liquor without specifying the kind. The plaintiff in error was charged in the declaration with selling intoxicating liquor, and it was proved that he sold whisky, so that his rights were not affected in any way by the provision and the stamp or receipt was not offered in evidence against him. He offered it in evidence himself. He raised no question at the trial concerning the information on the ground that it did not specify the kind of liquor sold. In another part of the argument, where his counsel recur to the same provision and object to it as in contravention of section 9 of article 2 of the constitution, as not informing the accused of the nature of the charge against him, they concede that if the provision is invalid it would not be fatal to the whole act. The provision is substantially the same as the one contained in section 14 of the dramshop act, which has stood the test for a great many years. The provision was sustained in

Cannady v. ¹⁷¹ People, 17 Ill. 158, Myers v. People, 67 Ill. 503, and other cases. The provision respecting the stamp or receipt has no tendency to overturn the doctrine of reasonable doubt in criminal cases. The term "prima facie evidence" implies evidence which may be rebutted and overcome, and the provision in question merely establishes a rule of evidence. The legislature may prescribe that a fact shall be prima facie evidence of a certain other fact if it has a tendency to prove such other fact. The fact upon which the presumption is to rest must have some fair relation to, or some natural connection with, the fact to be proved, and the existence of the established fact must reasonably tend to raise an inference of the main fact. The accused must also have a fair chance to make his defense and to submit the case to a jury upon all the evidence, which must establish his guilt beyond a reasonable doubt: Meadowcroft v. People, 163 Ill. 56, 56 Am. St. Rep. 447, 45 N. E. 303, 35 L. R. A. 176. The issuance of an internal revenue special stamp or receipt to a person engaged in business and the posting of the same in his place of business tend to prove that such person is engaged in the sale of intoxicating liquor at that place. Prima facie it is issued to enable the holder to engage in the business of selling intoxicating liquor, and when he does engage in business and posts it in his place of business it is a fair inference that liquor is sold at that place. If a particular sale to a particular person should be charged, the stamp or receipt would not have any tendency to prove that the particular sale was made, but if a sale were proved the document would tend to establish the nature of the thing sold. That question, however, does not concern the plaintiff in error, and, in any event, it would not affect the act as a whole.

It is next urged that the act provides for an election without any notice. It may be conceded that notice is essential to a valid election, but no such question is involved in this case. The act provides for notice, and, after specifying the notice to be given, provides that the failure to give ¹⁷² notice shall not affect the validity of the vote. The question whether that provision is valid could only arise upon a failure to give the prescribed notice, and whether such failure would invalidate an election might depend upon the facts of the particular case, such as whether there was a mere irregularity in giving notice, whether the voters

all knew of the proposition, and whether the result was affected in any way. That question does not arise on this record, and could not affect the whole act.

The next specification is, that the act provides for suspending ordinances for indefinite periods of time and again restoring them without the intervention of any legislative body. The act provides that during the time any territory is anti-saloon territory the operation of ordinances relating to sales of liquor and dramshop licenses therein shall be suspended, so far as inconsistent with the act. Counsel do not point out any constitutional provision which is violated, but say that the act in that respect is neither good law nor good sense nor in conformity with republican institutions or principles of self-government. That reflection seems to question the wisdom of the legislature or the policy of the law, with which we are not concerned.

Next it is said that the act changes the charters of municipalities, overturns and abolishes local self-government, and authorizes the voters outside of municipal limits to dictate the policies of municipalities and to dispose of and control their funds. Municipal corporations are creatures of the legislature, and their powers and privileges may be changed, modified or taken away at any time by general law. The position assumed by counsel is, that the provision is void for want of power in the legislature to enact it and also because it is not contained in the title of the act. It is directly within the general subject of the title, and the only respect in which it is claimed to be in violation of the constitution is, that it requires a municipality to refund the unearned portion of a license fee received by it. The provision ¹⁷³ for the return of the unearned portion of the license fee is equitable, but if void it would not affect the rest of the act. It is true that the legislature cannot compel a municipality to incur a debt (*Morgan v. Schusselle*, 228 Ill. 106, 81 N. E. 814), but we do not regard this provision as doing that. It simply provides that money in the treasury of the city for which the person who deposited it received no benefit shall be refunded. The constitutional limitation of municipal indebtedness has no application to a case where the municipality has received money for licenses which it ought to refund. If it had such application and the obligation to refund should be regarded as a debt, a city indebted to the limit could not voluntarily return

license fees which had been paid in for a license which the party could not use, and no one would attempt to uphold such a doctrine.

The next specification is, that the act gives new and unusual definitions to words and phrases, and gives no hint or suggestion of that fact in the title. The act defines certain words and terms used in it and explains their meaning as they are employed in this particular act. No provision of the constitution is pointed out which forbids such definitions, and they simply conduce to brevity and avoiding repetitions. Counsel are dissatisfied with the definition given to intoxicating liquors as including all distilled, spirituous, vinous, fermented and malt liquors, because the definition does not inform them how much water might be mingled with such liquors and still leave them intoxicating liquors. The provision is of the same nature as the one in the dram-shop act, which says that intoxicating liquors shall be deemed to include spirituous, vinous or malt liquors, and we are not advised that any difficulty has arisen in the many years during which that act has been in force in ascertaining its meaning. An argument that a definition should specify how much water, seltzer or other liquid not intoxicating could be put into a mixed drink and keep it within the definition, or how much whisky would be required to constitute a ¹⁷⁴ sale of intoxicating liquor, would be entitled to as much consideration as the point made by counsel. They do not offer any good reason why the act should be held invalid on account of their alleged criticism.

The next specification is, that the act provides for regulating the sale of intoxicating liquor by druggists and that the title does not say anything about such regulation. The act provides for creating and abolishing territory in which the sale and licensing of sales shall be prohibited, and it exempts from such prohibition sales of liquor by druggists for certain purposes under certain prescribed conditions. Such sales as are specified do not partake of the nature of the saloon business, and it has always been regarded as proper to exempt such sales either from the requirement of a dram-shop license or from prohibitory laws.

Counsel next say that the act gives persons residing outside of the city or village the right to determine the use of money in such city, and in this they again refer to the refunding of license fees. The voters of a community simply

determine that territory shall or shall not be anti-saloon territory and do not make the law. The legislature have made the law that the license fee shall be refunded in anti-saloon territory. The voters do not determine whether the license fee shall be refunded or not, and the point which is made that the subject of refunding is not expressed in the title does not require further attention.

A general assault is made on the title on the ground that it is misleading, incongruous and deceptive. One reason given is, that it apparently provides for abolishing anti-saloon territory by the same means by which the territory was created, while, in fact, in some cases, on account of changes in precincts or districts, the voters can never again vote on the question. We regard this as a misapprehension of the provisions for accomplishing the purpose expressed in the last clause of the title. We do not think of any case where it would be impossible, on account of change of ¹⁷⁵ boundaries, to submit the question again to voters of a particular territory by the use of the separate ballot provided for in section 9. Another reason given for charging that the title is misleading and deceptive is, that it uses the words "popular vote" while the act provides that a majority of the legal voters voting upon the proposition shall govern. Counsel concede that a law is not invalid because a majority of those voting on a proposition decide the question, and it seems to us an extraordinary proposition that an election at which every elector is entitled to vote should not be regarded as an election by popular vote. It is further argued that the form of the ballot is misleading and deceptive, and that the legislature have been guilty of a studied, inexcusable and altogether diabolical effort to defeat and circumvent the will of the voters by adopting a form of ballot which means the opposite of what the voter would naturally understand. As we understand them, they contend that the average voter will consider that he is voting for or against saloons and that "no" means anti-saloon, while under the form of ballot adopted a vote of "yes" means a vote against saloons. We do not see why that should be so. If the voters desire the district to be anti-saloon territory, there seems to be no good reason why they should not understand that "yes" is a vote in favor of that proposition. It is not to be presumed that voters will not know what they are voting about, and the case is not at all like

Harvey v. Cook County, 221 Ill. 76, 77 N. E. 424, where the ballot was so ambiguous as clearly to mislead voters.

Next it is said that the act violates the provision of section 13 of article 4 of the constitution, that laws shall not be revived or amended by reference to the title only. The act does not purport to amend or revive any law. Its only effect is to withdraw certain specified territory from the operation of existing laws by which the sale of liquor is licensed, regulated or prohibited, and as no law has been repealed none will be revived by virtue of the act. The act ¹⁷⁶ adopts the law as to other elections but prescribes some special regulations for elections under this act. There is no objection to the adoption in an act of the provisions of other laws which are not amended or changed thereby. The act also adds certain conditions to existing laws, under which druggists may make sales in anti-saloon territory for medicinal, mechanical, sacramental and chemical purposes, not to be drank upon the premises, but it makes no change in existing laws in other places. Druggists are exempt from the operation of the act so long as they comply with its terms, but no other law is amended or purports to be amended by the act. It does not amend the ballot law by the provision that the proposition shall be printed on the ballot below the list of candidates, which applies only to elections under this act.

Another point made by counsel is, that the act violates the interstate commerce clause of the federal constitution, and although that question is not involved in this case and any invalidity of the provision would not affect the act, the position of counsel is not tenable. In the section designed to prevent evasion of the act it is provided that the taking of orders or the making of agreements in anti-saloon territory for the sale or delivery of intoxicating liquors shall be held to be an unlawful selling. We are required to interpret the act in such a way as to uphold it rather than in a way which would invalidate it (People v. Hinrichsen, 161 Ill. 223, 43 N. E. 973) and it is always presumed that the legislature did not intend to exceed, and have not, in fact, exceeded, their jurisdiction: Endlich on Interpretation of Statutes, sec. 171; Stanton v. City of Chicago, 154 Ill. 23, 39 N. E. 987. It is not necessary every time a law is passed that the legislature should specifically state that there is no intent to interfere with interstate commerce or some other subject

of which they have no jurisdiction. The act does not purport to control in any manner the importation of liquor from other states.

¹⁷⁷ It is argued at some length that the act is in violation of the constitution because it is not a general law but a local one. The constitution prohibits special laws in certain enumerated cases and also in all other cases where a general law can be made applicable, but the question whether a general law can be made applicable in any case other than those enumerated is for the legislature and not for the courts: *Owners of Lands v. People*, 113 Ill. 296. Unless some other provision of the constitution is violated, the decision of the legislature whether a general law can be made applicable in any given case is conclusive. It is not contended that this act is local or special in the ordinary sense, but the reason alleged is, that it is only to be put in operation in particular localities as a result of submitting it to a vote of the people. While counsel say that the act is a local and special one, the real point made is that legislative functions have been delegated to the people. It is the law that legislative functions must be exercised by the legislature alone and cannot be delegated to any other person or body of persons, but the decisions in this state have settled beyond question that the legislature may enact laws which will become operative by a vote of the people of the district to be affected, provided the law contains an entire and perfect declaration of the legislative will. From the very beginning it has been held that the legislature have power to pass a law the operation of which depends upon the happening of a contingency or future event, and that such contingency may be an affirmative vote of the people to be affected by it: *People v. Reynolds*, 5 Gilm. 1; *People v. Solomon*, 51 Ill. 37; *Home Ins. Co. v. Swigert*, 104 Ill. 653; *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 8 N. E. 788; *Rouse v. Thompson*, 228 Ill. 522, 81 N. E. 1109. The law must be complete when it leaves the legislature, and require nothing to perfect it except the decision that it shall be operative within a certain district. This act does not purport to deal with the liquor traffic except in anti-saloon territory, and as to that subject it is perfect and complete¹⁷⁸ and not in violation of any constitutional provision: *People v. Knopf*, 183 Ill. 410, 56 N. E. 155.

The next specification is, that the act is invalid because it varies the punishment for selling liquor in different localities. Under the dramshop act the punishment is the same for first and subsequent offenses, while subsequent offenses are punished more severely under this one. The offenses are not identical. The offense in the dramshop act is selling in less quantity than one gallon or in any quantity to be drank upon the premises, while the offense punishable under this act consists in selling, bartering or exchanging any intoxicating liquor in any quantity. The act does not deny to a person the equal protection of the laws guaranteed by the fourteenth amendment to the federal constitution: *Ohio v. Dollison*, 194 U. S. 445, 24 Sup. Ct. Rep. 703, 48 L. ed. 1062. The view of counsel that if one accused of selling liquor in anti-saloon territory should take a change of venue to another township he would escape the larger penalty is a mistake. The change of venue would have no effect whatever on the degree of punishment.

It is next argued that the act deprives dramshop-keepers of their property without due process of law. Licenses to sell liquor are not contracts and create no vested rights. They are merely temporary permits to do what would otherwise be an offense against the law, and the license of plaintiff in error stated on its face that it was subject to all the laws of the state and ordinances of the village which then were or might thereafter be in force. Counsel admit that the license is not property—that the law may be changed and the license ended although paid for—and that in such a case a dramshop-keeper has no vested rights to continue the business by virtue of his license, but they contend that he has vested rights in the property which cannot be used for anything else. To say that a dramshop-keeper has a right to continue the use of his bar fixtures for the sale of liquor because he can put them to no other use would authorize ¹⁷⁹ him to continue the business, and be equivalent to holding that the law could not be changed so as to deprive him of his license or the right to continue the business, and that clearly is not the law. When plaintiff in error provided bar fixtures to carry on the business of selling liquor under a license, subject to all laws then in force or which might thereafter be enacted, he took the risk that the business might be made unlawful.

We have considered every argument or proposition propounded by counsel for plaintiff in error and have not found anything which renders the act void or the conviction of plaintiff in error erroneous. If any provision, such as the one making a stamp or receipt prima facie evidence or the one which purports to validate an election without notice, should be applied in some other case in such a way as to deprive any party of his legal rights he will not be without remedy. Plaintiff in error has not been injuriously affected by any such provision, and he has not been deprived of any constitutional or legal right.

The judgment of the county court is affirmed.

The Constitutionality of Local Option Laws is discussed in the note to Chicago etc. R. R. Co. v. Greer, 114 Am. St. Rep. 324.

The Legislature has Plenary Power to Regulate or Prohibit the Sale of Liquor: Hart v. State, 87 Miss. 171, 112 Am. St. Rep. 437, and cases cited in the cross-reference note thereto. No person has any vested right to retail intoxicating liquor: New Orleans v. Smyth, 116 La. 685, 114 Am. St. Rep. 566. And a license to sell may be revoked without notice: Wallace v. Reno, 27 Nev. 71, 103 Am. St. Rep. 747.

The Right of the Legislature to Regulate or Prohibit the Sale of Liquor, and to declare certain liquors intoxicating within the meaning of the law, irrespective of the intoxicating character of the liquors as a matter of fact, is a legal exercise of the police power: State v. Frederickson, 101 Me. 37, 115 Am. St. Rep. 295.

The Sufficiency of the Title of Statutes, within the requirements of the constitution, is discussed in the notes to Crookston v. County Commrs., 79 Am. St. Rep. 456; Bobel v. People, 64 Am. St. Rep. 456; Lewis v. Dunne, 86 Am. St. Rep. 267.

CITY OF CHICAGO v. BOWMAN DAIRY COMPANY.

[234 Ill. 294, 84 N. E. 913.]

MUNICIPAL CORPORATIONS — Milk Ordinance — Police Power.—A municipal ordinance requiring that every glass bottle or jar in which milk is sold shall have its capacity legibly and permanently indicated thereon, and fixing a penalty for using such receptacles of less capacity than they purport to contain, is a valid exercise of the police power to prevent fraud in the sale of milk. (p. 103.)

MUNICIPAL CORPORATIONS — Milk Ordinance—Special Legislation.—If an ordinance requires every glass bottle or jar in which milk is sold to have its capacity permanently indicated thereon and applies generally to all who sell milk in such receptacles it is not void as special legislation, although it does not apply to all who sell substances in liquid form, or to all who sell milk or cream within the city. (p. 103.)

MUNICIPAL CORPORATIONS—Milk Ordinance—Deprivation of Property.—Although a municipal ordinance regulating the sale of milk in glass jars or bottles deprives a person of the use of such jars or bottles as he has on hand at the time when such ordinance goes into effect, this does not render it void if its enactment is within a proper exercise of the police power. (p. 104.)

CONSTITUTIONAL LAW—Police Power.—Under a proper exercise of the police power property may be destroyed without compensation to the owner. (p. 104.)

MUNICIPAL CORPORATIONS—Milk Ordinance.—Although a seller of milk does not know that the bottles in use in his business hold less than the markings on the outside thereof show, this is no defense to a prosecution for the violation of a municipal ordinance fixing a penalty for using such bottles. (pp. 104, 105.)

The ordinance in question provides:

“(1) No person or corporation shall, after October 17, 1907, sell or offer for sale within the city of Chicago any milk or cream in bottles or in glass jars unless each of said bottles or glass jars in which said milk or cream is sold or offered for sale shall have blown into it, or otherwise indelibly and permanently indicated thereon, in a legible and conspicuous manner, the capacity thereof; (2) the inspector of weights and measures of the city of Chicago shall have the right, at any time, to examine any bottle or glass jar in which milk or cream is sold or offered for sale in the city of Chicago, or which is used by any person or corporation for the purpose of containing milk or cream to be sold or offered for sale, in order to ascertain whether such bottle or jar is of a capacity less than that which it purports to be; (3) and if any such bottle or jar is of a less capacity than that which it purports to be, or if any such bottle or jar shall not

have blown into it or otherwise indelibly and permanently indicated thereon, in a legible and conspicuous manner, its capacity, as aforesaid, the person or corporation selling or offering for sale milk or cream in any such bottle or jar, or having in his or its possession any such bottle or jar to be used, or which has been used, for the purpose of containing milk or cream to be sold or offered for sale in said city of Chicago, shall be fined not less than \$5 nor more than \$100 for each offense; (4) each and every bottle or glass jar found in the possession of any person or corporation used or to be used, or which has been used, by such person or corporation for the purpose of containing milk or cream to be sold or offered for sale in the city of Chicago, which shall be found to be of a less capacity than that blown into the same or otherwise so indelibly and permanently indicated thereon, or which shall not have blown into it or otherwise indelibly and permanently indicated thereon, in a legible and conspicuous manner, the capacity, as aforesaid, shall constitute a separate and distinct offense on the part of such person or corporation."

Ritsher, Montgomery, Hart & Abbott, for the plaintiff in error.

G. H. White and H. M. Seligman, for the defendant in error.

²⁹⁷ HAND, C. J. It is contended by the defendant that the ordinance for a violation of which it was convicted is unconstitutional in this: that it deprives it of its property without due process of law and is special legislation.

We think the ordinance can be sustained as an exercise of the police power of the city of Chicago. The police power is said to be an attribute of sovereignty and to exist ²⁹⁸ without any reservation in the constitution, and to be founded upon the duty of the state to protect its citizens and to provide for the safety and good order of society: 22 Am. & Eng. Ency. of Law, 2d ed., 918. In Hawthorn v. People, 109 Ill. 302, 50 Am. Rep. 610, it was held that the statutes requiring the operators of butter and cheese factories on the co-operative plan to give bonds to protect their patrons was valid, as a proper exercise of the police power of the state; and in McPherson v. Village of Chebanse, 114 Ill. 46, 55 Am. Rep. 857, 28 N. E. 454, that

an ordinance prohibiting persons from keeping open their place of business in a city or village for the purpose of vending goods, wares and merchandise on Sunday was a proper exercise of the police power of such city or village; and in *Booth v. People*, 186 Ill. 43, 78 Am. St. Rep. 229, 57 N. E. 798, 50 L. R. A. 762, that section 130 of the Criminal Code, which declares grain option contracts to be gambling contracts, was a valid police regulation and sustainable as such; and in *City of Chicago v. Gunning System*, 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230, it was said: "The police power of the state is that inherent or plenary power which enables the state to prohibit all things hurtful to the comfort, safety and welfare of society, and may be termed 'the law of overruling necessity': *Town of Lake View v. Rosehill Cemetery Co.*, 70 Ill. 191, 22 Am. Rep. 71; *Wabash etc. Ry. Co. v. People*, 105 Ill. 236. Anything which is hurtful to the public interest is subject to the police power, and may be restrained or prohibited in the exercise of that power: *Dunne v. People*, 94 Ill. 120, 34 Am. Rep. 213; *Cole v. Hall*, 103 Ill. 30; *Harmon v. City of Chicago*, 110 Ill. 400. All rights, whether tenable or untenable, are held subject to this police power: *Northwestern Fertilizing Co. v. Village of Hyde Park*, 70 Ill. 634." In *People v. Wagner*, 86 Mich. 594, 24 Am. St. Rep. 141, 49 N. W. 609, 13 L. R. A. 286, an ordinance providing that all bread manufactured by the bakers of the city of Detroit for sale should be made into loaves of one, two and four pounds' weight was held to be a valid exercise of the police power. The court, on page 600, said: "The police power of a state is not confined to ²⁹⁹ regulations looking to the preservation of life, health, good order and decency; laws providing for the detection and prevention of imposition and fraud, as a general proposition, are free from constitutional objection: 1 Tiedeman on Limitations, sec. 89, p. 208." And in *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610, on page 311, the court, in discussing the question whether the statute then under consideration fell within the exercise of the police power of the state, said: "It is said that this is not a police regulation. That may be true if the term were confined merely to the protection of the health and morals of the people. The term has a much more comprehensive meaning. It has been defined to be: 'The regulation and government of a country or city, so

far as it regards its inhabitants'; also, 'The laws, ordinances and other measures which require the citizens to exercise their rights in a particular form.' It is true, there are other and more limited meanings of the word, and when it is said that there are other limits to its exercise than the constitution, it has reference to the more restricted meaning of the term. When exercised by the legislature in its more comprehensive sense, in the passage of laws for the protection of life, liberty and property or laws for the general welfare, the only limitations to restrain its action must be found in the constitution. This, in the larger sense, is an exercise of the police power by the General Assembly and falls fully within legislative power, and sustains the enactment under consideration." And under the police power of the state it is held "weights and measures are established": Cooley's Constitutional Limitations, 2d ed., p. 596; *State v. Wilson*, 61 Kan. 32, 58 Pac. 981, 47 L. R. A. 71. It is said the police power of the state may, in the absence of any constitutional restrictions upon the subject, be delegated to the various municipalities throughout the state, to be exercised by them within the corporate limits: 22 Am. & Eng. Ency. of Law, 2d ed., 919.

Milk and cream are articles of general consumption. They are usually sold by the pint or quart, and while each ³⁰⁰ transaction involves but a few cents, the number of such transactions in a large city like Chicago daily reaches a large sum. The opportunities for fraud in their sale are great, and the ordinary legal remedy afforded the individual consumer to protect himself against fraud or deceit is wholly inadequate. Clearly, therefore, an ordinance like the one under consideration is valid and is not obnoxious to any of the provisions of the state or national constitution.

Neither does the fact, we think, that the ordinance does not apply to all persons who vend substances in liquid form or to all persons who engage in the business of selling milk or cream in the city of Chicago make the ordinance void, as special legislation. The ordinance, as framed, applies to all persons who sell milk or cream in bottles or glass jars in the city of Chicago, and in the fullest sense is general in its terms. In *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610, it was said: "It [the statute] embraces all persons in the state similarly engaged. If all laws were held unconstitutional because they did not embrace all persons, few

would stand the test. . . . A law is general, not because it embraces all of the governed, but that it may, from its terms, when many are embraced in its provisions, and all others may be when they occupy the position of those who are embraced." And in *Gundling v. City of Chicago*, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230, it was held that the city council of Chicago might pass an ordinance regulating the sale of cigarettes under the exercise of its police power, and that the ordinance was not void, as special legislation, by reason of the fact that it did not require a license to sell tobacco in all its forms in said city but subjected only tobacco to regulation put up in the form of cigarettes.

It is also urged that the defendant is deprived of its property in the bottles which it had on hand at the time the ordinance went into effect on October 1, 1907. The exercise of the police power differs from the exercise of the right of eminent domain. Under the right of eminent domain ³⁰¹ property cannot be taken or damaged without compensation, but under the police power it may be destroyed and the owner left remediless: 22 Am. & Eng. Ency. of Law, 2d ed., 916. In the *Booth* case (186 Ill. 43, 78 Am. St. Rep. 229, 57 N. E. 798, 50 L. R. A. 762), it was said: "In the exercise of this power the General Assembly may, by valid enactments—i. e., 'due process of law'—prohibit all things hurtful to the comfort, safety and welfare of society, even though the prohibition invade the right of liberty or property of an individual: 18 Am. & Eng. Ency. of Law, 739, 740; *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 22 Am. Rep. 71. . . . It is not without the power of the General Assembly, in the proper exercise of the police power, by an enactment otherwise valid, to declare that unlawful which was theretofore lawful, even if the act so condemned be an attribute of the right of liberty or property guaranteed to the citizen by the constitutional provisions under consideration."

It is also said that the evidence does not show that the defendant knowingly had bottles in its possession which had less capacity than the amount indicated on their outside. The evidence showed the defendant had bottles for use in its business in its possession which held less than the markings on the outside showed they would hold. This proof was sufficient to show a violation of the ordinance, and the

defendant could not excuse itself by saying that it had neglected to inform itself of the size of the bottles which it had in its possession.

The defendant has urged other reasons for a reversal, but we think them without force.

The judgment of the municipal court of Chicago will be affirmed.

A Statute Requiring manufacturers and sellers of baking-powder to affix a label to every can showing the residence of the manufacturer and the ingredients of the contents is constitutional: *State v. Sherod*, 80 Minn. 446, 81 Am. St. Rep. 268. See, also, the note to *Booth v. People*, 78 Am. St. Rep. 261. But it has been decided that a statute providing that all fruit contained in boxes or packages which are shipped in the state shall have marked upon them the locality in which the fruit was grown is an unconstitutional invasion of liberty: *Ex parte Hayden*, 147 Cal. 649, 109 Am. St. Rep. 183.

CASEY v. ADAMS.

[234 Ill. 350, 84 N. E. 933.]

NEGLIGENCE—Policeman as Trespasser.—A police officer detailed to guard the wagon of an express company against strikers and who accompanies such wagon to a building, entering therein not on business, nor on an invitation, express or implied, from the owner thereof, but as a matter of convenience and for reasons unconnected with his duties as a police officer, is a trespasser and cannot recover from the owner of the building for injuries received in falling down an open elevator shaft. (p. 106.)

NEGLIGENCE—Policeman as Licensee.—A police officer detailed to guard the wagon of an express company against strikers, who goes with it to a building and enters therein to perform his duties as a policeman, but without any invitation, express or implied, from the owner of such building, is a mere licensee, and such owner owes him no duty except to refrain from inflicting willful or wanton injury upon him, and is not liable for injuries received by him in falling down an open elevator shaft. (p. 106.)

J. C. McShane, for the plaintiff in error.

F. M. Cox, and J. F. Dammann, Jr., for the defendant in error.

³⁵⁴ SCOTT, J. Defendant in error maintained an elevator shaft and operated a freight elevator therein for the use of his tenants and employes in receiving and discharging merchandise. The deceased was a police officer directed

by his superior to ride on the wagon of the express company for ³⁵⁵ the purpose of protecting the express company's horses, its employés, and the wagon and merchandise therein, from striking teamster. When the employé of the express company in charge of this particular wagon backed the wagon up to the doorway opening into the elevator shaft the deceased stepped into the opening, which from the outside seemed dark, fell down the shaft and received a fatal injury. The wagon and the employés of the express company came there at the request of a tenant to receive goods. The deceased had no connection whatever with the business of the tenant. His sole duty was to act as a guard for and on behalf of the express company, to protect its employés and property and the property of others while in its custody. The tenant had no business to do with deceased and the deceased did not have occasion to see or communicate with any person within the building. He was not allured, induced or invited by the defendant in error or his tenant to enter the building. It must be inferred from the evidence that he entered the building for one or the other of two purposes: Either (1) as a matter of convenience for the purpose of getting out of the way of those who were about to place in the wagon packages which the tenant desired to ship; or (2) for the purpose of better protecting the employés of the express company while taking possession of the goods that were to be shipped, and for the purpose of better protecting the goods themselves as soon as they passed into the possession of the express company. If he went into the building for the first purpose, he was a mere trespasser, and defendant in error owed him no more duty than would the owner of the building across the alley if the deceased had elected to step into that building to wait while the goods were being loaded. If, on the other hand, he stepped into the building that he might better perform his duties as police officer, he was licensed so to do by the law itself, even in the absence of permission given by the owner of the building: Cooley on Torts, 313; Woodruff v. Bowen, 136 ³⁵⁶ Ind. 431, 34 N. E. 1113, 22 L. R. A. 198. In such case, however, he would be a mere licensee, to whom defendant in error would owe no duty except the duty to refrain from inflicting a willful or wanton injury upon him. It was so held by this court in Gibson v. Leonard, 143 Ill. 182, 36 Am. St. Rep. 376, 32 N. E. 182, 17 L. R. A. 588, in refer-

ence to a member of a fire insurance patrol who entered a building for the purpose of protecting property therein from fire, and who, while using an elevator in the building, was injured by the falling of the counter-weight, which, according to his contention, was not properly secured. The rule announced in that case must be held applicable to the policeman who enters without any express or implied invitation from the owner.

It is unnecessary to consider the question of contributory negligence.

The judgment of the branch appellate court will be affirmed.

The Owner of Premises has been held not liable to fire patrolmen who come thereon to extinguish a fire and injured defects therein: *Gibson v. Leonard*, 143 Ill. 182, 36 Am. St. Rep. 376. And it is held that the driver of a hose-cart connected with the fire department assumes the risks usual to his employment, but not the risks arising from the insecurity of streets due to the culpable negligence of the city: *Farley v. Mayor of New York*, 152 N. Y. 222, 57 Am. St. Rep. 511. A municipal corporation is liable to firemen for injuries sustained through its negligence in not furnishing him a reasonably safe place to work in one of its fire stations: *Bowden v. Kansas City*, 69 Kan. 587, 105 Am. St. Rep. 187.

PEOPLE v. CAMPBELL.

[234 Ill. 391, 84 N. E. 1035.]

ROBBERY.—Distinction Between Robbery and Larceny from the person lies in the force or intimidation used, and if the article is so attached to the person or clothes as to create resistance, however slight, or if there is a struggle to keep it, the taking is robbery. (p. 109.)

ROBBERY—Retaining Possession.—While there must be an actual severance of the property from the person to constitute robbery, still the crime is consummated if the thief retains possession of the property but a short time. It is no less robbery because ineffectual in its consequences. (p. 109.)

ROBBERY—Evidence Justifying Conviction.—On a prosecution for robbery, evidence that one of the two defendants charged with the robbery assisted the other in his efforts to retain possession of a diamond pin which he had jerked from the person of its owner, and that the defendants together waited for a street-car, which they boarded with the owner of the diamond just before it was taken from him, is sufficient to show that both defendants were present and justifies their conviction. (pp. 109, 110.)

CRIMINAL LAW—Jury as Judges of the Law.—An instruction that while the jury are judges of the law as well as the facts in criminal cases, it is the court's duty, if requested, to instruct them

what the law is, but that they are not absolutely bound by such instruction; and that if they could say on their oaths that they knew the law better than the court, they had a right to do so, but before assuming so solemn a responsibility they should be sure that they were not acting from caprice, that they were not controlled by their will or wishes, but from a deep conviction that the court was wrong, and that they were right, and that before saying this it was their duty to reflect whether they were better qualified to judge of the law than the court, and that if they were prepared to say that the court was wrong, the statute has given them that right, is properly given. (p. 110.)

WITNESSES—Credibility—Instructions.—An instruction to the jury that they were the sole judges of the credibility of each witness, and the fact that a witness was a policeman or a detective, or engaged in any other lawful business, did not render him incompetent to testify or furnish ground for arbitrarily rejecting his testimony, which should be considered with candor and fairness, and be given such weight as the jury thought it entitled to, is improper, as calling special attention to a particular witness, and should not be given. (p. 111.)

CRIMINAL LAW—Evidence—Improper Questions.—The asking of improper questions by the prosecution, even if done from an improper motive, does not necessarily call for a reversal of the case, unless the jury was improperly influenced thereby. (p. 112.)

W. H. Stead, attorney general, J. J. Healy, state's attorney, and R. E. Turney, for the people.

C. E. Erbstein, for the plaintiffs in error.

392 CARTER, J. Plaintiffs in error, Sidney Campbell and Robert Boyd, were found guilty in the criminal court of Cook county of robbing Maurice A. Schenick of a diamond pin worth four hundred dollars, and Campbell was sentenced to the reformatory and Boyd to the penitentiary.

It appears from the evidence that about midnight of August 12, 1907, as Maurice A. Schenick, proprietor of a downtown restaurant in Chicago, was about to take a street-car at Madison and Clark streets to go to his home he was jostled by several men, and when he had stepped on the car he felt a jerk at his diamond pin or stud, which was fastened in his shirt front. Schenick testified that, his attention being called by the jerk, he saw plaintiff in error Campbell with the stud in his hand and entirely out of the shirt; that he grabbed Campbell's hand and held it with his left hand, afterward securing the stud; that the spiral fastening was pretty well smashed in the scuffle. Campbell when on the stand and examined by his own attorney, admitted that he tried to take the pin, but testified that "as soon as it was kind of half out" Schenick made a grab for

him and that the pin was not wholly out of the shirt at all. Schenick further testified that as Campbell grabbed the pin plaintiff in error Boyd grabbed his (witness') left arm and tried to break the hold of Campbell's hand, while two other men who accompanied plaintiffs in error beat the witness. Schenick, and officer Pierce, who had been attracted to the scene, then chased Campbell and caught him. The officer took charge of Campbell and started for the station, surrounded by a crowd of people. Plaintiff in error Boyd followed with the crowd, and Schenick thereupon pursued and caught him. The two other companions of Campbell were arrested by two other police officers. The only witnesses who testified for the prosecution were Schenick and these three officers. Plaintiffs in error themselves were the only witnesses for the defense.

393 Counsel for plaintiffs in error contends that the evidence does not show that the alleged crime was robbery, but, at most, only larceny from the person. The difference between stealing from the person of another, and robbery, lies in the force or intimidation used: *Hall v. People*, 171 Ill. 540, 49 N. E. 495. In the absence of active opposition, if the article is so attached to the person or clothes as to create resistance, however slight, or if there be a struggle to keep it, the taking is robbery: 2 Bishop on New Criminal Law, sec. 1167; 1 Wharton on Criminal Law, 9th ed., sec. 854. Where a diamond pin, with a cork-screw stalk twisted in a lady's hair, was snatched out and a part of the hair was drawn away at the same time, it was held that this constituted robbery; and where a watch was fastened by a steel chain, which was broken in snatching the watch, it was held robbery: 2 Russell on Crimes, 6th ed., p. 88; *State v. Broderick*, 59 Mo. 318; *State v. McCune*, 5 R. I. 60, 70 Am. Dec. 176. While there must be an actual severance of the property from the person to constitute robbery, still the crime is consummated if the thief retains possession of the property but a short time. It is no less robbery because ineffectual in its consequences: 24 Am. & Eng. Ency. of Law, 2d ed., 993, and cases cited. Under these authorities the evidence justified the jury and court in finding the plaintiffs in error guilty of robbery as charged in the indictment.

The contention is also made that the testimony as to Boyd being present was not sufficient to justify his convic-

tion. With this we cannot agree. The prosecuting witness swore positively that Boyd assisted Campbell in the struggle for the diamond pin. Officer Pierce swore positively that he saw Boyd and Campbell, together with two others, at the corner of Madison and Clark streets and saw them get on the car with Schenick. Two other officers also testified that they saw the four men near the place of the robbery shortly before the occurrence and identified Boyd as one of the four. Boyd and Campbell both testified that they were not together,³⁹⁴ but the former's testimony as to how he came to be in the crowd that was following officer Pierce with the prisoner, Campbell, after the arrest, was not consistent with itself or with the admitted facts in the case.

The further contention is made that the giving for the people of instructions 10, 11 and 14 was error. Instruction 14 appears to have been copied substantially, if not literally, from *Schnier v. People*, 23 Ill. 17, where it is stated (page 26) that while the jury are made, under the statute, judges of the law as well as of the facts in criminal cases, it is the duty of the court, if requested by either party, to instruct them what the law is, but that it was the design of the statute that they should not be absolutely bound by such instruction; that "if they can say, upon their oaths, that they know the law better than the court does, they have the right to do so; but before assuming so solemn a responsibility they should be sure that they are not acting from caprice or prejudice, that they are not controlled by their will or their wishes, but from a deep and confident conviction that the court is wrong and that they are right. Before saying this upon their oaths, it is their duty to reflect whether, from their habits of thought, their study and experience, they are better qualified to judge of the law than the court. If, under all these circumstances, they are prepared to say that the court is wrong in its exposition of the law, the statute has given them that right." Plaintiffs in error contend that an instruction substantially like this was criticised by this court in *Juretich v. People*, 223 Ill. 484, 79 N. E. 181. The court in this last case said nothing to indicate that it was intended to overrule what was said in *Schnier v. People*, 23 Ill. 17. The instruction here is fully supported not only by *Schnier v. People*, 23 Ill. 17, but has been sanctioned repeatedly by this court: *Fisher v. People*, 23 Ill. 283; *Falk v. People*, 42 Ill. 331; *Mullinix v. People*, 76 Ill. 211; *Davi-*

son v. People, 90 Ill. 221. We deem the correctness of this instruction settled.

³⁹⁵ Instruction No. 11, as to the credit to be given to the testimony of the defendants, is substantially, if not word for word, like an instruction approved by this court in People v. Zajicek, 233 Ill. 198, 84 N. E. 249.

The people's tenth instruction told the jury that they were the sole judges of the credibility of each witness, but the fact that a witness was a policeman or detective, or engaged in any other lawful business, did not render such witness incompetent to testify or furnish ground for arbitrarily rejecting such testimony; that the business of policeman is a lawful one, and his testimony should not be rejected through caprice or prejudice alone; that while taking into consideration his business and surroundings, the jury should at the same time consider such testimony with candor and fairness, and give it such weight as, under all the circumstances as shown by the evidence, they thought it fairly entitled to. It is contended in the brief for the state that the reason for asking this instruction was because counsel for plaintiffs in error, in arguing to the jury, criticised police officers and their testimony. As there is nothing in the record showing that fact, we think the instruction should have been refused. The calling of special attention to any particular testimony or particular witnesses is a practice not to be commended: Hronek v. People, 134 Ill. 139, 23 Am. St. Rep. 652, 24 N. E. 861, 8 L. R. A. 837; Scott v. People, 141 Ill. 195, 30 N. E. 329; Martin v. People, 54 Ill. 225. We do not think, however, that this instruction was so prejudicial to the plaintiffs in error as to cause a reversal of the judgment: People v. Casey, 231 Ill. 261, 83 N. E. 278; Roberts v. People, 226 Ill. 296, 80 N. E. 776.

It is most earnestly and vigorously contended that the misconduct of the prosecuting attorney was such as to justify a reversal. While plaintiff in error Campbell was on the witness-stand he was asked questions as to his attempting to settle the case. In answer Campbell denied that he had made any such attempt, and the state did not afterward seek to contradict him in this regard. We cannot ³⁹⁶ see how this was injurious to Campbell. He admitted on the witness-stand, in answer to questions by his own counsel, that he attempted to take the pin. The main thing he denied was that he succeeded in getting it entirely loose

from the shirt front. The state, however, should not ask such questions unless it intended to follow them with proof of such facts.

Complaint is also made of certain questions asked of Campbell as to his being arrested prior to August 12th. The prosecuting attorney asked him, "How long had you been here?"—meaning how long prior to the date of this robbery. Campbell replied, "Why, I was arrested the first day I was here." The subsequent questions as to the former arrest appear to have grown naturally out of this answer, in an effort to find when he came to Chicago. Campbell testified that he was seventeen years old, but admitted, on cross-examination, that he gave his age to the police as twenty-two. The jury evidently were not improperly influenced by these questions, for they gave him the benefit of the doubt and fixed his age so as to allow confinement in the reformatory rather than the penitentiary. Counsel for the state also asked plaintiff in error Boyd, on cross-examination, where he got the ring that he had hidden between his pants and drawers when he was arrested, and followed this by the question, "Did you have a ring hidden between your pants and drawers when you were arrested?" The court promptly sustained objections to both these questions as soon as they were asked. There was nothing in the evidence that tended to show that a ring was in any way connected with the crime charged in the indictment, and it was therefore improper for counsel to ask these questions, but only two questions were asked concerning the ring, and no attempt was made to proceed along that line of cross-examination after objections had been sustained. These questions would not justify a reversal of the cause: *Schroeder v. People*, 196 Ill. 211, 63 N. E. 678. In the hurried work of a trial, counsel might, by mistake, ³⁹⁷ ask improper questions, and even if done from an improper motive it would not necessarily reverse the case. No absolute rule can be laid down as to the conduct of the prosecuting attorney. The matter is one which must necessarily be intrusted very largely to the discretion of the presiding judge: *Gallagher v. People*, 211 Ill. 158, 71 N. E. 842, and cases cited.

The evidence supports the verdict, and as we find no substantial errors in the record, the judgment of the criminal court will be affirmed.

The Crime of Robbery is the subject of a note to *State v. McCune*, 70 Am. Dec. 178. Whenever the elements of force and being put in fear enter into the taking, and are the cause inducing the owner of personal property to part with it, the taking is robbery, no matter how slight the act of force, or the cause creating the fear may be, nor with what other circumstances the taking may be accomplished: *State v. Parsons*, 44 Wash. 299, 120 Am. St. Rep. 1003. For the application of these principles to robbery committed by snatching a purse from the hands, see *Smith v. State*, 117 Ga. 320, 97 Am. St. Rep. 165; *Jones v. Commonwealth*, 112 Ky. 689, 99 Am. St. Rep. 330. Stealthily filching loose property from the pocket, with no more force than necessary to remove it from the pocket, is not robbery but larceny: *Colby v. State*, 46 Fla. 112, 110 Am. St. Rep. 87. And it is not robbery to take money by stealth and then resist its retaking by the owner: *Jones v. Commonwealth*, 115 Ky. 592, 103 Am. St. Rep. 340, See, too, *Jackson v. State*, 114 Ga. 826, 88 Am. St. Rep. 60.

The Crime of Larceny is the subject of a note to *People v. Miller*, 88 Am. St. Rep. 559.

KENNEDY v. SWIFT & CO.

[234 Ill. 606, 85 N. E. 287.]

MASTER AND SERVANT—Assumption of Risk.—If a servant is taken from the work on which he is engaged and ordered by his master to stand upon a narrow plank and assist in raising a heavy “block and fall” and hold it in position until it can be fastened in place, and, unknown to such servant, the hook of such “block and fall” is defective and he has no time in which to examine it, he does not assume the risk of being injured while performing the work in which he is thus engaged. (p. 115.)

MASTER AND SERVANT—Assumption of Risk—Question for Jury.—If a servant is taken from the work in which he is engaged and ordered by his master to stand upon a narrow plank and assist in raising a heavy “block and fall” and hold it in position until it can be fastened in place, the question whether the execution of the order of the master was attended with such danger that a man of ordinary prudence would not have incurred it is for the jury to determine. (p. 115.)

MASTER AND SERVANT—Negligence.—If a servant is injured through the joint negligence of the master and a fellow-servant, the master cannot escape liability on the ground that the fellow-servant also contributed to the injury. (p. 116.)

NEGLIGENCE—Question for Jury.—The questions of negligence and contributory negligence are usually questions of fact for the jury to determine. (p. 117.)

MASTER AND SERVANT—Assumption of Risk—Evidence.—If a servant is injured while doing unusual work in a certain way under the master's orders, it is proper for the servant to show the usual and customary manner of performing such work, not for the purpose of showing that there was a safer manner in which the work could have been done, but for the purpose of answering the master's contention upon the question of assumed risk. (p. 117.)

MASTER AND SERVANT—Effect of Injury to Servant upon His Health—Damages.—The jury is authorized in a personal injury case to take into consideration, in assessing a servant's damages against his master, the effect of the injury complained of, if any, upon his health, if he was a strong, healthy man, under thirty years of age, at the time he was wrongfully injured, and, at the time of the trial, occurring several months subsequent thereto, he was unable to perform manual labor by reason of such injury. (p. 118.)

TRIAL—Practice—Amendment of Complaint.—A complaint may be amended after verdict and pending a motion for a new trial, when the amendment is made to conform to the proof already introduced without objection. (p. 118.)

C. E. Pope, for the appellant.

D. J. Sullivan, for the appellee.

⁶⁰⁷ **HAND, J.** This was an action on the case commenced by the appellee in the circuit court of St. Clair county to recover damages for a personal injury alleged to have been sustained by him while in the employ of the appellant. The jury returned a verdict in favor of the appellee for the sum of three thousand dollars, upon which the trial court rendered judgment in favor of the appellee for the sum of two thousand dollars after having required a remittitur from the amount of the verdict of one thousand dollars, which judgment has been affirmed by the appellate court for the fourth district, and a further appeal has been prosecuted to this court.

The declaration contained two counts. The first count charged that the appellee and other of its servants were ordered by appellant to perform certain labor in an unusual and dangerous manner; and the second, that the appellant ⁶⁰⁸ furnished the appellee and other of its servants a defective appliance and ordered them to perform the work in which they were engaged in a dangerous place. The general issue was filed.

At the close of the appellee's evidence, and again at the close of all the evidence, the appellant entered a motion for a directed verdict, and the action of the trial court in overruling said motion is the first ground of reversal discussed in the brief of appellant.

It is first contended that the court erred in denying the said motion on the ground that the appellee was engaged in performing ordinary labor in a place and with tools of simple construction with which he was familiar, and that he assumed the risk of being injured while performing the

work in which he was engaged. We do not agree with this contention. The appellee was called from the work in which he was engaged and ordered by the foreman of appellant to stand upon a plank one foot wide and twelve feet long, situated some twelve feet above the floor, and in company with another of its employés to lift, with their hands, a block and fall weighing one hundred and seventy-five pounds, and to hold the same in position above their heads while it was being fastened by two of appellant's employés, with a rope, to the roof timbers of the building in which they were suspending said block and fall. The hook of the block and fall was defective, and by reason of such defect it easily released the rope held by the men upon the roof, and the plank upon which the appellee stood with his fellow-workman was so narrow that they were unable to easily retain their equilibrium while bearing the weight of said block and fall upon their hands and extended arms above their heads while said block and fall was being fastened by the men upon the roof, which resulted in the rope in the hook being released, and the appellee and his co-worker being unable to support the block and fall, it fell upon the plank upon which they were standing and broke the plank ~~in~~ in two, whereby they were precipitated to the floor and the appellee was severely injured. The appellee was not familiar with the condition of the hook, and had no time, after he was sent upon the plank, to examine the hook or the plank, and therefore we think he did not assume the risk incident to the service which he was directed by his foreman to perform in holding said block and fall in position with his hands, while standing upon said plank, until it could be fastened by the men upon the roof. This case, therefore, does not fall within the reason of the rule announced in the case of Webster Mfg. Co. v. Nisbett, 205 Ill. 273, 68 N. E. 936, and kindred cases relied upon by appellant. The appellee, at the time of his injury, was not engaged in performing ordinary labor, but was at that time under the direction of his foreman, engaged in a most hazardous and perilous undertaking, which rendered the appellant liable for his injury: Graver Tank Works v. O'Donnell, 191 Ill. 236, 60 N. E. 831; Springfield Boiler etc. Mfg. Co. v. Parks, 222 Ill. 355, 78 N. E. 809. In Illinois Steel Co. v. Schymanowski, 162 Ill. 447, 44 N. E. 876, this court said: "Where a corporation authorizes one of its employés to

have the control over a particular class of workmen in any branch of its business, such employé is, quoad hoc, the direct representative of the company. The commands which he gives within the scope of his authority are the commands of the company itself, and if such commands are not unreasonable, those under his charge are bound to obey at the peril of losing their situations, hence the company will be held responsible for the consequences." And in *Offutt v. World's Columbian Exposition*, 175 Ill. 472, 51 N. E. 651, it was said: "The rule is, that where the servant is injured while obeying the orders of his master to perform work in a dangerous manner the master is liable, unless the danger is so imminent that a man of ordinary prudence would not incur it." The question whether the execution of the order of the foreman was attended with such danger that a man of ordinary prudence ⁶¹⁰ (even though he knew of the danger which he encountered) would not have incurred such danger by going upon the plank and attempting to raise said block and fall with his hands was a question for the jury, and not one to be determined by the court as a question of law: *Pittsburg Bridge Co. v. Walker*, 170 Ill. 550, 48 N. E. 915; *Offutt v. World's Columbian Exposition*, 175 Ill. 472, 51 N. E. 651; *Graver Tank Works v. O'Donnell*, 191 Ill. 236, 60 N. E. 831; *Springfield Boiler etc. Mfg. Co. v. Parks*, 222 Ill. 355, 78 N. E. 809.

It is also urged that the appellee or his fellow-servants were guilty of such negligence in handling said block and fall as to defeat the right of recovery in appellee, as it is said either the block and fall was raised, or the rope lowered, sufficiently to let the hook, which formed a part of the block and fall, fall out of the loop of the rope by which it was suspended, and thereby the block and fall was released from the rope held by the men upon the roof, and the appellee and his fellow-workman, being unable to support the same, permitted it to fall upon the plank upon which the appellee and his fellow-workman were standing. The evidence fairly tended to show the opening in the hook was too large, and that the plank upon which the appellee and his fellow-workman stood was too narrow, and that the block and fall fell by reason of the defect in the hook or the narrowness of the plank upon which they stood, or both, or by reason of the defects in said hook and plank and the negligence of the men upon the roof or the negli-

gence of the appellee and his fellow-workman, and those questions were questions of fact to be submitted to and decided by the jury. The law is well settled that although the negligence of a fellow-servant of the appellee contributed to his injury, still, if such injury was caused, in part, by the negligence of the appellant, the appellee may recover, as the general rule is, where a servant is injured through the part negligence of the master and a fellow-servant, the master cannot escape liability on the ground that the fellow-servant ⁶¹¹ also contributed to the injury: Pullman Palace Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; Missouri Malleable Iron Co. v. Dillon, 206 Ill. 145, 69 N. E. 12. The questions of negligence and contributory negligence are usually questions of fact: Chicago City Ry. Co. v. Nelson, 215 Ill. 436, 74 N. E. 458; Chicago and Joliet Electric Ry. Co. v. Wanic, 230 Ill. 530, 82 N. E. 821.

The trial court did not err in declining to take the case from the jury.

It is also urged as grounds of reversal that the court permitted the appellee to introduce evidence tending to show that the usual way of raising a block and fall in the establishment of appellant was by using a block and tackle, and not by hand, as it is said the effect of such testimony was to convict appellant of negligence by showing that there was a safer method of raising said block and fall than that pursued at the time appellee was injured. It was proper to show the usual and customary manner of performing the work in which appellee was engaged when injured, not for the purpose of showing that there was a safer manner in which the work could have been done, but for the purpose of answering the contention of appellant upon the question of assumed risk, as appellee assumed only the risks ordinarily incident to the appellant's business and to the appellant's known manner of having it performed. Such proof was admitted in Pittsburg Bridge Co. v. Walker, 170 Ill. 550, 48 N. E. 915, Offutt v. World's Columbian Exposition, 175 Ill. 472, 51 N. E. 651, and Illinois Central R. R. Co. v. Sporleder, 199 Ill. 184, 65 N. E. 218. We do not think the admission of such evidence constituted reversible error.

Other objections are made to the rulings of the court upon the evidence, but we think they are without force.

It is also urged that the court misdirected the jury upon behalf of the appellee and refused to properly instruct the

jury upon behalf of appellant. The court gave one instruction for appellee and twenty-one instructions upon behalf of the appellant, and refused five instructions offered upon behalf ⁶¹² of appellant. The criticism made upon appellee's given instruction is, that the jury were authorized thereby to take into consideration, in assessing appellee's damages, the effect of the injury, if any, upon his health, and it is said there was no basis in the evidence for such instruction. One arm of the appellee was broken and the wrist of the other severely sprained and the tongue of the appellee bitten through. He was a strong, healthy man, under thirty years of age, at the time he was injured, and at the time of the trial, which occurred several months subsequent to his injury, as a result of the fall he was unable to perform manual labor. It is therefore apparent that there was evidence in the record upon which to base the said instruction. The appellant's given instructions stated the law as favorably to it as the law would justify, and the refused instructions were covered by the given instructions. There is therefore no ground for complaint on the part of the appellant as to the manner in which the court instructed the jury.

After verdict, and pending the motion for a new trial, appellee, by leave of court, amended the first count of the declaration by inserting therein an averment that the plank upon which he was directed by his foreman to stand was insufficient and dangerous. The statute authorizes amendments at any time before final judgment, and as the amendment was made to conform to the proof which had already gone in without objection, there was no error in permitting the amendment.

It is finally contended that the judgment is excessive. That question was finally settled by the judgment of the appellate court, and in the condition of this record it is not open for review in this court.

Finding no reversible error in this record, the judgment of the appellate court will be affirmed.

The Doctrine of Assumption of Risks and of Contributory Negligence of an employé in obeying the orders of his employer in doing work of a hazardous character is discussed in the notes to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884; *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 289.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

**WALKER v. CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY.**

[76 Kan. 32, 90 Pac. 772.]

RAILROADS—Liability for Fires—Contributory Negligence.—Farmers through whose premises a railroad is operated are not required to take unusual precautions against fires set out by the railroad company, but may use and cultivate their lands in accordance with the customary methods of farmers, without being open to a charge of contributory negligence. (p. 121.)

RAILROADS—Fires—Combustibles on Adjacent Farms.—A farmer who permits dry grass or cornstalks to remain in the field near a railroad track, where they are grown, as is customary with farmers, is not chargeable with contributory negligence nor deprived of his right of action against the railroad company for its negligence in setting out a fire. (p. 122.)

King & Wheeler, for the plaintiff in error.

M. A. Low and Paul E. Walker, for the defendant in error.

³² JOHNSTON, C. J. C. C. Walker brought an action against the Chicago, Rock Island and Pacific Railway Company, alleging that sparks were thrown from a locomotive of a passing freight train, starting a fire on his farm which ran through his young orchard, destroying some of the trees and damaging others.

By the testimony it appears that the railroad of the defendant passes diagonally through plaintiff's farm. On one side of the track plaintiff had planted several hundred young apple trees in the spring of 1903, and in that year had raised a crop of corn in the same field. The corn had been cultivated in the growing season, ³³ but afterward crabgrass and some weeds had grown in the field. The corn

was gathered, leaving the stalks where they had grown, and the crab-grass, which had dried up in the fall, was left upon the ground.

On March 9, 1904, the fire occurred which burned the trees, and the testimony tends to show that the sparks and cinders from defendant's engine started the fire in the dry grass in the plaintiff's field and not on the right of way of the railway company. The verdict was in favor of the defendant, and the plaintiff complains of the following instruction given by the court on the subject of contributory negligence: "The defendant in this case claims that if the fire did originate from the defendant's train the plaintiff himself was guilty of contributory negligence, and that by reason of such contributory negligence he cannot recover in this cause. And the contributory negligence of which the defendant alleges and claims the plaintiff to be guilty is that he permitted combustible grass and stalks to grow and accumulate and become dry in very close proximity to the right of way of the defendant company, and that he did not exercise ordinary and reasonable care in protecting his own property from fires that are liable to originate from the ordinary operation of a railroad train over the plaintiff's farm. Upon that question you are instructed that persons who own property adjoining or near a railroad are bound to take notice of the increased danger to their property from fire, and to exercise a proportionate amount of care to protect it; and if the plaintiff in this case allowed dry grass and weeds and dry cornstalks to remain on his premises adjoining the defendant's right of way, so that the fire could readily start therein, then I instruct you that this is a circumstance for you to consider as tending to prove contributory negligence on the part of the plaintiff. But the question of contributory negligence, of course, is entirely for the jury to determine, from all the evidence in the case. If you find that the plaintiff was guilty of contributory negligence but for which the fire would not have caught, then he cannot recover in any event."

³⁴ This instruction is drawn and was given upon the theory that it is the duty of the owner of land adjoining a railroad to keep it free from all combustible material, so that sparks and cinders thrown out by a locomotive will not readily start a fire on his land, and that the failure to do this is such contributory negligence as will bar a recovery for loss resulting from such a fire. The rule of responsibility is not cor-

rectly stated, and the instruction was not applicable to the facts of the case. The building of a railroad through the plaintiff's land did not deprive him of any beneficial use to which it is adapted. He can still farm it in the usual and ordinary way, and is not required to abandon any proper use, nor to take special precautions against fire negligently set out by the railway company. Nothing in the testimony indicates that the plaintiff's farming operations were unusual. He cultivated his corn and gathered it from the stalks, as is the custom of the country. After the cultivation of the corn the usual crop of wild grass sprung up, which in the course of time ripened and dried, and this was left where it had grown. It was no more his duty to remove the stalks and dry grass from the field than it would have been to remove the dry grass from an adjacent pasture, meadow or prairie land in its natural state. The stubble of harvested wheat is easily ignited by fire thrown from a locomotive, but it would hardly be contended that an owner of a wheatfield should abandon wheat growing or be required to remove the stubble from the field because of the risk from fire negligently set out.

In *Ft. Scott & W. Ry. Co. v. Tubbs*, 47 Kan. 630, 28 Pac. 612, a fire case, it was held that an adjacent owner was entitled to use his land in the ordinary way, and was not chargeable with contributory negligence for the mere failure to take precautions against the negligence of the railway company, and in deciding the case the rule of liability stated by Mr. Chief Justice Agnew, of Pennsylvania, was quoted: "The conclusion from the case is very clear that a ³⁵ plaintiff is not responsible for the mere condition of his premises lying along a railroad, but in order to be held for contributory negligence must have done some act or omitted some duty, which is the proximate cause of his injury, concurring with the negligence of the company. Farmers may cultivate, use and possess their farms and improvements in the manner customary among farmers, and are not bound to use unusual means to guard against the negligence of the railroad company; indeed, are not bound to expect that the company will be guilty of negligence": See, also, *Philadelphia etc. R. R. Co. v. Schultz*, 93 Pa. 341; *Patton v. St. Louis etc. Ry. Co.*, 87 Mo. 117, 56 Am. Rep. 446; *Kendrick v. Towle*, 60 Mich. 363, 1 Am. St. Rep. 526, 27 N. W. 567; *Gulf etc. Ry. Co. v. Johnson*, 54 Fed. 474, 4 C. C. A. 447; *New York etc. R. R.*

Co. v. Grossman, 17 Ind. App. 652, 46 N. E. 546; Cleveland etc. Ry. Co. v. Stephens, 173 Ill. 430, 51 N. E. 69; Chicago etc. R. R. Co. v. Kern, 9 Ind. App. 505, 36 N. E. 381; Pittsburgh etc. R. R. Co. v. Jones, 86 Ind. 496, 44 Am. Rep. 334; American Strawboard Co. v. Chicago etc. R. R. Co., 177 Ill. 513, 53 N. E. 97; Kellogg v. Chicago etc. Ry. Co., 26 Wis. 223, 7 Am. Rep. 69; 2 Thompson on Negligence, sec. 2314.

If the plaintiff used his land for legitimate purposes, and in the manner usually followed by other farmers, he cannot be deprived of redress for injuries resulting from the negligence and wrong of another. Of course, this does not mean that a person can invite and increase peril or needlessly and recklessly put his property in a position of known danger and be free from fault. That is not the usual or reasonable method of farming, and therefore if it were shown that the owner needlessly stacked or stored combustible material unnecessarily close to a railroad, and perhaps if it appeared that he placed or permitted accumulations perilously close to the track, and contrary to the practical and customary method of farming in the country, it would be such evidence of contributory negligence as should be submitted to a jury. A land owner, of course, takes all the risks of losses resulting ³⁶ from fire where the railroad is operated with due care, but all know that even with the exercise of proper care fire sometimes does escape from locomotives, and hence it is not practical or sensible for anyone needlessly to deposit combustible material unnecessarily close to a railroad track. For that reason, probably, it is not a common practice of farmers owning lands adjacent to a railroad to pile up or permit accumulations of material easily ignited unnecessarily close to a railroad, and thus enhance the risk of bringing on the destruction of their own property. As has been seen, an owner cannot needlessly thrust his property in the way of danger, nor safely depart from the customary methods employed by others. This view has already been recognized, as well as the rule that after a fire has been started an owner should use reasonable diligence and effort to protect his property from destruction: St. Joseph etc. R. R. Co. v. Chase, 11 Kan. 47; Kansas etc. R. R. Co. v. Brady, 17 Kan. 380; Central etc. R. R. Co. v. Hotham, 22 Kan. 41; Kansas City etc. R. R. Co. v. Owen, 25 Kan. 419; Missouri Pac. R. R. Co. v. Kincaid, 29 Kan. 654; Atchison etc. R. R. Co. v. Ayers,

56 Kan. 176, 42 Pac. 722; St. Louis etc. R. R. Co. v. League, 71 Kan. 79, 80 Pac. 46.

Here, however, there was no piling up of dry grass, weeds or cornstalks—no accumulation of combustible rubbish unnecessarily close to the track, nor was there any attempt to show that the plaintiff's method of farming and caring for his fields were not in line with the common usage among the farmers of the country. In the absence of such testimony there was no occasion or excuse for submitting the question of plaintiff's negligence to the jury.

It is equally clear that the instruction to the effect that the mere leaving of stalks and dry grass on the land where they grew should be treated as proof of contributory negligence was not a correct rule.

For the error in charging the jury the judgment is reversed and the cause remanded for a new trial.

Railroad Companies are required to exercise a high degree of care to avoid setting out fires along their right of way; and when it is shown that sparks from its engines have started a fire, the company is presumptively chargeable with negligence: *Fireman's Ins. Co. v. Seaboard Air Line Ry.*, 138 N. C. 42, 107 Am. St. Rep. 517; *Norfolk etc. Ry. Co. v. Fritts*, 103 Va. 687, 106 Am. St. Rep. 911, and cases cited in the cross-reference note thereto. As to the contributory negligence of the owner of the destroyed property as affecting the liability of the railroad company, see *Kendrick v. Towle*, 60 Mich. 363, 1 Am. St. Rep. 526; *Laird v. Railroad*, 62 N. H. 254, 13 Am. St. Rep. 564; *Peter v. Chicago etc. R. R. Co.*, 14 Mich. 324, 80 Am. St. Rep. 500; *Rowell v. Railroad*, 57 N. H. 132, 24 Am. St. Rep. 59.

WESTERN FURNITURE AND MANUFACTURING COMPANY v. BLOOM.

[76 Kan. 127, 90 Pac. 821.]

EMPLOYER'S LIABILITY.—The Doctrine of Assumption of Risks is not available as a defense in an action by an employé against his employer for injuries sustained because of the failure of the latter to comply with a statute requiring him to guard his machinery for the safety of employés. (p. 128.)

E. G. Anderson and Stanley, Vermilion & Evans, for the plaintiff in error.

I. P. Campbell, J. G. Campbell and Ray Campbell, for the defendant in error.

128 MASON, J. The Western Furniture and Manufacturing Company prosecutes error from a judgment against it obtained by Max Bloom on account of injuries received while in its employ by reason of its failure to comply with the statute requiring manufacturers safely to guard their machinery for the purpose of protecting their employes: Laws 1903, c. 356, sec. 4.

Complaint is made that although the plaintiff during the examination of jurors as to their competency was permitted to ask certain questions regarding their relation to an insurance company, the defendant was denied the right to ask similar questions as to their connection with a law firm. The limitation of such inquiries is necessarily committed to the sound discretion of the trial court (*Swift & Co. v. Platte*, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635), and there is nothing in the record that suggests an abuse of discretion in the present instance.

Complaint is also made of the refusal to give several special instructions asked relating to contributory negligence. While the charge as given was somewhat general, we think it sufficiently covered this subject, and therefore that no error is shown in that connection.

The important question presented arises upon the refusal of the court to submit to the jury any issue with respect to the assumption by the plaintiff of the risk of injury arising from the defendant's failure to observe the statute. Whether the defense of assumption of risk is ever open in an action founded upon statutes of the kind here relied upon, commonly known as "factory **129** acts," or upon any statute giving a right of action to an employé on account of injuries resulting from the negligence of his employer, is a question upon which there is great difference of judicial opinion. It has not heretofore been passed upon by this court. In *Creamery P. Mfg. Co. v. Daniels*, 72 Kan. 418, 83 Pac. 986, the negligence for which a recovery was sought was within the terms of the statute, but the case was submitted to the jury under an instruction embodying the ordinary rule as to assumed risk. The plaintiff, having recovered judgment, did not attack the instruction. As the defendant also accepted it, it became the law of the case. The effect of the statute on this defense was therefore not involved in the proceeding in this court, and was not argued or suggested. In *Madison v. Clippinger*, 74 Kan. 700, 88 Pac. 260, the question was ar-

gued, but as its decision could not affect the disposition of the case it was not passed upon. In sections 116 and 117 of Dresser's Employers' Liability, in the course of a full discussion, the opinion is expressed that the servant may, under some circumstances, be held to have assumed the risk occasioned by the breach of an obligation imposed upon the master by statute. This view is approved in sections 205 and 235 of White's Personal Injuries in Mines, but upon somewhat different grounds. In section 229 of Reno's Employers' Liability Acts, section 650 of volume 2 of Labatt's Master and Servant, and sections 4702 and 4704 of volume 4 of Thompson's Commentaries on the Law of Negligence the conflict is noted, and the authors, without avowing any strong convictions of their own, indicate that the rule generally adopted is that the statutes do not abolish the defense.

A collection of cases bearing upon the matter is to be found in volume 20 of the American and English Encyclopedia of Law, at page 121, and volume 3 of the Supplement to the American and English Encyclopedia of Law, at pages 1304 and 1305, which can ¹³⁰ be made practically complete by the addition of *Narramore v. Cleveland etc. Ry. Co.*, 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68, the leading case in favor of the view that the defense is not available, and *Birmingham Ry. etc. Co. v. Allen*, 99 Ala. 359, 13 South. 8, 20 L. R. A. 457, and *Denver etc. Ry. Co. v. Norgate*, 141 Fed. 247, 72 C. C. A. 365, 6 L. R. A., N. S., 981, 5 Am. & Eng. Ann. Cases, 448, holding the contrary. In a note to the last-named case in 6 L. R. A., N. S., 981, the authorities are classified and reviewed in detail, and the result is thus summarized:

"The jurisdictions are well-nigh equally divided on this question. Of the effect of the statute imposing duties on a master to abolish by implication the defense of assumption of risk, Alabama, Iowa, Massachusetts, Minnesota, New York, Ohio, Rhode Island, and Wisconsin hold that such statutes do not abolish that defense.

"On the other side holding that the defense of assumption of risk is abolished in such cases by implication, are the courts of Illinois, Indiana, Louisiana, Michigan, Missouri, Vermont and Washington": Page 988.

Where the defense is held to be unavailable it is usually upon the grounds stated with great force by Judge Taft in *Narramore v. Cleveland etc. Ry. Co.*, 96 Fed. 298, 37 C.

C. A. 499, 48 L. R. A. 68: First, that assumption of risk is essentially a contract by the employé to waive the benefit of the statute; and, second, that considerations of public policy will not permit such a contract to be given effect. If both of these propositions are sound, the conclusion reached obviously follows. Therefore, where the defense is permitted, one or the other of them is denied—sometimes both, as in *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161, the leading American case upon that side of the controversy, where it is maintained that assumption of risk is not strictly speaking a contract, but that if it is so regarded it is one which the employé is competent to make. The ¹³¹ essential character of assumption of risk, and its connection with considerations of public policy and with the maxim "*Volenti non fit injuria*," are discussed in a note to that case in 47 L. R. A. 161, and in sections 82, 88, 116 and 117 of Dresser's *Employers' Liability*, as well as in many of the cases cited in the notes referred to. It is unnecessary to enter upon a consideration of the matter at this time, for this court has already committed itself to the view, with which it is entirely satisfied, that as applied to the relation of master and servant the term is one of contract.

"The doctrine of 'assumption of risk' rests for its support upon an agreement of the employé with his employer, express or implied from the circumstances of his employment, that his employer shall not be liable to him in damages for any injury incident to the service he is employed to perform, resulting from a known or obvious danger arising in the performance of the service": *Atchison etc. Ry. Co. v. Bancord*, 66 Kan. 81, 71 Pac. 253, syllabus.

"Reduced to its last analysis, the doctrine of assumed risk must rest for its support upon the express or implied agreement of the employé that, knowing the danger to which he is exposed, he agrees to assume all responsibility for resulting injury": *Id.*, p. 88, opinion.

It is also unnecessary at this time to enter upon an independent examination of the second of the two subsidiary questions upon which the solution of the problem presented depends. Upon that, also, this court is definitely and finally committed. In *Kansas etc. Ry. Co. v. Peavey*, 29 Kan. 169, 44 Am. Rep. 630, where the statute making a railway company liable to its employés for injuries resulting from

the negligence of any of its agents or servants (Gen. Stats. 1901, sec. 5858) was under consideration, it was said:

“If the statute was enacted for the better protection of the life and limb of railroad employes, it would be against public policy for the courts to sanction contracts made in advance for the release of this liability, especially when we consider the unequal situation of ¹⁸² the laborer and his employer. Take this illustration: In some states—and in our own—the owners of coal mines which are worked by means of shafts are required to make and construct escapement shafts in each mine, for distinct means of ingress and egress for all persons employed or permitted to work in the mines. Such a statute is for the benefit of employes engaged in working in coal mines; but the owner of such a mine would not be permitted to contract in advance with employes for operation of the mine in contravention of the provisions of the statute. The state has such an interest in the lives and limbs of its citizens that it has the power to enact statutes for their protection, and the provisions of such statutes are not to be evaded or waived by contracts in contravention therewith. The general principle deduced from the authorities is, that an individual shall not be assisted by the law in enforcing a contract founded upon a breach or violation on his part of its principles or enactments; and this principle is applicable to legislative enactments, and is uniformly true in regard to all statutes made to carry out measures of general policy; and the rule holds equally good, if there be no express provision in the statute peremptorily declaring all contracts in violation of its provisions void, in regard to statutes intended generally to protect the public interests, or to vindicate public morals”: Page 176.

It is not important whether the result there reached might have been justified upon other grounds. The broad principle announced—that a workman employed in a dangerous occupation may not by agreement waive the provisions of an act intended for his protection or relieve his employer from a statutory liability in that connection—has become a settled tenet of this court. This fact was recognized in a subsequent hearing in the same case by the justice whose individual opinion led him to a contrary view (*Kansas etc. Ry. Co. v. Peavey*, 34 Kan. 472, 8 Pac. 780); and the doctrine was again declared and applied in the recent case of *Atchison etc. Ry. Co. v. Fronk*, 74 Kan. 519, 87 Pac. 698, which arose upon

the same statute, in these words: "The state has an interest in the lives, health and safety of its citizens, and whenever a business, although ¹⁸³ lawful in itself, is dangerous to the lives or injurious to the health of the employés engaged in conducting such business it becomes a question of public concern and the state may intervene in the interest of the public welfare. We have many such statutes enacted in the interest and for the protection of different classes of citizens. The owner or lessee of coal mines worked by means of shafts is required to maintain escapement and ventilating shafts in accordance with certain prescribed rules, and no person is permitted to take more than five pounds of powder in any such mine at one time. The protection thus provided by the state for the safety of its citizens is a matter of public concern, and cannot be contracted away by the individual. . . . For the reasons suggested, a contract by one entering the service of a railroad company waiving his right of action for damages which he may receive in consequence of the negligence of its agents, servants or employés is void": Pages 526, 527.

It is clear, therefore, that unless the court recedes from its position that assumption of risk is one of the terms of the contract of employment, or from its position that the protection vouchsafed to employés by statute against the negligence of their employers cannot be contracted away, it must hold that assumption of risk is not available as a defense to an action founded upon the factory act. These positions are adhered to, and its results that the judgment must be affirmed.

An Employer Who Violates a Statutory Duty imposed upon him for the better protection of his employés cannot, according to the better view, invoke the doctrine of assumption of risks or contributory negligence when sued by an injured employé: See the note to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 891; *Lenahan v. Pittson Coal Min. Co.*, 218 Pa. 311, 120 Am. St. Rep. 885.

HUBBARD v. CHENEY.

[76 Kan. 222, 91 Pac. 793.]

MORTGAGE—Deed to Secure Purchase Price.—A deed to a husband and wife jointly, in which she is named as a grantee to secure the payment of money that she loans him to make up the purchase price of the land is a mortgage as to her, so that when the loan is paid, her interest ceases and his title becomes clear. (p. 131.)

MORTGAGE—Deed Absolute.—Parol Evidence is admissible to show that a deed to a husband and wife jointly was, as to her, intended as a mortgage. (p. 131.)

MORTGAGE—Deed Absolute—Declarations.—Where a deed has been executed to a husband and wife jointly, his declarations explanatory of ownership, while in possession of the land, including letters written by him which the evidence does not clearly show whether or when the addressee received them, are admissible to show that, as to the wife, the deed was intended as a mortgage. (pp. 132, 133.)

J. B. Larimer and T. F. Garver, for the plaintiffs in error.

J. J. Schenck, for the defendants in error.

223 JOHNSTON, C. J. This was an action by Frederick R. Hubbard, Leverett W. Hubbard and Belle Hubbard Ransom, cousins and only surviving heirs to Jennie E. Cheney, against Ernest and Maud Cheney to recover an eighty-acre tract of land in Shawnee county. Henry W. Cheney was the husband of Jennie E. Cheney. In 1879 Henry W. Cheney purchased the land in controversy for sixteen hundred dollars, and three hundred dollars of the purchase price was furnished by his wife, Jennie E. Cheney. Both husband and wife were named as grantees in the deed of conveyance.

In May, 1904, Henry W. Cheney executed a will, leaving all of his estate to Jennie E. Cheney, his wife, and in one of the clauses stated that it was his desire that his wife should remember his nephew, Ernest Cheney, when she had no further use for the property, and make such provision for him as she thought just and equitable. About a month later Jennie E. Cheney made a will, which contained a number of specific devises and bequests, and left the residue of the estate to her husband. In her will it was provided: "It is also my desire that in case of the death of my husband, Henry Warren Cheney, while I am still living, that his estate shall go to Ernest and Maud Cheney. It is my express desire that my cousin Charles **224** E. Hubbard, his wife and

children, are not to receive anything from my estate. . . . All of the residue of my estate, real, personal and mixed property, I give, devise and bequeath to my husband, Henry Warren Cheney, with no conditions or restrictions, having full confidence that when he shall have no further use for the property he will remember my cousins named in paragraph two of my will [being the plaintiffs], and make such provision and distribution of whatever remains of my estate among said cousins as to him may seem just and equitable.”

On June 14, 1904, Henry W. Cheney died, and eighteen days later his wife passed away. The will of each was duly probated, and the validity of neither has never been questioned.

The plaintiffs insist that they have a perfect title to the land; that the deed of 1879 to Henry W. Cheney and Jennie E. Cheney created an estate by the entirety; that when Henry W. Cheney died his surviving wife became the absolute owner; and that at her death it necessarily went to the plaintiffs, as the residuary legatee under the will was dead, and, the land not having been disposed of by will, and Charles E. Hubbard, one of her four cousins, having been expressly excluded by the will, the three remaining cousins inherited the property.

On the other side it is contended that the deed, although executed jointly to the husband and wife, was a mere security to the wife for the three hundred dollars, which she had advanced toward the purchase price, and that the wife merely held the property in trust until the repayment of the borrowed money; that when the money was repaid the husband became the sole owner of the property, and under the wills of both husband and wife it passed to the defendants.

Whether the naming of Jennie E. Cheney in the deed was intended as a conveyance to her or only as a means of securing the payment of the money borrowed from her was the principal question in the trial of the ²²⁵ cause. The following interrogatories were submitted and answered by the jury:

“(1) Q. Did Henry W. Cheney purchase the real estate in controversy about 1879? A. Yes.

“(2) Q. If you answer question No. 1 in the affirmative, then you may state whether or not Jennie E. Cheney, his wife, loaned him three hundred dollars or any other amount with which to make the purchase. A. Yes.

“(3) Q. If you answer question No. 2 in the affirmative, then you may state whether or not there was an arrangement,

agreement or understanding between Henry W. Cheney and Jennie E. Cheney, his wife, at the time of said purchase, that the title of the real estate should be taken in the name of Henry W. Cheney and Jennie E. Cheney jointly for the purpose of securing Jennie E. Cheney in the money she had loaned to Henry W. Cheney. A. Yes."

In addition to the special findings the jury found generally in favor of the defendants, and upon these findings judgment against the plaintiffs was given. Plaintiffs contend here that the conveyance to the husband and wife jointly created an estate by the entirety, which could only be divested by a conveyance or by a written contract legally made. It is well-settled that a deed to land absolute on its face and taken as a security is no more than a mortgage. If the land in question was purchased by Henry W. Cheney, and Jennie E. Cheney was only named as a grantee to secure the payment of the three hundred dollars loaned to her husband to make up the purchase price, she would only hold in trust for her husband, and when her loan was paid, her interest would cease and his title become clear and complete. It was competent, then, to show the resulting trust—that the deed was intended to operate as a mortgage—by parol evidence; and the rule applies where the instrument is in form a joint deed the same as if it had been made to Mrs. Cheney alone. Equity looking back of forms to the substance of things regards the transaction as the parties themselves regarded it, namely, the giving and taking of security ²²⁶ for borrowed money. The purpose of the parties in having the deed made to her, and that it was intended as a mere security, which had been discharged, could be proved without writings or records: *Moore v. Wade*, 8 Kan. 380; *Glynn v. Home Building Assn.*, 22 Kan. 746; *Bennett v. Wolverton*, 24 Kan. 284; *McDonald & Co. v. Kellogg*, 30 Kan. 170, 2 Pac. 507; *Marsh v. Davis*, 33 Kan. 326, 6 Pac. 612; *Hutchison v. Myers*, 52 Kan. 290, 34 Pac. 742.

It is claimed, however, that the evidence received was insufficient for that purpose, and further, that the court admitted testimony that was incompetent. Objections were unsuccessfully made to the admission of letters written by Henry W. Cheney to his wife and sister about the time the land was purchased, and also to declarations by him and his wife respecting the purchase and ownership of the land, some of which were made long after the purchase but during their

possession of the land. These rulings are not good grounds for a reversal of the judgment. The declarations of persons in possession of real property which illustrate the character of their possession and explain their claims of ownership are admissible to show the character and extent of their claims: *State v. Gurnee*, 14 Kan. 111. The rule has been applied in cases where the possession and ownership of personal property was in controversy: *Stone v. Bird*, 16 Kan. 488; *Reiley v. Haynes*, 38 Kan. 259, 5 Am. St. Rep. 737, 16 Pac. 440.

In an action of ejectment by the grantee against the heirs of the grantor, where the question was whether a deed absolute on its face was intended as a mortgage, the supreme court of Indiana held that the declarations of the grantor while in possession of the land, explanatory of the possession and of the rights claimed in the land, might be received in evidence. It was also held that the declarations need not have been made while the claimant was actually on the land, but that it was sufficient to establish their competency to show ²²⁷ that they were made in connection with some act relating to the character of the possession and evidencing ownership. To that end the declarations of the deceased grantor while negotiating for buildings and insurance and while making improvements were held to be admissible: *Creighton v. Hoppis*, 99 Ind. 369. See, also, *Bennett v. Camp*, 54 Vt. 36; *Maus v. Bome*, 123 Ind. 522, 24 N. E. 345; *McDaneld v. McDaneld*, 136 Ind. 603, 36 N. E. 286; *Fyffe v. Fyffe*, 106 Ill. 646; *Duffey v. Presbyterian Congregation of Bellefonte*, 48 Pa. 46; *Stockton Sav. Bank v. Staples*, 98 Cal. 189, 32 Pac. 936; *Kingsford v. Hood*, 105 Mass. 495; 3 Wigmore on Evidence, sec. 1779; 24 Am. & Eng. Ency. of Law, 690.

The letters written by Henry W. Cheney to his wife and sister about the time of the purchase of the land were competent evidence in the case, not to show that the statements contained in them were true, but to illustrate and explain the accompanying acts of purchase and possession. One of them, it is true, had very little in it that was material to the case, but its weight and force in showing that the title was in the husband and that the wife only held a lien on the land was for the determination of the jury. There is no force in the objection that it was not shown that the letters were mailed by Henry W. Cheney or that his wife ever received or saw them. They were identified as the letters of Henry W. Cheney, were shown to be in his handwriting,

and to have been in the possession of Mrs. Cheney. The fact that she received the letters or the time of their reception is not as important as if the letters had been offered to show a contract or some like purpose. Since they were offered to illustrate and qualify the purchase and possession of the land, it is only important that they be shown to have accompanied the acts of purchase and possession, and hence it is immaterial whether they were received and acted upon by Mrs. Cheney.

The oral declarations of Henry W. Cheney while he ²²⁸ was in possession, testified to by a number of witnesses, were admissible under the rule stated. The declarations made by Mrs. Cheney while living on the land, to the effect that she had no title in the land and that the only interest she ever had was a lien thereon for the three hundred dollars loan, were declarations against interest, and were therefore admissible under another rule. Some of the statements given in evidence were rather remote from the question in issue, and some of them were immaterial, but we do not regard their admission to have been prejudicial or to furnish cause for reversal.

The judgment of the district court is affirmed.

When a Deed Absolute is Given as Security, it is treated as a mortgage and nothing else: *Smith v. Pfinger*, 126 Wis. 253, 110 Am. St. Rep. 911; and it will remain a mortgage until the equity of redemption is cut off, and cannot render it anything else by stipulation: *Plummer v. Ilse*, 41 Wash. 5, 111 Am. St. Rep. 997.

One Who Alleges that a Deed Absolute is in Fact a Mortgage has the burden of proof to establish his contention: *Deadman v. Yantia*, 230 Ill. 243, 120 Am. St. Rep. 291. Parol evidence is admissible for this purpose, but it must be clear and convincing: *McElroy v. Allfree*, 131 Iowa, 112, 117 Am. St. Rep. 412; *Glass v. Hieronymus*, 125 Ala. 140, 82 Am. St. Rep. 225; *Dickson v. Stewart*, 71 Neb. 424, 115 Am. St. Rep. 596.

**ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY v. McELROY.**

[76 Kan. 271, 91 Pac. 785.]

RAILROADS—Persons on Track Between Train and Depot.— If a railroad company stops a passenger train on a sidetrack so that there are other tracks between the train and the depot platform, the entire space between the depot and the train must, with regard to people having business at the train, be regarded the same as if it constituted the platform. They, therefore, have a right to assume that they will be protected by the company, and they need not be on their guard against approaching trains. The ordinary rule of "look and listen" has no application to such a situation. (p. 135.)

RAILROADS—Licensee on Track.—A Boy sent by his father to deliver a package to a passenger on an expected train is rightfully on the premises of the railway company, and entitled to at least reasonable care while returning from the train over tracks intervening between the train and the station platform. (p. 136.)

RAILROADS—Running Trains Between Depot and Passenger Train.— Where a railroad company stops a passenger train on a sidetrack, leaving other tracks between it and the depot platform, it is negligence to run another train on these intervening tracks at a high rate of speed, without warning, while business is being transacted at the standing train, and the company is liable to one rightfully there who is injured by the moving train. (p. 137.)

William R. Smith, O. J. Wood and Alfred A. Scott, for the plaintiff in error.

C. C. Coleman and F. L. Williams, for the defendant in error.

272 GRAVES, J. Clarence McElroy, a boy about eleven years of age, was struck by a passing engine on the railroad track of the plaintiff in error at the station of Aurora, in Cloud county, and was injured so that his left foot had to be amputated. He commenced this action in the district court of Clay county May 3, 1905, and recovered a judgment of three thousand dollars. The railway company brings the case here for review.

At the station of Aurora the north-bound passenger train and the one going south pass each other. The north-bound train, as a rule, arrives first, and stops on a sidetrack, leaving the main track between it and the depot platform. Passengers leaving the train and those getting on are compelled to cross over the main track. If the train going south arrives before the north-bound train leaves, which it does ordinarily, no stop is made until reaching the depot platform. The

plaintiff, on the occasion in question, was sent by his father, who was engaged in business at that place, to deliver a small package of merchandise to a passenger on the north-bound train. The boy delivered the package to the passenger while the train was standing on the sidetrack, and before he got across the main track ²⁷³ on his return he was struck by the engine of the train going south, as it was approaching the platform. No warning by whistle, bell or otherwise was given to indicate the coming of the train from the north. The plaintiff did not look or listen for the incoming train or take any care to avoid danger therefrom.

Much has been said in argument concerning the degree of care due from the company to the plaintiff, and upon the question of plaintiff's contributory negligence. Many special questions were submitted to, and answered by, the jury for the purpose of developing these propositions. In our view of the case, however, it will be unnecessary to consider all of the questions presented. Where a railroad company finds it necessary or convenient in the transaction of its business to have a passenger train stop on a sidetrack, leaving one or more tracks between such train and the depot platform, that method may be adopted; but if it is, then, as between the company and other people, the entire space between the depot and the train must be regarded the same as if it all together constituted the platform.

One of the special questions presented to the jury in this case, and their answer thereto, reads:

“(29) Q. If you find that the defendant, the Atchison, Topeka and Santa Fe Railway Company, was negligent, then state fully, first, in what respect it was negligent, and, second, what agent or employé was guilty of such negligence. A. First, because it allowed the main track next to the station to be used as a platform to transfer passengers, baggage, mail and express from the north-bound passenger train, known as No. 307, to and from the station; that said company had no proper signals, alarms and safeguards at Aurora. Second, that the train crew of the south-bound train, No. 306, failed either to ring the bell or blow the whistle on approaching the station.”

Under this finding of fact it will be unnecessary to consider the strict legal relation existing between the plaintiff and the company, or to define the exact degree of diligence due from the company to the plaintiff. ²⁷⁴ It is conceded

that the plaintiff was rightfully where he received the injury, and that the company owed him at least reasonable and ordinary care. Under this conceded rule we think the case may be decided.

What constitutes ordinary care must always be determined from the circumstances of the situation being considered. In volume 1 of Thompson's Commentaries on the Law of Negligence, section 25, it is said: "The care, caution and diligence required by the law is always measured by the circumstances of the particular case, and the rule of ad-measurement is the greater the hazard the greater the care required."

The situation presented in this case shows that the railway company, when it ran the train going south into the station, was chargeable with notice that its patrons and other people were scattered over the space between the depot and the other train, engaged as people are on such occasions—removing baggage, hurrying on and off the train, giving and receiving parting and welcoming salutations—and were generally in a state of confusion, which would make them less liable to notice the approach of danger and less prepared to avoid it than under ordinary circumstances. It knew that the people so situated had a right to feel secure and safe from any danger on account of the negligent operation of trains in their midst, and would feel entirely free from any necessity for the exercise of care or caution. These and other conditions always present upon such occasions constitute the situation by which must be measured the degree of care with which a person of ordinary caution and prudence would run a passenger train among people thus engaged.

The conduct of the company in running its train at a high rate of speed, without warning of any kind, was culpable negligence. The plaintiff and others rightfully there were under no duty or obligation to anticipate and guard against negligence on the part of the railway company. They had the right to feel secure from injury on account of passing trains. They might rest ²⁷⁵ upon this feeling of security until warned or notified of danger. The ordinary rule of "look and listen" has no application to such a situation. When a railroad operates a train under such circumstances, it assumes the peril. These conclusions result from the application of the most obvious and familiar rules of human conduct: 2 Shearman & Redfield's Law of Negligence, 5th

ed., sec. 525; 1 Thompson's Commentaries on the Law of Negligence, secs. 25-31, 968 et seq.; 3 Thompson's Commentaries on the Law of Negligence, sec. 2705; Tubbs v. Michigan Cent. R. Co., 107 Mich. 108, 61 Am. St. Rep. 320, 64 N. W. 1061; Terry v. Jewett, 78 N. Y. 338; Brassell v. New York etc. R. R. Co., 84 N. Y. 241; Denver etc. R. R. Co. v. Hodgson, 18 Colo. 117, 31 Pac. 954.

The judgment is affirmed.

For Authorities upon the Question involved in the principal case, see Atlantic City R. R. Co. v. Goodin, 62 N. J. L. 394, 72 Am. St. Rep. 652; Tubbs v. Michigan Cent. R. R. Co., 107 Mich. 108, 61 Am. St. Rep. 320; Philadelphia etc. R. R. Co. v. Anderson, 72 Md. 519, 20 Am. St. Rep. 483; Warren v. Fitchburg R. R. Co., 8 Allen, 227, 85 Am. Dec. 700; Karr v. Milwaukee Light etc. Co., 132 Wis. 662, 122 Am. St. Rep. 1017.

REEVES v. BASCUE.

[76 Kan. 333, 91 Pac. 77.]

EXEMPTIONS.—A Traction Engine, and the Saws, Belts, Carrier and Other Appliances commonly used with it in sawing lumber, are tools and implements within the meaning of the exemption law. (pp. 138, 139.)

EXEMPTIONS.—A Mortgage on Exempt Property, given without the consent or signature of the mortgagor's wife, is without validity. (p. 139.)

Ryan & Phillips, for the plaintiff in error.

T. J. Karr, for the defendant in error.

³³³ JOHNSTON, C. J. This was an action brought by Reeves & Co. to recover possession of a traction engine and sawmill used in connection with it for the sawing of lumber. Bascue purchased a part of a thrashing outfit from plaintiff, and to secure payment of a portion of the purchase price executed a chattel mortgage on the machinery in controversy. He failed to make ³³⁴ one of the payments when it became due, and the plaintiff thereupon secured possession of the property under a writ of replevin.

The principal defense made by Bascue was that the chattel mortgage, under which the plaintiff claimed the right of possession, was void. The basis of this claim was that he was

a married man, the head of a family; that the property was exempt; and that as his wife did not join him in the execution of the chattel mortgage, it was void.

The trial resulted in a judgment in favor of the defendant for the possession of the property, or its value, placed at six hundred and fifty dollars, and also for three hundred and fifty-seven dollars and fifty cents as damages for the wrongful detention of the property.

The plaintiff complains, and contends that the engine and other appliances for sawing lumber constitute a manufacturing plant and cannot be classed as the necessary tools and implements of the defendant's business. His principal business, it appears, is sawing timber into lumber of various dimensions and forms. He did use the traction engine in thrashing for a brief time during the thrashing season, but the sawing of lumber appears to have been his principal occupation. Aside from the traction engine, which is portable, the saws, carrier, belts, etc., are said to be such as can be moved in a farmer's wagon. Were they exempt? The statute provides that there shall be exempt to a resident of the state who is the head of a family "the necessary tools and implements of any mechanic, miner, or other person, used and kept in stock for the purpose of carrying on his trade or business, and in addition thereto, stock in trade not exceeding four hundred dollars in value": Gen. Stats. 1901, sec. 3018, subd. 8.

It will be observed that the fact that the tools and implements are large and heavy does not take them out of the operation of the statute. Nor is there any limit placed on the number, character or value of the tools and implements protected by the exemption. It is enough that they belong to the mechanic, miner or ³³⁵ other person, that they are necessary, and are personally used for the purpose of carrying on his trade or business. If he uses the tools and implements in person and performs a considerable portion of the work himself, it would seem to be immaterial whether he is called a manufacturer or a mechanic. A liberal interpretation is given to statutes of exemption, and following the one already placed upon this provision in *Jackman v. Lamberton*, 71 Kan. 138, 80 Pac. 55, the appliances in controversy must be held to be exempt. In that case a traction engine and a separator, belts and other parts of a thrashing outfit were held to be implements within the meaning of the ex-

emption statute, and it was further held that a chattel mortgage given by the owner of an exempt outfit in which his wife did not join was invalid.

In another case it was held that a printing plant used by the head of a family for printing a newspaper, a business to which he devoted the greater part of his time, some of the work being done by himself but the larger part by his employes, constituted tools and implements within the meaning of the statute and was exempt: *Bliss v. Vedder*, 34 Kan. 57, 55 Am. Rep. 237, 7 Pac. 559.

The engine and sawmill being exempt, the mortgage given thereon, without the consent or signature of Bascue's wife, is without validity, and gave Reeves & Co. no right of possession: Gen. Stats. 1901, sec. 4255; *Skinner v. First Nat. Bank*, 63 Kan. 842, 66 Pac. 997; *Alexander v. Logan*, 65 Kan. 505, 70 Pac. 339; *Jackman v. Lambertson*, 71 Kan. 138, 80 Pac. 55.

The objection to striking out a portion of the plaintiff's reply is without merit, and we find nothing substantial in the objections made to the rulings on the admission of testimony. The defendant asked for damages resulting from the wrongful taking and detention of the property, and was entitled to show and recover the usable value of the property from the time of the taking to the date of judgment: *Yandle v. 336 Kingsbury*, 17 Kan. 195, 22 Am. Rep. 282; *Werner v. Graley*, 54 Kan. 383, 38 Pac. 482; *Stockton Bank v. Showers*, 65 Kan. 431, 70 Pac. 332. He was also entitled to recover for the injury to the property while it was unlawfully detained.

There was sufficient proof to sustain the findings of the court, and its judgment is affirmed.

EXEMPTION OF TOOLS AND IMPLEMENTS.

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I. General Rules of Exemption.

a. Necessity of Tools to Debtor.—In order to entitle a debtor to claim a tool or implement exempt, he must show that the same is necessary in plying his trade or carrying on his business. Thus a saloon-keeper cannot claim the exemption of a pool table which has no necessary or proper connection with the saloon business: *Googen v. Phillips*, 49 Mich. 7, 12 N. W. 889. Neither can a cigar-maker claim a watch and chain: *Rothschild v. Boelter*, 18 Minn. 361; nor a hotel-keeper claim a grain drill: *Reed v. Cooper*, 30 Kan. 574, 1 Pac. 822. The exemption is not restricted, however, to such tools or implements as are absolutely necessary; it extends to such as are reasonably necessary and advantageous in carrying on his work: *Bequillard v. Bartlett*, 19 Kan. 382, 27 Am. Rep. 120; *Howard v. Williams*, 19 Mass. (2 Pick.) 80; *Kenyon v. Baker*, 16 Mich. 373, 97 Am. Dec. 158; *Healy v. Bateman*, 2 R. I. 454, 60 Am. Dec. 94. Thus an insurance agent or an abstractor of titles may claim the exemption of an iron safe in which to keep his papers, as a tool or apparatus: *Davidson v. Sechrist*, 28 Kan. 324; *Betz v. Maier*, 12 Tex. Civ. App. 219, 33 S. W. 710; and a jeweler may claim his safe exempt as the implement of an artisan: *In re McManus*, 87 Cal. 292, 22 Am. St. Rep. 250, 25 Pac. 413, 10 L. R. A. 567.

b. Use of Tools by Debtor.

1. Necessity of Keeping Them for Use.—It is another general rule that if a debtor would claim his tools or implements exempt, he must keep them for the purpose of carrying on his trade, and be engaged or about to engage in his occupation: *Prosser v. Hartley*, 35 Minn. 340, 29 N. W. 156. Tools kept for any other than actual use in his occupation are not exempt as "tools of his occupation": *Norris*

v. Hoitt, 18 N. H. 196; Bond v. Tucker, 65 N. H. 165, 18 Atl. 653. It is not necessary, however, that he should actually be using them at the time of the levy if he intends them for use when he resumes work: Hickman v. Cruise, 72 Iowa, 528, 2 Am. St. Rep. 256, 34 N. W. 316; Fields v. Moul, 15 Abb. Pr. 6. Where a debtor temporarily suspends the exercise of his trade he does not lose his right to claim his tools and implements exempt; but if he abandons his occupation, or absconds, leaving the state for parts unknown, his exemption ceases: Cable v. Hoolihan, 98 Minn. 143, 116 Am. St. Rep. 348, and note, 107 N. W. 967.

2. Necessity of Using Them Personally.—It has been suggested that only those tools can be claimed exempt which the debtor uses personally: Abercrombie v. Alderson, 9 Ala. 981. The better rule, however, is that the debtor may be entitled to an exemption of his tools when used by his employés or apprentices: Daniels v. Hayward, 5 Allen, 43, 81 Am. Dec. 731. "The exemption is not limited merely to the tools used by the tradesman with his own hands, but comprises such, in character and amount, as are necessary to enable him to prosecute his appropriate business in a convenient and usual manner, and the only rule by which it can be restricted is that of good sense and discretion in reference to the circumstances of each particular case. It would be too narrow a construction of a humane and beneficial statute to deny to tradesmen, whose occupation can hardly be prosecuted at all, much less to any profitable end, without the aid of assistants, as journeymen and apprentices, the necessary means of their employment": Howard v. Williams, 2 Pick. 80; In re Peterson, 95 Fed. 417. A husband cannot claim an exemption of his wife's tools or implements: Smith v. Rogers, 16 Ga. 479.

c. Size and Character of Tools.

1. Simple Hand Tools.—The earlier authorities were inclined to limit the word "tools," as employed in exemption statutes, to simple tools worked by hand: Seeley v. Gwillim, 40 Conn. 106; Batchelder v. Shapleigh, 10 Me. 135, 25 Am. Dec. 213; Henry v. Sheldon, 35 Vt. 427, 82 Am. Dec. 644. It may be conceded that the machinery of large manufacturing plants cannot be regarded as "tools": Daniels v. Hayward, 5 Allen, 43, 81 Am. Dec. 731; but some courts have gone to the extreme of limiting the term to small machines operated by hand or foot power: Knox v. Chadbourne, 28 Me. 160, 48 Am. Dec. 487; Kilburn v. Demming, 2 Vt. 404, 21 Am. Dec. 543. Other authorities, however, take a more liberal view and hold simple machinery exempt as tools or implements, and this is the more reasonable rule, especially in view of the tendency in modern times to displace simple tools with more complicated machinery: In re Robb, 99 Cal. 202, 37 Am. St. Rep. 48, 33 Pac. 890; Fish v. Street, 27 Kan. 270; McDowell v. Shotwell, 2 Whart. 26.

2. Heavy and Ponderous Machinery.—A threshing separator, traction-engine, belts and all parts necessary to constitute a threshing-machine, kept by the owner for the purpose of carrying on his business of threshing, constitutes an "implement": *Jackman v. Lambertson*, 71 Kan. 138, 80 Pac. 55. A statute exempting the farming utensils and implements of husbandry of the judgment debtor entitles him to retain as exempt a threshing outfit necessary to enable him to carry on his farming operations, though he also uses it in threshing for others: *Spence v. Smith*, 121 Cal. 536, 66 Am. St. Rep. 62, 53 Pac. 653; and such a state entitles a debtor to hold exempt a combined harvester: *Estate of Klemp*, 119 Cal. 41, 63 Am. St. Rep. 69, 50 Pac. 1062, 39 L. R. A. 340. A portable engine and boiler, with saw attachments, which one uses to make a livelihood in carrying on his business as lumberman, are "implements" within the exemption law: *Eckman v. Poor*, 38 Colo. 200, 87 Pac. 1088; See, too, the decision of the supreme court of Kansas in the principal case.

II. Exemption of Farming Implements.

a. In General.—Farming implements, with certain limitations as to value and number, are generally exempt by statute from attachment and execution; and where a person engages in diversified farming, his exemption is not restricted to such implements as he may use in some one of the separate branches: *Estate of Slade*, 122 Cal. 434, 55 Pac. 158. However, the implements of husbandry which are exempt are ordinarily those that are used by the farmer in conducting his own farming operations; such implements as he keeps chiefly for renting or hiring out are usually not exempt. Hence, a well-boring apparatus and derrick, used for hire and only occasionally used on the farm, are not embraced under a statute exempting all instruments of husbandry used on the homestead: *Nelson v. Fightmaster*, 4 Okl. 38, 44 Pac. 213; and an expensive threshing outfit, consisting of a threshing engine, water-tanks, thresher, derrick and forks, a seed-cleaner, feeding machine, feeding rack, and cook-house, owned in common by several farmers, used by them to a limited extent on their own lands, but principally in doing work for others for hire, is not exempt: *Estate of Baldwin*, 71 Cal. 74, 12 Pac. 44. It is not necessary, however, that the implements shall be used exclusively on the premises of the debtor. A threshing outfit, necessary for carrying on a large farm, is exempt from execution, notwithstanding the owner customarily uses it to thresh the crops of others after having threshed his own: *Spence v. Smith*, 121 Cal. 536, 66 Am. St. Rep. 62, 53 Pac. 653. But it has been affirmed that a threshing-machine is not exempt as a "working tool": *Ford v. Johnson*, 34 Barb. 364.

A reaper and mower is exempt as a farming utensil: *Voorhees v. Patterson*, 20 Kan. 355; *Humphrey v. Taylor*, 45 Wis. 251, 30 Am. Rep. 738. So are a plow, harrows, and the like: *Wilkinson v. Alley*,

45 N. H. 551; and a shovel, pickax, dungfork and hoe: *Pierce v. Gray*, 73 Mass. (7 Gray) 67; and a grindstone: *White v. Capron*, 52 Vt. 634. A logging outfit, which is necessary in improving a farm, may be exempt: *State v. Creech*, 18 Wash. 186, 51 Pac. 363. A whip is not exempt, in the absence of special circumstances: *Savage v. Davis*, 134 Mass. 401. A wagon may be claimed exempt as a farming tool: *Hall v. Nelson*, 59 N. H. 573. A cream separator is a tool or instrument of a farmer: *In re Hemstreet*, 139 Fed. 958; and vats, presses, knives, and the like, used by a woman in making cheese, are exempt as tools and implements: *Fish v. Street*, 27 Kan. 270.

b. **In Case of Suspension of Occupation.**—A person whose business is farming may be within the exemption laws, although he does not own a farm nor have one leased, and is not doing any specific thing as a farmer, on the particular day on which execution is levied upon his property: *Hickman v. Cruise*, 72 Iowa, 528, 2 Am. St. Rep. 256, 34 N. W. 316. The fact that a farmer is temporarily residing in town, has sought other employment while there, and has offered part of his farming implements for sale, does not deprive him of his exemptions as a farmer if he intends to resume farming: *Pease v. Price*, 101 Iowa, 57, 69 N. W. 1120.

III. Exemption of Vehicles and Harness.

a. **Wagons and Buggies Generally.**—If a wagon is a tool of debtor's occupation, it is exempt from levy: *Johnson v. Lang*, 71 N. H. 251, 93 Am. St. Rep. 509, 51 Atl. 908. The word "wagon," as used in exemption statutes is given a liberal interpretation and made to embrace many vehicles that do not come within the strict definition of the term. It should, to quote from *Rodgers v. Ferguson*, 32 Tex. 533, "be construed in its popular and most general sense, and should include all four-wheel vehicles, whether covered or placed on springs, and for whatever use they may be employed, whether for the transportation of property or persons. The intention of the legislature was to protect all laboring citizens in the pursuit of their occupations, and a correct construction of the law would seem to protect the drayman and cartman in the possession of their vehicles, although they do not come within the strict definition of the word 'wagon.' In the case at bar, the evidence is clear that the vehicle in controversy was used by its owner sometimes as a hack for the transportation of persons, and sometimes as a wagon for the transportation of wood, cotton and corn; and whether used for one purpose or the other, it was evidently the intention of the legislature that it should be exempt from forced sale."

The term "wagon" has been held to include a light two-seated carriage used by the debtor in riding to and from his work: *Kimball v. Jones*, 41 Minn. 318, 43 N. W. 74. It has also been held to include a buggy: *Allen v. Coates*, 29 Minn. 46, 11 N. W. 132; *Nichols*

v. Clairborne, 39 Tex. 363. In *Gordon v. Shields*, 7 Kan. 320, the exemption of a buggy, designed for the transportation of persons only, was denied. Said Justice Brewer: "We think the term 'wagon' a generic one, including as well vehicles for the carriage of persons as those for the transportation of commodities, and broad enough properly to embrace such a vehicle as the buggy in controversy. But we are constrained to think, after a careful examination of the statute, as well as the decisions of other courts, that the term 'wagon' is here used in a limited sense. The statute reads: 'also one wagon, cart or dray; two plows, one drag, and other farming utensils.' . . . Only those wagons which are adapted to farm purposes are exempt. Now a vehicle which is, in the language of the court below, adapted and designed for carrying persons only, cannot in any true sense be called a 'farming utensil'—is not an implement of husbandry."

A half interest in a two-horse wagon is not exempt as a "one-horse wagon": *Kirksey v. Rowe*, 114 Ga. 893, 88 Am. St. Rep. 65, 40 S. E. 990.

It has been decided that the exemption of a horse embraces those things essential to his use, such as a bridle, saddle, and so forth: *Cobbs v. Coleman*, 14 Tex. 449; *Dearborn v. Phillips*, 21 Tex. 449. On the other hand, it has been held that the exemption of beasts of the plow does not embrace a wagon or harness: *Somers v. Emerson*, 58 N. H. 48; *Carty v. Drew*, 46 Vt. 346.

b. Wagons in Repair Shop.—The right of a debtor to claim a wagon as exempt is not affected by the fact that at the time of the levy the wagon is in a shop awaiting repairs and in the meantime he is using a borrowed wagon: *Wolf v. Farley*, 16 N. Y. Supp. 168.

c. Omnibus, Dray or Hearse.—A hearse is a wagon within the meaning of the exemption statute: *Spikes v. Burgess*, 65 Wis. 428, 27 N. W. 184. So is a dray: *Cone v. Lewis*, 64 Tex. 331, 53 Am. Rep. 767. But it has been thought that a hackney coach is not: *Quigley v. Gorham*, 5 Cal. 418, 63 Am. Dec. 139; the court in this case define "wagon" as a common vehicle for the transportation of goods of all descriptions, and decline to extend it to vehicles intended for passengers. It has been affirmed, however, that an omnibus owned by a hotel-keeper, and used by him in his business, is exempt from execution under a statute exempting the "necessary tools and instruments of any mechanic, miner, or other person, used and kept for the purposes of carrying on his trade or business": *White v. Gemeny*, 47 Kan. 741, 27 Am. St. Rep. 320, 28 Pac. 1011.

d. Carts or Two-wheeled Vehicles.—While a "cart" ordinarily means a two-wheeled vehicle, still under exemption statutes it may be construed to embrace a four-wheeled vehicle: *Favers v. Glass*, 22 Ala. 621, 58 Am. Dec. 272. Under a statute exempting "one ox cart," an ox wagon may be held exempt; and a "two-horse wagon" includes such

wagon though drawn by oxen: *Webb v. Brandon*, 51 Tenn. (4 Heisk.) 285. The harness and cart used by the owner of a stallion as a means of conveyance when he is employed therewith are exempt from execution as the property of a laborer: *Krebs v. Nicholson*, 118 Iowa, 134, 96 Am. St. Rep. 370, 91 N. W. 923. But the horses and carts of one engaged in carting have been denied exemption under a statute exempting implements of a debtor's trade: *Enscoe v. Dunn*, 44 Conn. 93, 26 Am. Rep. 430.

e. **Bicycles.**—Under a statute declaring that a debtor may hold exempt from execution a wagon or other vehicle, with the proper harness or tackle, by the use of which he habitually earns his living, a bicycle may be exempt: *Roberts v. Parke*, 117 Iowa, 389, 94 Am. St. Rep. 316, 90 N. W. 744, 57 L. R. A. 764. It has been decided, however, that a bicycle is not a "wagon," within the meaning of the exemption law: *Shadewald v. Phillips*, 72 Minn. 520, 75 N. W. 717; and also that it is not a "tool or apparatus" belonging to the profession of an architect: *Smith v. Horton*, 19 Tex. Civ. App. 28, 46 S. W. 401.

f. **Vehicles Used by Particular Persons.**—The sled or wagon of a teamster is exempt from execution, but a wagon used only for convenience or pleasure is not: *Parshley v. Green*, 58 N. H. 271; *Rice v. Wadsworth*, 59 N. H. 100. The wagon, buggy, or sleigh used by a physician in his practice is exempt: *Farner v. Turner*, 1 Iowa, 53; *Richards v. Hubbard*, 59 N. H. 158, 47 Am. Rep. 188; *Van Buren v. Loper*, 29 Barb. 388; *Eastman v. Caswell*, 8 How. Pr. 75; *Knapp v. Bartlett*, 23 Wis. 68, 99 Am. Dec. 109. And a showman who uses a wagon to transport himself and views to illustrate his lectures about the country may claim the wagon as exempt: *Hall v. Nelson*, 59 N. H. 573. The harness and buggy of an insurance agent, used by him in carrying on his business, are exempt as "tools and implements": *Wilhite v. Williams*, 41 Kan. 288, 13 Am. St. Rep. 281, 21 Pac. 256. But in Texas a single man who is a land and insurance agent cannot claim his harness and buggy as exempt as tools or apparatus belonging to his trade or profession: *Cates v. McClure*, 27 Tex. Civ. App. 459, 66 S. W. 224. In Colorado, however, the horse, wagon, and harness belonging to a single man engaged in assaying and working ores are exempt: *Watson v. Ledere*, 11 Colo. 577, 7 Am. St. Rep. 263, 19 Pac. 602, 1 L. R. A. 854. A wagon with patent couplings attached, used by the owner in selling patent couplings, was denied exemption in *Gibson v. Gibbs*, 75 Mass. (9 Gray) 62; and a peddler's wagon was held not exempt as "cart or truck-wagon" in *Smith v. Chase*, 71 Me. 164.

g. **Harness.**—While a harness used by a debtor in his occupation may be exempt from execution (*Watson v. Lederer*, 11 Colo. 577, 7 Am. St. Rep. 263, 19 Pac. 602, 1 L. R. A. 854; *Wilhite v. Williams*, 41 Kan. 288, 13 Am. St. Rep. 281, 21 Pac. 256), a set of harness does

not fall within the words "common tools of trade," as used in an exemption statute: *Kirksey v. Rowe*, 114 Ga. 893, 88 Am. St. Rep. 65, 40 S. E. 990. In *Carty v. Drew*, 46 Vt. 346, a butcher's harness was denied exemption because not named in the statute.

IV. Exemption of Other Tools and Implements.

a. **Implements of Professional Men.**—The statutes of many states expressly provide that the library and instruments of a professional man are exempt; and in order to entitle him to claim this exemption, it is not necessary that he should devote his time exclusively to the practice of his profession: *Perkins v. Wisner*, 9 Iowa, 320; *United States Equitable etc. Society v. Goode*, 101 Iowa, 160, 63 Am. St. Rep. 378, 70 N. W. 113, 35 L. R. A. 690; *State v. St. Paul*, 111 La. 71, 35 South. 389; *Sutton v. Facey*, 1 Mich. 243; *Brown v. Hoffmeister*, 71 Mo. 411; *Roberts v. Moody*, 30 Neb. 683, 27 Am. St. Rep. 426, 46 N. W. 1013; *Robinson's Case*, 3 Abb. Pr. 467; *Fowler v. Gilmore*, 30 Tex. 432. It has been held that the office furniture of an attorney is exempt from execution under a statute which exempts the tools and implements of professional men: *Abraham v. Davenport*, 73 Iowa, 111, 5 Am. St. Rep. 665, 34 N. W. 767. But a dentist's chair is not exempt as a "common tool of trade," nor as a chair suited to the "use of the family": *Burt v. Stocks Coal Co.*, 119 Ga. 629, 100 Am. St. Rep. 203, 46 S. E. 828; neither is an attorney's library exempt as "common tools" or "working tools" of the debtor's trade: *Lenoir v. Weeks*, 20 Ga. 596; *Church, Petitioner*, 15 R. I. 245, 2 Atl. 761. A dentist's instruments have been held exempt as "mechanical tools": *Maxon v. Perrott*, 17 Mich. 832, 97 Am. Dec. 191; but in *Whitcomb v. Reid*, 31 Miss. 567, 66 Am. Dec. 579, it is decided that a dentist is not a "mechanic," and does not carry on a "trade," within the meaning of a statute exempting from execution the "tools of a mechanic necessary for carrying on his trade."

b. **Implements of Undertakers.**—The desk, safe, and candelabra owned by undertaker and used by him in his business are not within the terms "professional instruments, furniture and library" as these terms are employed in an exemption statute, for his calling is a business rather than a profession: *O'Reilly v. Erlanger*, 95 N. Y. Supp. 760, 108 App. Div. 318. But under a statute providing that "all tools or other mechanical instruments or appliances moved or worked by hand, necessary to the practice of any trade or profession, and used in the practice thereof, shall be exempt from execution," a bankrupt who is an undertaker may hold exempt such tools and appliances as are necessary in carrying on his occupation: *Steiner v. Marshall*, 140 Fed. 710, 72 C. C. A. 103.

c. **Safes of Abstractor, Insurance Agent or Jeweler.**—A jeweler may claim his safe in which he keeps his goods exempt as the implement of an artisan: *In re McManns*, 87 Cal. 292, 22 Am. St. Rep.

250, 25 Pac. 413, 10 L. R. A. 567. And an insurance agent may claim the safe in which he keeps his papers as a tool or apparatus: *Betz v. Maier*, 12 Tex. Civ. App. 219, 33 S. W. 710. A safe, a set of abstracts, a cabinet and a table used by an abstracter in his business of making and supplying abstracts of title to persons desiring them are exempt. The trade or business is that of an abstracter of titles. The safe and other articles named are means whereby the abstracter carries on that business through which he procures a livelihood: *Davidson v. Sechrist*, 28 Kan. 324.

d. **A Seat in a Stock Exchange** cannot be claimed exempt as working tools of the member: *Leggett v. Waller*, 39 Misc. Rep. 308, 80 N. Y. Supp. 13.

e. **Musical Instruments.**—The piano of a music teacher may be claimed as exempt: *Amend v. Murphy*, 69 Ill. 337; *Tanner v. Billings*, 18 Wis. 163, 86 Am. Dec. 755, so may the violin and bow of a musician: *Goodard v. Chaffee*, 2 Allen, 395, 79 Am. Dec. 796. And a debtor who is both a musician and a tinner, and who supports himself by playing the cornet and working at his trade, is entitled to exemption from the attachment of his cornet: *Baker v. Willis*, 123 Mass. 194, 25 Am. Rep. 61.

f. **Sewing-machines and Tools of Tailor.**—A sewing-machine necessary to carrying on the trade of the owner is exempt from execution: *Dowling v. Clark*, 85 Mass. (3 Allen) 570; *Rayner v. Whicher*, 88 Mass. (6 Allen) 292. General exemption of one sewing-machine has no reference to the occupation of the owner, and in no way qualifies or restricts a specific exemption of the tools and instruments of a person used in carrying on his trade; a tailor who necessarily uses two sewing-machines in carrying on his trade is entitled to claim them both exempt: *Cronfeldt v. Arrol*, 50 Minn. 327, 36 Am. St. Rep. 648, 52 N. W. 857. And under a statute exempting the tools and instruments of a mechanic "used to carry on his trade for the support of himself and family," the tools and instruments of a tailor are exempt, although he is neither a householder nor the head of a family, where such an intention appears from the entire exemption law: *Geiger v. Kobilka*, 26 Wash. 171, 90 Am. St. Rep. 733, 66 Pac. 423.

g. **Implements of Milliner.**—The tools, implements and fixtures of a milliner, necessary for carrying on her business, are exempt from execution; and under this head may be included a clock, stove, screen, pitcher, and table-cover: *Woods v. Keyes*, 96 Mass. (14 Allen) 236, 92 Am. Dec. 765.

h. **Tools of Barber.**—A barber's chair and foot-rest, used by him in his business, are exempt from attachment as a tool: *Allen v. Thompson*, 45 Vt. 472. A barber's chair and mirror are exempt as tools of a mechanic: *Terry v. McDaniel*, 103 Tenn. 415, 53 S. W. 732, 46 L. R. A. 459. And two barber chairs, and a mirror in front

of, and a table accompanying each, used by a barber who keeps another barber to assist him, are held exempt in *Fore v. Cooper* (Tex. Civ. App.), 34 S. W. 341.

i. Implements of Guide or Fisherman.—The net and boat of a fisherman, though large enough to require two men to operate them, have been held exempt: *Sammis v. Smith*, 1 Thomp. & C. 444. See, too, *Enscoe v. Dunn*, 44 Conn. 93, 26 Am. Rep. 430. A professional guide for hunters and fishermen, who is registered under the laws of Maine, is entitled to claim an exemption of his canoe as a tool of his trade or occupation: *In re Mullen*, 140 Fed. 206.

j. The Apparatus of a Photographer, such as his lens, is exempt from execution as an implement of trade: *Davidson v. Hannan*, 67 Conn. 312, 52 Am. St. Rep. 282, 34 Atl. 1050, 34 L. R. A. 718. Yet it has been affirmed that a photographer is not a "mechanic" within the exemption statute: *Story v. Walker*, 11 Lea, 515, 47 Am. Rep. 305. The building in which he carries on his business, though personal property, is not exempt: *Holden v. Stranahan*, 48 Iowa, 70; and his apparatus which he has ceased to use for taking likenesses, and is using only to teach the art to a prospective purchaser, is not exempt as a "tool of his occupation": *Norris v. Hoitt*, 18 N. H. 196.

k. Apparatus for Printing, such as a printing-press, cases and types, may be claimed as exempt as "tools," unless they are such in number or magnitude that they are more properly classed as machinery or apparatus for manufacturing: *Sallee v. Waters*, 17 Ala. 482; *Patten v. Smith*, 4 Conn. 450, 10 Am. Dec. 166; *Prather v. Bobo*, 15 La. Ann. 524. Compare *Spooner v. Fletcher*, 3 Vt. 133, 21 Am. Dec. 579. In *Green v. Raymond*, 58 Tex. 80, 44 Am. Rep. 601, it is adjudged that a printing-press, types and cases are exempt from forced sale as "tools and apparatus of trade or profession." It has also been decided that a printer's printing-press is exempt as an implement of trade, but that a printer who is also a money-lending agent cannot exempt his press, unless he derives his principal support from printing: *Jenkins v. McNall*, 27 Kan. 532, 41 Am. Rep. 422.

A printing-press and printing materials, used in printing and publishing a weekly newspaper from which the owner derives his principal support, personally arranging the matter and forms therefor, and performing such other work as is usually performed by the foreman of a weekly newspaper, are exempt from execution, although he is not a practical printer and most of the work is done by employes, and he is a partner in two other kinds of business and also a justice of the peace: *Bliss v. Vedder*, 34 Kan. 57, 55 Am. Rep. 237, 7 Pac. 599.

Where the statute exempts only such tools or implements of a mechanic or artisan as are necessary to carry on his trade, the question whether the manager of a printing establishment, consisting of

four printing-presses, a miscellaneous assortment of type, a paper-cutting machine, and the general paraphernalia of a printing office, costing some three or four thousand dollars, can be claimed by the owner as exempt because the whole plant is necessary to carry on his trade is a question for the jury: *In re Mitchell*, 102 Cal. 524, 36 Pac. 840.

l. A Bankrupt Baker may have set apart to him, under the bankruptcy act, the implements necessarily used by him and his journeyman assistants in carrying on a bakery, when the state statute exempts from execution the "tools or implements of a mechanic or artisan necessary to carry on his trade": *In re Petersen*, 95 Fed. 417.

m. The Implements Used by a Restaurateur in following his business, such as tables, silverware, lines, and the like, are within a statute which exempts the tools and apparatus belonging to any trade or profession. Hence, the proceeds of an insurance policy on these articles is not subject to garnishment in the hands of the insurance company: *Geise v. Pennsylvania* (Tex. Civ. App.), 107 S. W. 555.

n. A Bowling-alley, Including the Pins and balls used in the game of bowling, is not exempt from execution as the tools and implements of the trade or business of the keeper of the alley: *Williams v. Vincent*, 70 Kan. 595, 109 Am. St. Rep. 469, 79 Pac. 121.

HARRIS v. AIKEN.

[76 Kan. 516, 92 Pac. 537.]

VOLUNTARY ASSOCIATION—Expulsion of Member.—Notwithstanding property rights are involved, a voluntary association may expel an offending member, if he being charged with conduct for which his expulsion is a proper penalty if he is guilty, he has reasonable notice of the charge and opportunity to defend himself; is given a fair hearing; a decision is rendered against him in good faith; and he is not denied the benefit of any special rule that may exist relating to the matter. (p. 153.)

VOLUNTARY ASSOCIATION—Expulsion of Member.—Written Notice of proceedings to expel a member of an association is not necessary, so long as he actually appears before the committee conducting the investigation. (pp. 153, 154.)

VOLUNTARY ASSOCIATION—Expulsion of Member.—An Accusation in Writing is not essential before a member is expelled from an association, if he is given full and explicit information of the wrongdoing charged against him. (p. 154.)

VOLUNTARY ASSOCIATION—Expulsion of Member.—Informal Proceedings.—A hearing for the expulsion of a member from an association need not be conducted with the formalities attendant

upon court proceedings, nor need the ordinary rules of evidence be observed thereat. (p. 154.)

VOLUNTARY ASSOCIATION—Expulsion of Member.—The fact that three members of an association, in pursuance of their duty, start an investigation looking toward the expulsion of another member, does not disqualify them from sitting in judgment upon him when his hearing is had. (p. 154.)

VOLUNTARY ASSOCIATION.—The Expulsion of a Member of an association by a committee is valid, at least when afterward ratified by the association. (p. 154.)

John A. Hale, for the plaintiff in error.

Keplinger & Trickett and Ball & Ryland, for the defendant in error.

⁵¹⁷ MASON, J. W. P. Harris brought a suit to enjoin the Traders Livestock Exchange from giving effect to an order expelling him from membership in that body. Having been denied relief, he prosecutes error. The case was heard before a referee, who made full findings of fact, which are accepted by the parties. The question presented is whether the facts so found show that Harris was lawfully expelled. The exchange is not incorporated, and is not an organization for profit, but it owns some personal property, and its members enjoy certain trading privileges at the Kansas City stockyards, so that a membership has a value of about seven hundred and fifty dollars. The association is based upon a code of rules, or by-laws, vesting the general management of its affairs in an executive committee of nine members, which also constitutes a committee on arbitration, whose duties are thus defined: "It shall be the duty of the committee of arbitration to investigate all grievances of the members of this exchange relative to business at the stockyards, and adopt such measures as they deem best, to amend the same, and their decisions shall be final."

Nowhere else in the by-laws is there any reference to the discipline of members, excepting for the following rule:

"All members convicted of any violation of any of ⁵¹⁸ these rules shall be subject to fine, suspension or expulsion, as recommended by the executive board."

The proceedings against Harris originated in information which came to members of the executive board that a conspiracy had existed between several weighmasters employed by the Kansas City Stockyards Company and certain members of the exchange in pursuance of which false weights were

registered in favor of the latter. Three members of the committee began an investigation, in the course of which a weighmaster, one Bruce Reichelderfer, made a statement to them that he had favored Harris by returning false weights in transactions to which the latter was a party, and exhibited memoranda purporting to show this; he did not, however, profess to have personal knowledge that Harris was cognizant of the fraud. The further proceedings are thus recited in the findings:

“At this point Messrs. Downs, Farrar and Orvis reported the above information to the full executive committee of nine members, and thereupon the plaintiff was notified verbally, by a messenger sent for that purpose, that the executive committee desired to see him. The plaintiff went before the full committee, at which time and place Mr. Farrar, who was presiding, stated in detail the charges made against the plaintiff in the statement of the weighmaster of scale No. 2, giving the plaintiff the date of each transaction, the number of cattle bought or sold on each date, the true weight, the false weight, and the amount of money paid to the weighmaster for his criminal services.

“The plaintiff promptly denied having either directly or indirectly procured any false weight to be made, and denied all knowledge of any such transaction.

“The chairman of the executive committee then and there, in the presence of the full committee, informed the plaintiff that the committee were endeavoring to ascertain the truth or falsity of the statement made by Bruce Reichelderfer, for the purpose of vindicating the innocent and punishing the guilty, and asked the plaintiff to produce his books of accounts, in order that the ⁵¹⁹ board might see whether his books threw any light upon the matter under investigation.

“The plaintiff at first refused to produce his books, then said he would consider the matter, and in the course of a few days produced the books of the firm of P. H. Harris & Co., of which the plaintiff was a member. These books recorded the purchases and sales set forth in Reichelderfer's memoranda and corresponded in all particulars with the memoranda, except that there was nothing to indicate that false weights entered into any of the transactions.

“The books of P. H. Harris & Co. showed an item of expense of eighty-five dollars, paid during the first week of May, 1904, the period during which the false weighing

was said to have been done. The committee insisted upon an itemized statement of this expense and an explanation of it, but the plaintiff was unable to itemize this charge and to explain it to the satisfaction of the committee. The plaintiff was asked by the committee if he had any further evidence which he desired to offer, to which inquiry he answered that he had not.

“One or more members of the exchange implicated by the statement of Bruce Reichelderfer confessed the truth of the charge made against the confessing member, but none of these persons claimed to have any knowledge of W. P. Harris’ connection with any such transaction.”

Upon this evidence the executive board found Harris guilty of participating in a conspiracy to obtain false weights, ordered his expulsion, and notified him that he had been expelled. Afterward this action was reported to the exchange at a regular meeting, and a resolution was adopted approving and commending it.

We perceive no substantial grounds for questioning the regularity and sufficiency of the proceedings against Harris. The authorities recognize differences in the rules governing the expulsion by an association of one of its members depending upon its character. In the case of a corporation organized for profit the offense upon which such action is based must be one prohibited by the written laws of the body, and perhaps a more rigid adherence to the prescribed method of procedure ⁵²⁰ is required than is essential where the organization is of a mere social character: See 3 Am. & Eng. Ency. of Law, 1072, 1073. This Traders Livestock Exchange, however, in spite of the fact that a membership therein has a pecuniary value, falls into the latter class rather than into the former, for its purpose is stated as being “to promote and protect all interests connected with the buying and selling of livestock at the Kansas City stockyards, and to cultivate courteous and manly conduct [on the part of the members] toward each other, and give dignity and responsibility to yard traders.”

Moreover, nothing really necessary to effect a valid expulsion in any case appears to have been wanting here. We do not understand that it is even claimed that the charge against Harris was not such as justified expelling him if it was properly substantiated. Although the language of the by-laws already quoted is very general, it seems to warrant all that

was done and the manner of doing it. Notwithstanding property rights may be involved, an association may sever relations with an offending member upon these conditions: That he is charged with conduct for which expulsion is a proper penalty if he be guilty; that he has reasonable notice of the charge and opportunity to defend himself against it; that he is given a fair hearing; that a decision is rendered against him in good faith; and that he is not denied the benefit of any special rule that may exist relating to the matter. All these conditions seem to be met here.

The objections urged by the plaintiff are: That he was not given a written notice of the proceedings against him; that he was not furnished with a written copy of the charge; that the action of the committee which conducted the investigation was influenced by information obtained from persons who did not appear at the hearing and whom he had no opportunity to cross-examine; that three members of the committee were the persons who began the investigation and ⁵²¹ whose attitude was that of prosecutors rather than triers; that the order of expulsion was made by the committee and not by the exchange itself. Of these in order it may be said: Harris appeared before the committee and it was therefore immaterial what kind of a notice he had or whether he had any: *Moore v. National Council*, 65 Kan. 452, 70 Pac. 352. He was given explicit and full information as to the precise character of the wrongdoing alleged against him, and his complaint of the want of a written accusation is wholly without merit—in no possible way could his substantial rights have been affected by such omission. It was not at all necessary that the hearing before the committee should have been conducted with the formalities attendant upon court proceedings or that the ordinary rules of evidence should have been enforced: 4 Cyc. 303. Harris was sent for to give an account of himself in consequence of hearsay information—allegations made by persons who did not profess to have knowledge at first hand of his complicity in the conspiracy, and whose testimony on that account would not have been competent in court, and the cross-examination of whom could consequently not have been of vital importance. He was not denied the right to present anything he desired in his own behalf. He was the only witness before the executive board, the members of which obviously found in his own bearing and statements convincing proof of his guilt. There

is nothing in the record tending to impugn the good faith of any member of the board, and the fact that three of them, in pursuance of their duties and acting in the interest of the exchange, started the investigation which resulted in the hearing and condemnation of Harris did not incapacitate them from sitting in judgment upon him. It is held to be competent for a society to delegate to a committee the authority to expel a member, making such action final: See cases cited in note to *Del Ponte v. Societa etc.*, 114 Am. St. Rep. 24-30. The rule relating to the ⁵²² executive board while acting as a committee of arbitration seems to delegate the right of final action in such matters to that body; but however that may be, the subsequent approval of its course by the exchange amounted to a ratification of the order of expulsion.

It is unnecessary to review in detail the decisions bearing upon questions of the general character of those here involved. Cases have been cited which appear to tend to support some of the claims of the plaintiff. For the most part they are affected by peculiarities of statutes, charters or circumstances. But the present case does not approach near enough to the line of debatable ground to make it worth while to discuss nice distinctions.

The judgment is affirmed.

The Expulsion of Members from a Voluntary Association is discussed in the note to *Del Ponte v. Societa Italiana*, 114 Am. St. Rep. 24. The remedies of members of such associations are discussed in the note to *Robinson v. Templar Lodge*, 59 Am. St. Rep. 198. An action may be sustained by a member for his illegal expulsion; mandamus to compel readmission is not his sole remedy: *Lahiff v. St. Joseph's etc. Society*, 76 Conn. 648, 100 Am. St. Rep. 1012.

WEAVER v. FIRST NATIONAL BANK.

[76 Kan. 540, 94 Pac. 273.]

STARE DECISIS—Constitutional Questions.—In matters involving the interpretation of the constitution it is usual and proper to give less force to the doctrine of stare decisis than in other cases. (p. 158.)

STARE DECISIS—Homestead Questions.—While substantial justice may often be better promoted by adhering to an erroneous decision than by overthrowing a rule once established, still in so important a matter as the enforcement of homestead rights guaranteed by the constitution, courts feel an obligation to re-examine a difficult and doubtful question in the aspect of any new light that may be offered. (p. 159.)

HOMESTEAD—Rights of Surviving Spouse.—While a homestead exemption cannot originate without the existence of a family, that is, a household consisting of more than one person, still when the homestead character has once attached, it may persist for the husband or wife alone, who is the sole surviving member of the family. (p. 166.)

HOMESTEAD—Rights of Surviving Spouse.—Where a woman after the death of her husband continues to reside alone on the family homestead, it is exempt against her creditors as well as against his, whether her indebtedness was incurred before or after the death, and whether the legal title to the property was in her or in him during coverture. (pp. 166, 167.)

John D. Myers, for the plaintiff in error.

Charles Hayden, for the defendants in error.

541 MASON, J. The first National Bank of Chicago obtained a personal judgment against Mary E. Weaver, upon an indebtedness which originated in 1905, and caused an execution to be levied upon real estate. She brought a suit to enjoin its sale, claiming that it was exempt, and being denied relief prosecutes error. The property was at one time the homestead of the plaintiff in error and her husband—he having the legal title to one of the lots of which it was composed, she that of the other. During their married life he executed and recorded a deed to her of the lot standing in his name. In his will, however, he treated both lots as belonging to him, devising a life interest therein to his wife and the remainder to their children. He died in 1881. Mrs. Weaver elected to take under the will and continued to occupy the property with the children, all of whom finally became of age and moved away, leaving her in its sole occupancy, this being the situation when the judgment was rendered and the execution levied.

From this statement it is clear that Mrs. Weaver held the property free from any claim that might be made by a creditor of her husband. Such is the doctrine announced in *Cross v. Benson*, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560, with which the court is entirely satisfied—a doctrine derived from the words of ⁵⁴² the constitution itself, without the aid of any broadening statute. But whether it could be levied upon for the satisfaction of her own debt is a very different question. In volume 21 of the *Cyclopedia of Law and Procedure*, at page 578, it is said, principally upon the authority of *Keyes v. Cyrus*, 100 Cal. 322, 38 Am. St. Rep. 296, 34 Pac. 722: “Where a homestead has vested in the surviving husband or wife it is not only exempt from the debts of the deceased spouse, but also from the debts of the survivor, whether the latter obligations were incurred prior or subsequent to the death.”

The California statute construed in the case cited provided for setting apart to the widow of a homestead out of the estate of her deceased husband, but did not in terms make it exempt from liability for her debts. The court, however, held, disapproving on this point *Estate of David Walley*, 11 Nev. 260, that a legislative purpose to create such exemption should be inferred, saying: “The manifest object of the section is the support of the family, and to make provision for their support and maintenance. These demands of the family are deemed superior to those of heirs or creditors. . . . A homestead may be set apart to the widow, even though the estate be insolvent, and the property so set apart constitute the entire estate of the decedent; but if the homestead thus set apart to her could be immediately taken in execution by one of her creditors it would fail to be available for her use or support, and it might happen that her creditor would fare better than a creditor of the decedent whose money had perhaps been used to purchase the very property so set apart”: Page 326.

The substance of this argument can be applied with plausibility to our own constitution, which reads: “A homestead . . . occupied as a residence by the family of the owner . . . shall be exempted from forced sale under any process of law”: Gen. Stats. 1901, sec. 235. It surely requires no undue straining ⁵⁴³ of the rule that homestead laws are to be liberally construed to promote their beneficent purpose to say that the framers of this provision never in-

tended that property withheld from the husband's creditors for the benefit of his widow might yet be seized upon to satisfy debts which she had made. Whenever circumstances exist, therefore, that enable the widow to invoke the aid of the law at all, it would seem that she should be protected even against process founded upon her own obligations. It must be confessed, however, that this proposition is in irreconcilable conflict with the principle declared in *Ellinger v. Thomas*, 64 Kan. 180, 185, 67 Pac. 529. The precise matter there decided was, as expressed in the syllabus, that "a homestead claimant whose wife is dead, and whose children have grown to maturity and moved away and ceased their dependence on him and no longer constitute part of his family, no one else being associated with him in the family relation, cannot continue to retain the homestead exemption." The reasoning upon which this conclusion was based is exhibited by this excerpt from the opinion: "The constitutional exemption is for the benefit of the family, and if there be no family there can be no exemption. The broader terms of the statute may sometimes extend the exemption to a single person, as was shown in *Shirack v. Shirack* [44 Kan. 653, 24 Pac. 1107], but the constitution limits the exemption right to families. The word 'family' denotes a collective and communal body, and not a single individual. No one can be his own family. There is no more reason for continuing the homestead exemption to a sole adult survivor of the family than there would be to confer it on him in the first instance. The latter, we know, has not been done, and before it can be said that the former has been done some warrant must be found in the law for saying it. We know that constitutions and statutes allowing exemptions are liberally construed in favor of exemption claimants, but, nevertheless, the spirit and intent of the exemption privileges must be found in the words of the exemption grant, looked at ⁵⁴⁴ in the light of its object, and not utterly beyond such words, or in opposition to them. The homestead interest is not an estate in land. It has been sometimes spoken of in loose and inaccurate speech as an estate, but only to characterize it as a right secured by law. It is an exemption of land under stated conditions. If the conditions do not exist, or having once existed are at an end, the exemption ceases. The views above expressed are in harmony with the rule which the text-writers have col-

lected out of the various decisions: Waples on Homestead and Exemption, c. 3, subtitle, 'Claiming After Loss of Family.' "

As already stated, adherence to the view thus expressed must be fatal to the contention of the plaintiff in error. It cannot be said here, as it was in *Cross v. Benson*, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560, that the widow was herself "the family of the owner" (syllabus), in the sense in which the expression was there used. The legal title appears to have been in her at the time of her husband's death. But aside from that consideration, where the property is sought to be taken to satisfy her debt, she must be deemed to be herself the owner. The question, therefore, is fairly presented here, as it was in *Ellinger v. Thomas*, 64 Kan. 180, 67 Pac. 529, whether the exemption which has once attached to property in consequence of its being occupied as a residence by the family of the owner continues for the benefit of one spouse after the death of the other and the dispersion of the rest of the household. The court is, of course, always reluctant to treat as still open a question which it has once definitely passed upon. But in matters involving the interpretation of the constitution it is usual and proper to give less force to the doctrine of stare decisis than in other cases. One reason for this is thus stated in volume 26 of the *American and English Encyclopedia of Law*, at page 162: "A reason advanced to support this distinction between decisions construing statutes and those construing the constitution is that if the people are dissatisfied ⁵⁴⁵ with the construction of a statute, the frequently recurring sessions of the legislature afford easy opportunity to repeal, alter or modify the statute, while the constitution is organic, intended to be enduring until changed conditions of society demand more stringent or less restrictive regulations, and if a decision construes the constitution in a manner not acceptable to the people the opportunity of changing the organic law is remote."

Doubtless substantial justice may often be better promoted by adhering to an erroneous decision than by overthrowing a rule once established. But in so important a matter as the enforcement of the homestead rights guaranteed by the constitution the court feels an obligation to re-examine a difficult and doubtful question in the aspect of any new light that may be offered. Moreover, *Ellinger v. Thomas*, 64 Kan. 180, 67 Pac. 529, is of comparatively recent announcement. It has not been acted upon as a precedent in this

court. And the strictness of its doctrine was so commented upon in *Cross v. Benson*, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560, as to suggest that it might require later modification, although it was then said that "no former decision need now be overturned": Page 509. These considerations are thought to justify further investigation of the question stated.

In the work cited in *Ellinger v. Thomas*, 64 Kan. 180, 67 Pac. 529 (*Waples on Homestead and Exemption*), the author gives strong expression to the view that a homestead right can never survive for the benefit of a single member of the family, more, however, as his own judgment of what is sound law than as a deduction made from the decisions. It is true that he undertakes to distinguish some of the cases having a contrary tendency upon the ground that they turn upon special statutes, but others he condemns as being unsound in principle. That his own final conclusions are based upon a broad consideration of the policy and scope of homestead laws generally appears from these extracts therefrom:

"3. The homestead immunity is not to protect ⁵⁴⁶ single persons, but families. It is not to protect the head of a family in his individual capacity but as a member of the household which he represents. It is secondarily for the family's stability—primarily for the good of the state. So, when the family is gone, the reason for allowing its late head to acquire this immunity is gone. . . . Take the family away, and what motive is left the state for interfering between debtor and creditor? If any, it certainly is not family conservation.

"4. There is more reason for assigning lost family as a ground for acquiring, than in assigning discontinued occupancy, forfeited title, or any formerly existing qualification of which the claimant might once have availed himself, but did not. The aged widower, left alone in the world, needs to be sheltered—not more than the aged woman who has never had a family. Both may be proper objects of charity, but homestead laws are not charitable enactments—their beneficence being incidental. So, the argument that the ex-householder needs charity may be as plausibly applied to the impecunious spinster. Because he has had a wife and children, is his need necessarily greater than hers?" Pages 99, 100.

In section 70 of *Thompson on Homestead and Exemption* it is said: "It is thus seen that the existence of a family

is necessary to the acquisition of the homestead right in nearly all the states. Does a continuation of the right depend on a continuation of the family relation? When the association of persons which constitutes the family is broken up, whether by separation or the death of some of its members, does the right of homestead continue in the remaining householder, provided the other requisites of the statute concur? Most of the cases answer this question in the negative."

It is quite manifest that the last word is a clerical error and should be "affirmative," for the cases cited in the note supporting the statement are those which sustain the claim of exemption. In the recent case of *Palmer v. Sawyer*, 74 Neb. 108, 113, 103 N. W. 1088, the state of the law as exhibited by the adjudicated cases is well presented in these words:

547 "Turning now to the decisions of the courts of last resort in other states on statutes of somewhat similar construction to our own, we find an irreconcilable conflict in the various conclusions reached. This conflict in some instances is traceable to the different provisions of the statutes construed, and in other instances to the conception taken by the court of the intention of the legislature in the enactment of the statute. Those courts which look upon the statute as a statute of nurture, intended solely for the protection of the dependent members of the family from the improvidence of the head of the family, without any division arrive at the conclusion that, when the homestead has been selected and the dependent members of the family for whose benefit it was created have ceased to occupy, the protection of the homestead ceases, because the reason for the protection has ceased. The leading cases supporting this theory of construction are: *Revalk v. Kraemer*, 8 Cal. 66, 68 Am. Dec. 304; *Santa Cruz Bank v. Cooper*, 56 Cal. 339; *Johnson v. Little*, 90 Ga. 781, 17 S. E. 294; *Cooper v. Cooper*, 24 Ohio St. 488; *Galligar v. Payne*, 34 La. Ann. 1057; *Hill v. Franklin*, 54 Miss. 632; *Fullerton v. Sherrill*, 114 Iowa, 511, 87 N. W. 419. In opposition to this view is another line of decisions based on the hypothesis that the intention of the legislature in enacting the various homestead statutes was to protect the home and all its inmates from any business misfortune and financial adversity that might befall them; that the protection extends to the head of the family as well as to the dependent members. This theory leads to the conclusion that, when a home-

stead has been selected by the head of a family, he becomes invested with a right or estate in such homestead, which cannot be defeated by the death or abandonment of the home by the other members of the family who occupied it at the time of its selection. The following are some of the leading cases supporting this view: *Silloway v. Brown*, 12 Allen (Mass.), 30; *Kimbrel v. Willis*, 97 Ill. 494; *Stanley v. Snyder*, 43 Ark. 429; *Beckmann v. Meyer*, 75 Mo. 333; *Webb v. Cowley*, 5 Lea (Tenn.), 722; *Blum v. Gaines*, 57 Tex. 119; *Stults v. Sale*, 92 Ky. 5, 36 Am. St. Rep. 575, 17 S. W. 148, 13 L. R. A. 743."

While this classification shows nearly an equal division among the jurisdictions from which cases are ⁵⁴⁸ cited, such preponderance as there is favors the exemption. The Nebraska court, moreover, aligned itself with the majority. And the following decisions from other states may be added to the list: *Pardo v. Bittorf*, 48 Mich. 275, 12 N. W. 164; *Barney v. Leeds*, 51 N. H. 253; *Wilkerson v. Merrill*, 87 Va. 513, 12 S. E. 1015, 11 L. R. A. 632, overruling *Calhoun v. Williams*, 32 Gratt. (Va.) 18, 34 Am. Rep. 759; *Towne v. Rumsey*, 5 Wyo. 11, 35 Pac. 1025. See, also, *Moore v. Parker*, 13 S. C. 486, and *In re Feas' Estate*, 30 Wash. 51, 70 Pac. 270. The cases of *Pierce v. Kusie*, 56 Vt. 418, and *Myers v. Ford*, 22 Wis. 139, are sometimes cited as authorities upon this side of the question, but they have no real bearing on the matter, for they are based upon statutes under which the existence of a family was not necessary to the inception of the homestead right.

On the other hand the following should be added to the leading cases supporting the minority view: *Herrin v. Brown*, 44 Fla. 782, 103 Am. St. Rep. 182, 33 South. 522; *Jones v. McCrary*, 123 Ga. 282, 51 S. E. 349 (as being perhaps more closely in point than the Georgia case cited by the Nebraska court); *Betts v. Mills*, 8 Okl. 351, 58 Pac. 957.

It would be impracticable within the space reasonably to be allotted to the consideration of a question of this character to attempt to review in detail the cases cited, or to discuss how far they are affected by differences in local statutes. It is true that there is much diversity in the legislation of the different states, but it is equally true that the same general policy runs through all of it. Such examination as it has been practicable to make leads to a belief that the difference in numerical strength between the two lines of authorities

is really as great as it appears to be from the summary given. While some of those marshaled with the majority should perhaps be rejected from the computation for special reasons, several among the minority ⁵⁴⁹ are equally inconclusive. The question of course is not one to be determined by a roll-call of the courts that have passed upon it; but with respect to a matter that is of equal importance and interest in every state of the Union having homestead exemption laws it is of especial interest to observe the rulings that have been made in different jurisdictions. The reasoning in support of what it is fair to call the majority doctrine is illustrated by these extracts from typical cases:

“Although a homestead estate cannot be acquired except by a householder having a family, yet when once acquired, and still occupied by him, it has been held not to be defeated or lost by the death or absence of his wife and children: *Doyle v. Coburn*, 6 Allen, 71. Any other construction would render a husband who had been deprived of his family by accident or disease, or by their desertion, without any fault of his, liable to be instantly turned out of his homestead by his creditors”: *Silloway v. Brown*, 94 Mass. 30.

“Upon all these considerations, we are inclined to the opinion that the tenant has not lost his right of homestead by the death of his wife and the dispersion of his children; that he is still entitled to the shelter of a home, exempt from the claims of creditors; that there is nothing in the act (to adopt the language of the tenant’s counsel) which requires the harsh interpretation that he shall lose his homestead merely because of the death of his wife, which was the act of God, and which the tenant could not prevent.

“We may conceive the case of a poor debtor, entitled to, acquiring and enjoying a homestead during all the years of a long and laborious life. His children have grown to man’s estate and have all departed from the paternal roof, it may be to distant lands, where they have established their own homes and surrounded themselves with their own families; it may be that they have all died. At last the wife dies, and the father is left alone in the dwelling which he has always called his home, and which is endeared to him by fondest associations and by sacred memories. He is too old and feeble to acquire another. Shall he be turned out of the old homestead because of the inevitable fate which has deprived him of his wife?

“Or, we may take the case of the young man who by ⁵⁵⁰ habits of industry and frugality has acquired just enough property to purchase a shelter for himself and the young wife who is to share it with him. No child is born to them, and in a few weeks, or months it may be, the wife dies, and the young man is no longer, in strict construction, the head of the family. Shall he, too, therefore, be deprived of his homestead, and so, perhaps, of the opportunity of marrying again and adopting other members of his household?

“Such a construction is not required by the terms of the act. Such a construction would be strict, exclusive, harsh, unjust, illiberal and subversive of the ‘humane policy of the law’”: *Barney v. Leeds*, 51 N. H. 253.

“The appeal raises this question: The existence of a family being necessary to the acquisition of a homestead, does a continuation of the right depend on a continuation of the family relation? The decided weight of authority is that a homestead estate, when once acquired, and still occupied by the owner, is not defeated or lost by the death of his wife or the arrival of his children at years of maturity. . . . The reason assigned is not very satisfactory, or, at most, is one to be addressed to the political departments of the government. So that the decision seems to savor of what Jeremy Bentham calls judge-made law. Yet it has been generally followed. . . . The constitution, which contains our homestead statute, has not in express terms anticipated and provided for every possible phase of the question. It therefore devolves upon the courts to construe and apply the law to new cases as they arise. Interpreting the law according to its spirit and following the current adjudications, we hold, though with some hesitation, that when the association of persons, which constitute the family, is broken up, whether by separation or the death of some of the members, the right of homestead continues in the former head of the family, provided he still resides at his old home”: *Stanley v. Snyder*, 43 Ark. 429.

“The householder or head of [a] family is himself a part of the household—a part of the family. The exemption is, however, not only for the benefit of the family, but for his benefit also. Having been set apart for his benefit, and also for the benefit of his family, ⁵⁵¹ it would be an illiberal construction of this provision of the constitution to hold that,

if he survived the other members of his family, this provision would no longer shield him against his creditors, but cease and determine, and at the end of a long life, it may be devoted to his family, that he should be uncovered and exposed to the creditors and the debts which had been accumulating during the years that he had been devoting his life and this property to the maintenance of his family. This humane provision, which this court has so often declared to be a shield, would be thus forged into a sword suspended for a time over his head by a thread as slender as the tenure of life of a little child. . . . If we are to construe this constitutional provision liberally, so that all the intents thereof may be fully and perfectly carried out, we must not disregard the benefits provided for the householder, and consider only the benefits provided for the other members of his family. It appears to us to be the just and proper construction of this provision to hold that, having once been established by law, it [the homestead exemption] continues at least as long as the householder shall continue to live and occupy the domicile provided for the benefit of himself and his family. To hold otherwise would be to hold that the constitutional provision for his benefit was of no effect, but exclusively for the benefit of the other members of his family": *Wilkinson v. Merrill*, 87 Va. 513, 12 S. E. 1015, 11 L. R. A. 632.

"There is something repugnant in the proposition that to the sorrow of losing his family should be added the misfortune that his home should be taken from him by forced sale; and that, too, for a debt for the payment of which it was not believed, either by himself or the creditor, at the time of its creation, that the homestead would be liable, and for the security of which it did not enter as an element of credit": *Blum v. Gaines*, 57 Tex. 119.

"It seems to be settled, on general principles, that a homestead once acquired by the head of a family will not be defeated or lost by the death or absence of his wife and children, if he continues to occupy it. Any other construction would render a husband who has been deprived of his family by accident or disease, or by their desertion without any fault of his, liable to ⁵⁵² be instantly turned out of his homestead by his creditors": *Beckmann v. Meyer*, 75 Mo. 333.

"There is much force in the observation that the homestead act has respect to the family of the debtor, is for its benefit,

to secure a home for the family, and that in any case where this family relation is not found to exist the homestead exemption does not subsist, there being no reason or cause for the application of the homestead law. This is very true as to the coming into existence of the homestead estate, and although the prime object of the statute be the securing of a home for the family, and for the benefit of the family as such, the second section of the statute shows that not to be the sole purpose throughout. That section provides that upon the death of the original owner of the homestead the homestead exemption shall continue after the death for the benefit of the husband or wife surviving, so long as he or she continues to occupy the homestead. It is not so long as he or she also remains a householder having a family, but simply so long as he or she continues to occupy the homestead, entirely irrespective of the condition of being a householder having a family. There may be no surviving child and no family, still the homestead exemption is continued to the surviving wife or husband, so long as she or he continues to occupy the homestead. If, then, the homestead exemption may continue in such surviving husband or wife so long as he or she continues to occupy the homestead, without the condition of being a householder having a family, why, in the case of the original owner of the homestead before his death, after the homestead estate has once become vested in him, should not the homestead exemption continue for him so long as he occupies the homestead premises, although he may have ceased to be a householder having a family? Why should not the statute in this respect regard him, the original owner, the meritorious cause of the homestead exemption, with equal favor as the survivor of such an one after his death? We are of opinion that it does, and that within the spirit of this second section, and the fair intent of the homestead act, taken together, the homestead exemption continued here after plaintiff had ceased to be a householder having a family; that after the homestead estate has once been acquired, under the statute, it continues in the original owner so long as ⁵⁵³ he occupies the homestead premises, although he may have ceased to be a householder having a family, and will only become extinguished in some one of the modes mentioned in the statute, of which ceasing to be a householder having a family is not one. This rendering of the statute would be in accord with the liberal interpretation which this

court has always given to the homestead law": *Kimbrel v. Willis*, 97 Ill. 494.

"Undoubtedly the having of a family was necessary to the creation of the right in him, but is it necessary to the continuance of it? While essential to its coming into existence, yet, when it has once vested in the debtor, does he lose it by death or the marriage of his children, leaving him alone, but still a housekeeper in the occupancy of the property? The statute makes no express mention in this respect. We must therefore, look to its general scope and spirit for guidance, the right being the creature of it": *Stults v. Sale*, 92 Ky. 5, 36 Am. St. Rep. 575, 17 S. W. 148, 13 L. R. A. 743.

The statutes the construing of which gave rise to these expressions, however much they may otherwise differ from the homestead provision of the Kansas constitution, manifestly have this in common with it: they do not in terms declare that the homestead exemption shall survive the dissolution of the family. The same considerations that impelled the court in each of the cases cited to read such declaration into the law are operative here. The substance of the arguments by which such interpretation has been justified is applicable here. In spite of the assertion sometimes made that one whose wife and children have died stands in all respects in the same position as one who has never been the head of a family, the policy of the homestead law affords ground for a distinction, which may be given effect without doing violence to the language of the constitution. The right to the exemption cannot originate without the existence of a family—of a household consisting of more than one person. But when the homestead character has once attached and the head of the family remains in continuous occupancy⁵⁵⁴ of the property, doing nothing on his own part and suffering nothing within his control to be done that might affect his relation to it, in a sense it is still "occupied as a residence by the family of the owner," although death may have removed every other person interested in its exemption; it is occupied as a residence by a constituent part of the family, and by all of the family that survives.

It having already been determined in *Cross v. Benson*, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560, that in virtue of the constitutional provision the widow, although living alone, may claim the homestead exemption against debts made by her husband, only by an unwarranted strictness of construction

and nicety of discrimination could a like exemption be denied to the husband, or to the wife with respect to her own debts, whatever may have been the condition of the legal title during their married life—whether held by either or by both. The tendency to grant to one spouse the same privileges that are secured to the other, and to ignore distinctions based upon the condition of the legal title during their married life, is illustrated by this language from *Stults v. Sale*, 92 Ky. 5, 36 Am. St. Rep. 575, 17 S. W. 148, 13 L. R. A. 743: “It is urged with force that the homestead exemption is for the benefit of the family, and, therefore, where this family relation does not exist there is no homestead exemption. In other words, the reason for the rule ceasing, the rule ceases. This is true as to the coming into existence of the homestead right; and it is no doubt also true that the primary object of the statute was the protection of families from want, and the giving to them a shelter; yet the fact that the statute gives the homestead of the deceased wife to the husband during his occupancy of it, although he has no family, shows that it was not intended to provide for the wife and children alone. He, in such a case, does not become homeless. Can it well be supposed that the legislature intended that in the event of the death of the wife owning the homestead the benefit of it should continue to the husband during his ⁵⁵⁵ occupancy, although he has no family, and yet that if he be the owner of it, and his wife or children die, or the latter marry and leave him, his right to the exemption ceases? If so, it is a singular state of case; and if so, it is equally true of the wife, where she owns the homestead. In the event of the husband’s death owning the homestead, she takes it as a survivor so long as she occupies it, although she has no family; but if she owns it, and her husband dies, there being no longer any family, her homestead right ceases. Why should not the original owner have a right equal to the survivor, and why should not the law favor the latter equally at least with the former? Is the party to be worsted because he owns the property? Can any reason be given why the same right should not exist, as to his own property as is given to him in his wife’s property after her death? Ought not his claim to a homestead in his own property, as against his own creditors, to be as much regarded as his claim to one in her property after her death? The construction here contended for

by the creditor should not be given to a statute which was enacted from a spirit of liberality toward the debtor": Page 7.

The same attitude is shown in *Eubank v. Landram*, 59 Tex. 247, where it was said: "The constitution provides that the homestead 'shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead.' In other words, the constitution protects the surviving husband or wife in their right to the homestead, whether as against the heirs of the deceased or the creditors of the survivor, so long as such survivor occupies the homestead as such. And this exemption does not depend upon the title being in the survivor at the time of the death of the other marital partner. Whether the title to the property be vested in the community, or be the separate property of the deceased or the survivor, is immaterial; so long as the survivor continues to occupy the homestead as such it is neither subject to execution nor partition among the heirs of the deceased marital partner": Page 248.

This court is convinced that in *Ellinger v. Thomas*, ⁵⁵⁶ 64 Kan. 180, 67 Pac. 529, too strict a rule of construction was adopted; that a more liberal interpretation, resulting in a different conclusion, would have been more in harmony with the constant effort shown in other jurisdictions and in other cases in this jurisdiction to ascertain and give effect to the spirit of homestead enactments in the light of the broad general purposes they are designed to accomplish; that it is better to disapprove the doctrine there announced than to strive to retain it as a portion of a system with other parts of which it is in essential conflict. That decision is therefore overruled.

It results that the judgment in the present case must be reversed.

The Limitations upon the Doctrine of Stare Decisis are discussed in the note to *Truxton v. Fait*, 73 Am. St. Rep. 98.

A Homestead Right is for the benefit of the entire family, and is not lost by the death, marriage or removal of some of the members of the family: See *Montgomery v. Dane*, 81 Ark. 154, 118 Am. St. Rep. 37, and cases cited in the cross-reference note thereto; *Garner v. Freeman*, 118 La. 184, 118 Am. St. Rep. 361; *Davis v. Feltman Co.*, 112 Ky. 293, 99 Am. St. Rep. 289. For other authorities upon the exemption of a homestead in favor of a surviving spouse, see *Keyes v. Cyrus*, 100 Cal. 322, 38 Am. St. Rep. 296; *Dickey v. Gibson*, 113 Cal. 26, 54 Am. St. Rep. 321; *Roberts v. Greer*, 22 Nev. 755, 58 Am. St. Rep. 755; 1 *Ross on Probate Law and Practice*, 457-518.

CLAYTON v. CLARK.

[76 Kan. 832, 92 Pac. 1117.]

ATTACHMENT—Intent to Defraud.—Where an Affidavit for an attachment charges “that defendants have sold, conveyed and disposed of their property and are causing the same to be removed out of Graham county for the purpose and with the fraudulent intent to defraud their creditors,” the words “for the purpose and with the fraudulent intent to defraud” are sufficiently broad to include an intent to “hinder” and “delay.” (p. 171.)

ATTACHMENT.—The Word “Defraud,” as used in the phrase “disturb, hinder, delay, or defraud creditors,” is the most generic term of the four, and really includes all the others. (p. 171.)

ATTACHMENT.—An Intent to Defraud, Hinder or delay any creditor is sufficient to give any other creditor the right to an attachment. (p. 171.)

W. L. Sayers and S. N. Hawkes, for the plaintiff in error.

George W. Jones, for the defendants in error.

⁸³² GRAVES, J. This was an attachment proceeding on a claim before it was due. The claim consists of two promissory notes, one of which is dated February 24, 1906, for seventy dollars, and became due one year after date; the other is dated March 1, 1906, for forty-three dollars and fifty cents, and also matured one year after date. The defendants in error are the makers of the notes, and the plaintiff in error the owner and holder thereof. The defendants in error are tenants on the farm of the plaintiff in error. The notes are unsecured, and were not given in payment of ⁸³³ rent. The rent for the year 1906 was payable in a share of the crop. On August 18, 1906, defendants in error sold to one Coleman all their personal property not exempt, including their corn crop, and were preparing to remove to another county at once. On August 20, 1906, plaintiff in error commenced an action in the district court of Graham county on the two notes, and obtained an attachment therein. An affidavit therefor was filed which, so far as material, reads: “That defendants have sold, conveyed and disposed of their property and are causing the same to be removed out of Graham county for the purpose and with the fraudulent intent to defraud their creditors in this, to wit, that the defendants have executed unto one Coleman a pretended bill of sale of three horses and other property, and have caused a

part of said property to be removed from their place of abode, to wit, from Graham county, Kansas, and attempting to remove, and are about to remove all of their property, except what they claim under the exemption laws of the state of Kansas."

The writ was issued by the probate judge, the district judge being absent from the county, and the property was taken thereunder. On October 1, 1906, a motion to discharge the attachment was filed, placing the ground of the affidavit in issue. On October 2, 1906, a motion was heard before the district court, wherein a large amount of testimony was heard, both oral and written. Upon the hearing the court found the following facts: "Thereupon the plaintiff, defendants, and D. Coleman, each in turn introduced his evidence and rested, and the court, after arguments of counsel and due consideration, doth find: That at the date of filing the affidavit and obtaining the issuance of the order of attachment herein defendants were about to remove their property out of the jurisdiction of this court, and were about to remove and dispose of a part of their property and had removed and disposed of a part of their property, and all property not exempt by law, and that all of said acts were done, and were about to be done, for the ⁸³⁴ purpose of, with the intent to, and to the effect of, hindering and delaying their creditors in the collection of their claims; but the court finds plaintiff has failed to prove a specific intent to defraud the creditors of said Clark; and inasmuch as it is not alleged that the said defendants have, in any way, disposed of their property with the intent to hinder and delay the creditors of said Clark in the collection of their claims or debts, it is therefore ordered that said attachment be dissolved at the cost of plaintiff."

Plaintiff brings the case here for review.

The district court has drawn a distinction between an act done with intent to defraud creditors and the same act when done merely with intent to hinder and delay creditors in the collection of their claims which we do not think applicable in this case.

The affidavit for attachment charges that the acts complained of on the part of the defendants were done "for the purpose and with the fraudulent intent to defraud their creditors." No charge is made, unless it is contained in these

words, that they were done with the intent to "hinder" and "delay" (Gen. Stats. 1901, sec. 4624) their creditors in the collection of their claims. The court finds that what the defendants did was done "for the purpose of, with the intent to, and to the effect of, hindering and delaying their creditors in the collection of their claims," but as no specific intent to defraud their creditors was shown the court found the ground of the affidavit not sustained.

We suppose this finding and order were made upon the theory that the ground stated in the affidavit, and the one found to have been established by the evidence, were separate and distinct from each other. In the view we have taken this was erroneous. The language ⁸³⁵ of the affidavit—"for the purpose and with the fraudulent intent to defraud"—is sufficiently broad and comprehensive to include the term "hinder or delay," as the greater includes the less. In volume 2 of Words and Phrases Judicially Defined, at page 1949, it is said, on the authority of *Weber v. Mick*, 131 Ill. 520, 23 N. E. 646, that the word "'defraud,' as used in the phrase, disturb, hinder, delay, or 'defraud creditors,' is the most generic term of the four, and really includes all the others, since to 'disturb, hinder, or delay' a creditor in the collection of his debts are only different modes of 'defrauding' him of his rights, and these words are used merely as more specific statements of various forms of fraud": See, also, 14 Am. & Eng. Ency. of Law, 244; *Edgell v. Smith*, 50 W. Va. 349, 40 S. E. 402; *Armstrong v. Ames Co.*, 17 Tex. Civ. App. 46, 43 S. W. 302; *Petrovitzky v. Brigham*, 14 Utah, 472, 47 Pac. 666; *McBryan v. Trowbridge*, 125 Mich. 542, 84 N. W. 1084. The affidavit, therefore, covers the finding of the court, and the motion should have been denied.

If it was the purpose of the court to decide that an intent on the part of the defendants to defraud the plaintiff must be shown, we also think such a conclusion erroneous. An intent to defraud, hinder or delay the plaintiff or any creditor is sufficient to give any other creditor the right to an attachment: *Waples on Attachment and Garnishment*, 2d ed., sec. 71; 3 Am. & Eng. Ency. of Law, 201-244; *Noyes v. Cunningham*, 51 Mo. App. 194; *McBryan v. Trowbridge*, 125 Mich. 542, 84 N. W. 1084; *Sherrill v. Bench*, 37 Ark. 560. In the last-named case an instruction was sustained which reads: "It need not appear that the defendant had disposed of his

property with the fraudulent intent to cheat, hinder or delay the plaintiffs; but if it appear from the evidence that the defendant had sold or otherwise disposed of his property, with the fraudulent intent to ⁸³⁶ cheat, hinder or delay any one of his creditors, this will be sufficient": Page 561.

The judgment of the district court is reversed, with direction to deny the motion to dissolve the attachment and proceed with the case in accordance with the views herein expressed.

To Disturb, to Hinder, and to Delay a Creditor in the collection of his debts are only different modes of defrauding him of his rights, and those words are used merely as specific statements of various forms of fraud, the words "to defraud" being the more generic term which includes them all: *Weber v. Mick*, 131 Ill. 520, 23 S. E. 646. The words "hinder" and "delay" are synonymous. To defraud implies or includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscionable advantage is taken of another: *Armstrong v. Ames*, 17 Tex. Civ. App. 46, 43 S. W. 302; *Petrovitzky v. Brigham*, 14 Utah, 472, 47 Pac. 666.

BRUNER v. MARTIN.

[76 Kan. 862, 93 Pac. 165.]

LIMITATIONS.—The Words "Where the Cause of Action has Arisen in Another State," as used in the statute of limitations, mean when the cause of action has accrued in the foreign state, or when the plaintiff has the right to sue the defendant there; they do not refer to the origin of the transaction out of which the cause of action has arisen. (pp. 177, 178.)

LIMITATIONS—Conflict of Laws.—An Action on a Promissory Note cannot be maintained in Kansas under section 22 of the Civil Code, if both parties were nonresidents when the cause of action accrued, and the defendant resided in a foreign state until the cause of action was barred by the law of that state. (p. 178.)

LIMITATIONS—Mortgages.—Where a Note is Barred by the statute of limitations, no action can be maintained on the mortgage securing it. (p. 179.)

George A. Vandever, F. L. Martin and E. L. Foulke, for the plaintiffs in error.

Francis C. Price, for the defendant in error.

⁸⁶² PORTER, J. This suit was brought by Jennie S. Martin against Esther Bruner and others to foreclose a mortgage

on real estate. A judgment was rendered for the plaintiff, and the defendants bring these proceedings in error.

The sole question involves the construction of the statute of limitations. There was a stipulation as to facts, from which it appears that the plaintiff resides in New Jersey and has never been a resident of Kansas. She acquired the note and mortgage by purchase from another nonresident. The note and mortgage ⁸⁶³ were executed in Kansas, July 2, 1888, by Charles and Lucy B. Veatch, husband and wife, who were the owners of the real estate. The note was payable five years after date, at the city of New York, to the Kansas and New Jersey Loan Company, a Kansas corporation, and contained a clause providing that it should be construed in all respects according to the laws of Kansas. The mortgage was duly recorded in Meade county, Kansas, where the land is situated. It contained the usual conditions. In 1890 before the maturity of the note, Charles Veatch and wife, makers of the note and mortgage, conveyed the real estate to Francis M. Bruner and removed to the state of Missouri, where they have since resided, and they have never since returned to or been within this state.

The note and mortgage were before maturity indorsed and transferred to a nonresident of Kansas, and by subsequent indorsement and transfer became the property of the plaintiff. The limitation laws of Missouri bar an action upon a promissory note ten years after the cause of action thereon accrues. The principal defendants are the heirs of Francis M. Bruner, who purchased the land from Charles Veatch, subject to the mortgage. They were all residents of the state of Iowa and have resided there continuously. The defense relied upon is the statute of limitations. The answer alleged that the cause of action for the foreclosure of the mortgage arose at the time the note became due and was therefore barred by the five-year statute of limitation; that the cause of action upon the note arose in Missouri, where the makers resided at the time the note matured; and the provisions of the Missouri statute of limitations were set out. Section 22 of the Civil Code, in so far as it is directly involved, reads as follows: "Where the cause of action has arisen in another state or country, between nonresidents of this state, and by the laws of the state or country where the cause of action arose an action cannot be maintained ⁸⁶⁴ thereon by reason

of lapse of time, no action [can be] maintained thereon in this state": Gen. Stats. 1901, sec. 4450.

In its last analysis the case turns upon the meaning of the words "cause of action has arisen" and "cause of action arose," as used in the foregoing section. The trial court construed the word "arisen" to mean "originate," and upon this construction based its ruling; and it is the contention of the plaintiff that the cause of action in this case arose within the state of Kansas, where the contract was made, and that section 22 has no application, but that section 21 of the code applies. The latter section reads as follows: "If when a cause of action accrues against a person he be out of the state, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is so absconded or concealed; and if after the cause of action accrues he depart from the state, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought": Gen. Stats. 1901, sec. 4449.

There is a conflict of authority upon the precise question involved, and it has never, we believe, been decided in this state. Some courts in construing statutes containing the exact language of ours, and others in construing statutes of almost identical language, have held that a different meaning attaches to the words "cause of action has arisen" as used in section 22 and the words "cause of action accrues" as used in section 21. These courts have declared that a cause of action arises when and where the transaction occurs from which it originates; that is, where the contract is made: See the following authorities: *Chevrier v. Robert*, 6 Mont. 319, 12 Pac. 702; *John Shillito Co. v. Richardson*, 102 Ky. 51, 42 S. W. 847; *Powers Mercantile Co. v. Blethen*, 91 Minn. 339, 97 N. W. 1056; *Doughty v. Funk*, 15 Okl. 643, 84 Pac. 484, 865 4 L. R. A., N. S., 1029. The Oklahoma statute, construed in the last-named case, is copied literally from the Kansas statute, and the opinion which cites the cases upholding this view presents the reasons thereof as well as any to which our attention has been called.

The decisions referred to are against the better reasoning, in our opinion, and unquestionably opposed to the great weight of authority. The phrase "cause of action" has often

been defined. It cannot exist without the concurrence of a right, a duty and a default, or, stated differently, an obligation must exist upon one party in favor of the other, the performance of which is refused. Bouvier defines it as a right to bring an action. To the same effect see *Bucklin v. Ford*, 5 Barb. (N. Y.) 393; *Meyer v. Van Collem*, 28 Barb. (N. Y.) 230; *Lewis v. Hyams*, 26 Nev. 68, 99 Am. St. Rep. 677, 63 Pac. 126, 64 Pac. 817. "Cause of action is the right to prosecute an action with effect": *Douglas v. Forrest*, 4 Bing. (Eng.) 686. In *Veeder v. Baker*, 83 N. Y. 156, the phrase was defined as follows: "It may be said to be composed of the right of the plaintiff and the obligation, duty or wrong of the defendant; and these combined, it is sufficiently accurate to say, constitute the cause of action": Page 160.

Pomeroy, in section 347 of the fourth edition of his *Code Remedies*, uses the following language: "Every judicial action must therefore involve the following elements: a primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself. Every action, however complicated or however simple, must contain these essential elements. Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term, and as it is used in the ⁸⁶⁸ codes of the several states. They are the legal cause or foundation whence the right of action springs."

Many other definitions by courts and text-writers which are substantially the same may be found collated in the able dissenting opinion of Mr. Justice Young in *Colonial & U. S. Mortgage Co. v. Northwest Thrasher Co.*, 14 N. D. 147, 103 N. W. 915, 70 L. R. A. 814.

It would be difficult to find a better or more apt statement of where and when a cause of action arises than is found in the following extract from the opinion in *Durham v. Spence*, L. R. 6 Ex. (Eng.) *46: "Now, the cause of action must have reference to some time as well as to some place; does, then, the consideration of the time when the cause of action arises give us any assistance in determining the place where it arises? I think it does. The cause of action arises when that is not

done which ought to have been done, or that is done which ought not to have been done. But the time when the cause of action arises determines also the place where it arises; for when that occurs which is the cause of action, the place where it occurs is the place where the cause of action arises": Page 52.

In *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384, the court said: "Nor is there room for difference as to what is meant by the phrases 'cause of action has accrued' or 'cause of action has arisen,' since the death of the testator. They do not mean the contracting of the indebtedness, for a cause of action does not accrue or arise from the making of the contract of indebtedness alone, but out of the nonperformance of it as well": Page 578.

In *Lewis v. Hyams*, 26 Nev. 68, 99 Am. St. Rep. 677, 63 Pac. 126, 64 Pac. 817, the same question was involved, and it was there held that the phrase "when the cause of action has arisen" means exactly the same as if the statute had said "when a cause of action has accrued." In a further opinion upon an application for a rehearing, it was stated that after an exhaustive and careful re-examination the court was unable to reach a different conclusion: *Lewis v. Hyams*, 26 Nev. 68, 99 Am. St. Rep. 677, 63 Pac. 126, 64 Pac. 817.

⁸⁶⁷ The New York Code of Civil Procedure provides that an action may be maintained by one foreign corporation against another "where the cause of action arose within the state." The words "where the cause of action arose within the state" were construed in *Shelby Steel Tube Co. v. Burgess Gun Co.*, 8 App. Div. 444, 40 N. Y. Supp. 871. The goods were ordered by letter from Buffalo. The acceptance was in the state of Ohio. The court, after stating that the contract was actually made in Ohio, used the following language: "It does not follow, however, that because the contract was not made within this state a cause of action could not arise here. No cause of action arose anywhere upon this contract until the defendant had made some default in the payment of the contract price of the goods purchased": Page 448.

The statute of Washington is substantially the same as ours. It was construed in reference to these phrases in the case of *Freundt v. Hahn*, 24 Wash. 8, 63 Pac. 1107. The contention there was that the words "has arisen" and "arose"

were used in the sense of originated and with a meaning entirely different from "accrued" as used in the other section. The court in a well-considered opinion construed the words to mean the same thing, and that the cause of action arose where and at the time it accrued: To the same effect see the following cases: *Osgood v. Artt*, 10 Fed. 365, 11 Biss. 160; *Hower v. Aultman*, 27 Neb. 251, 42 N. W. 1039; *Minneapolis Harvester Works v. Smith*, 36 Neb. 616, 54 N. W. 973; *Harrison v. Union National Bank*, 12 Neb. 499, 11 N. W. 752; *Luce v. Clarke*, 49 Minn. 356, 51 N. W. 1162; *Drake v. Bigelow*, 93 Minn. 112, 100 N. W. 664; *Orr v. Wilmarth*, 95 Mo. 212, 8 S. W. 258; *Zoll v. Carnahan*, 83 Mo. 35; *Scroggs v. Daugherty*, 53 Mo. 497; *Frost v. Witter*, 132 Cal. 421, 84 Am. St. Rep. 53, 64 Pac. 705; *Strong v. Lewis*, 204 Ill. 35, 68 N. E. 556.

The transaction by which a promissory note is executed ~~see~~ and delivered creates no cause of action, nor can a cause of action be said to originate thereby. If, as in the vast majority of instances, the note is promptly paid at maturity no cause of action exists. If there be a default when the note matures, and the payee is dead, no cause of action exists until an administrator is appointed, for the reason that before there can be a cause of action there must be a party entitled to enforce some obligation owing to him by some one who refuses to perform. In a case where the note is not paid when it matures, and the payee is alive, or, if dead, there is a personal representative, a cause of action arises out of the failure of the payer to perform the obligation. The place where it arises is the place where some court has jurisdiction of the subject matter and the party against whom the cause of action has arisen. The cases referred to holding that the cause of action arises where the contract was entered to ignore the true definition of a cause of action and confuse it with the subject of the action. The execution of the note is but a part of the transaction out of which the cause of action arises; the failure to keep the obligation and to perform the promise is the main thing which creates the cause of action, and unless there be such a failure no cause of action ever arises.

"The true test, therefore, to determine when a cause of action has accrued is to ascertain the time when plaintiff could first have maintained his action to a successful result": 25 Cyc. 1067.

In the language of the court in *Freundt v. Hahn*, 24 Wash. 8, 63 Pac. 1107, "if the notes had been paid at maturity, no legal cause of action would have existed. It could neither have originated nor arisen until the breach of the contract to pay the money": Page 11.

A cause of action cannot be said to have arisen until it actually exists. In other words, a cause of action has not arisen until it has accrued. The words are synonymous. The subject of the action in this case was the promissory note and mortgage. They were ⁸⁶⁹ executed in Kansas. The subject of the action originated in Kansas, but there was no cause of action until the maker failed to pay at maturity.

It is insisted that this construction destroys the effect of section 21; that the legislature by the use of different expressions in the two sections intended by section 21 to furnish protection to citizens of Kansas, and also to persons temporarily within the state with whom contracts should be executed in the state under Kansas laws; that by section 22 it was intended to provide protection for the citizens of this state who made contracts in another state with citizens of such other state upon which a cause of action arose in the other state. The same reason is assigned by the court in *Chevrier v. Robert*, 6 Mont. 319, 12 Pac. 702, for the holding in that case, and the same contention was urged in many of the other cases cited where the courts construed the two sections as we construe these.

We find no difficulty in giving to section 21 the effect and operation given to it every day and which it has always had. It applies only to cases where the defendant resides in the state when the cause of action accrues but is either out of the state or has absconded or concealed himself. It provides that the time of his absence or concealment shall not be computed in his favor.

In *Orr v. Wilmarth*, 95 Mo. 212, 8 S. W. 258, it was held that the provision of the Missouri statute, which is practically the same as our section 22, has no application to cases where the defendant was a nonresident when the cause of action accrued, and that the section corresponding with our section 21 only applies to those cases where the defendant resided in the state when the cause of action accrued, citing *Thomas v. Black*, 22 Mo. 330, *Scroggs v. Daugherty*, 53 Mo. 497, and *Fike v. Clark*, 55 Mo. 105.

We conclude, therefore, that as the action was barred by the statute of Missouri, where the cause of action arose, no action can be maintained thereon in ⁸⁷⁰ this state by reason of the provisions of section 22 of the Code of Civil Procedure. It is unnecessary to cite authorities to the effect that, the note being barred, no action can be maintained upon the mortgage.

For these reasons the judgment is reversed and the cause remanded for further proceedings.

The Words "When a Cause of Action has Arisen," as used in the statute of limitations, should be construed to mean when jurisdiction exists in the courts of a state to adjudicate between the parties upon the particular cause of action, if properly invoked, or, in other words, when the plaintiff has the right to sue upon the particular cause of action, without regard to the place where it had its origin: *Lewis v. Hyams*, 26 Nev. 68, 99 Am. St. Rep. 677; *Freundt v. Hahn*, 24 Wash. 8, 85 Am. St. Rep. 939.

The Statute of Limitations of the Forum usually governs, in case of a conflict of laws, unless the statute is regarded as extinguishing the debt and not merely barring the remedy: See the note to *Menzell v. Hinton*, 95 Am. St. Rep. 660; *Arp v. Allis-Chalmers Co.*, 130 Wis. 454, 118 Am. St. Rep. 1036. By the laws of Ohio a cause of action accruing in another state and barred by its laws is also barred in Ohio: *Hunter v. Niagara Fire Ins. Co.*, 73 Ohio St. 110, 112 Am. St. Rep. 699.

HARROD v. BURKE.

[76 Kan. 909, 92 Pac. 1128.]

LIS PENDENS.—The Purpose of the Rule of Lis Pendens is to prevent third persons during the pendency of the litigation from acquiring interests in the land which would preclude the court from granting the relief sought. (p. 181.)

LIS PENDENS.—The Rule of Lis Pendens has no Application to independent titles not derived from any of the parties to the suit nor in succession to them. (p. 181.)

LIS PENDENS.—All Persons Entering upon the Possession of property pendente lite are presumed to enter under the defendant. (p. 181.)

EJECTMENT.—When the Sheriff Returns that He has Executed a Writ of possession, and put out a certain person who was not a party to the action, and has put the plaintiff in possession, it is presumed that the officer has performed his duties properly, and that the person removed was in privity with a party to the action and therefore subject to the operation of the writ. (p. 182.)

EJECTMENT.—Crops Growing on Land when the successful party in ejectment is put in possession are a part of the realty and belong to him, in the absence of evidence showing any right of severance in favor of the other party. (pp. 182, 183.)

Hackney & Lafferty, for the plaintiff in error.

A. M. Jackson and A. L. Noble, for the defendant in error.

⁹¹⁰ BENSON, J.— This was an action of replevin for wheat in the shock. The court directed a verdict for the defendant, and the plaintiff brings the case here. Error is predicated upon this instruction.

The wheat was upon lands for the possession of which the plaintiff's wards recovered a judgment, which was affirmed in this court: *Beiswanger v. Bangs*, 72 Kan. 702, 83 Pac. 1032. The defendant entered into possession of the land after the action of ejectment had been commenced, under a contract to purchase from one H. T. Trice, who was not a party, and was not shown to be in privity with any party thereto, and whose title, if he had any, was not disclosed. A writ was issued upon the judgment in that action to put the plaintiffs therein in possession. The writ commanded the sheriff to put out the defendants in the action, Christian Henry Beiswanger and F. B. Cook, "or any person or persons found in possession," and ⁹¹¹ to restore the possession to the plaintiffs. The sheriff served this writ, and made return that he had done so, and that he had put Edmund Burke out of possession and had put the guardian of the plaintiffs named in the writ in peaceable possession of the lands. At that time, May 25, 1905, the wheat in question was growing on the premises. When the wheat ripened, Burke entered and cut it. It was then replevied by the plaintiff in this action. The statute provides: "When the petition has been filed, the action is pending, so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's title; but such notice shall be of no avail unless the summons be served or the first publication made within sixty days after the filing of the petition": Gen. Stats. 1901, sec. 4515.

The plaintiff argues that this statute applies to all persons, whether parties to the action or in privity with such parties or not. This is not the correct view. The statutory provision is to be construed in the light of the authorities generally on the subject of *lis pendens*, and is designed to embody the doctrine of equity jurisprudence on that subject: *Smith v. Kimball*, 36 Kan. 474, 13 Pac. 801. The rule in equity is that a pending suit, duly prosecuted and not

collusive, is notice to a purchaser of the property in dispute from a party to the litigation, so as to affect and bind his interest by the decree: 2 Pomeroy's Equity Jurisprudence, 3d ed., sec. 633. The constructive notice by the pendency of the suit extends only to those who derive title from a party or privy pendente lite: 2 Pomeroy's Equity Jurisprudence, 3d ed., sec. 637. The purpose of the rule is to prevent third persons during the pendency of the litigation from acquiring interests in the land which would preclude the court from granting the relief sought, and it has no application to independent titles, not derived from any of the parties to the suit nor in succession to them: *Merrill v. Wright*, 65 Neb. 794, 101 ⁹¹² Am. St. Rep. 645, 91 N. W. 697; *Webster v. Filley*, 43 Kan. 475, 23 Pac. 1080; *Travis v. Topeka Supply Co.*, 42 Kan. 625, 22 Pac. 991.

It was proper, however, for the sheriff under the writ to place the plaintiffs therein in possession, and in performing this duty to dispossess the defendants named in the writ and all persons holding under or in privity with them after the commencement of the action. It is shown that the defendant Burke went into possession under H. T. Trice, but the origin of Trice's title, if he had any, is not shown. After producing his contract from Trice the defendant offered no evidence to show title in his vendor. In such a situation the presumption is that Trice held under a defendant in the ejectment action. All persons entering upon possession of property pendente lite are presumed to have entered under the defendant in the litigation: 3 Freeman on Executions, 3d ed., sec. 475. The supreme court of California, in deciding this proposition, said in *Wetherbee v. Dunn*, 36 Cal. 147, 95 Am. Dec. 166, affirming the same statement in *Leese v. Clark*, 29 Cal. 664: "Prima facie, all who come into possession after action brought must go out, for the presumption is, nothing to the contrary appearing, that they came in under the defendant. This presumption is not overthrown by showing that they came in as tenants of John Clark, without showing affirmatively that John Clark also came in before suit brought, or, at least, that he has come in under a title adverse to that of the defendant, not in collusion with him, and under such circumstances as would entitle him to the protection of the court, on a proper application, against the writ."

In an early case in Kentucky the rule was thus stated: "If it had appeared that the appellees had been in possession, not under the defendant in the suit in which the decree was pronounced but in virtue of a paramount title, they would no doubt have been entitled to the interposition of the court in their favor. ⁹¹³ But they have not shown how they claim, and in the absence of all proof of the fact we cannot presume that they held under such title; and if they held under the defendant in the suit, whether as lessees or as purchasers, as it appears they obtained the possession pending the suit, the decree is unquestionably obligatory upon them, as well as the defendant; and we are acquainted with no principles or practice which would require a scire facias to be served on them before they could be turned out of possession": *Long v. Morton*, 2 A. K. Marsh. (Ky.) 39.

Mr. Justice Field, delivering an opinion of the federal circuit court, held: "Prima facie all parties entering upon land after suit in ejectment brought for its recovery are in possession in subordination to the defendant, and are equally liable to be removed by the writ issued upon the judgment recovered against him": *Hall v. Dexter*, 3 Saw. 434, syllabus, Fed. Cas. No. 5929.

In the absence of any evidence showing what title, if any, Trice had or claimed to have, the proof that the defendant entered as his vendee did not rebut the presumption that he was holding under the defendants in the ejectment action.

There is the further presumption that the proceedings of the sheriff were regular, for in the absence of evidence to the contrary it must be presumed that the officer performed his duties properly: *Head v. Daniels*, 38 Kan. 1, 15 Pac. 911; *Wilkins v. Tourtellott*, 42 Kan. 176, 22 Pac. 11. Nothing to the contrary appearing, it must be presumed in favor of the regularity of the proceedings and the truth of the sheriff's return that the defendant was in possession in succession to, or in privity with, the defendants named in the writ, and therefore subject to its operation.

The sheriff having delivered the possession of the land with the wheat growing upon it, the plaintiff, presumptively at least, was entitled to such wheat. It was a part of the real estate: *Chapman v. Veach*, 32 ⁹¹⁴ Kan. 167, 4 Pac. 100; *Missouri Val. Land Co. v. Barwick*, 50 Kan. 57, 31 Pac. 685. In the absence of evidence showing any right of severance

in the defendant, the plaintiff was entitled to the possession of the wheat under the writ: Adams on Ejectment, 4th ed., *347; 3 Freeman on Executions, 3d ed., sec. 474; 15 Cyc. 183; Huerstal v. Muir, 64 Cal. 450, 2 Pac. 33.

As the defendant Burke was prima facie holding under the defendants in the ejectment action, no evidence of an adverse title being offered, and the presumption, in the absence of evidence to the contrary, being also in favor of the regularity of the proceedings of the sheriff, the plaintiff appears to have been in the lawful possession of the growing wheat when the defendant entered and cut it. The court erred, therefore, in instructing a verdict for the defendant, and in denying the motion for a new trial.

The judgment is reversed and a new trial ordered.

The Law of Lis Pendens is the subject of a note to Stout v. Phillipi Mfg. etc. Co., 56 Am. St. Rep. 853. The prime object of the rule of lis pendens is to preserve the property which is the subject of litigation in order to make it possible for the courts to execute their final judgments and decrees: Wingfield v. Neall, 60 W. Va. 106, 116 Am. St. Rep. 882; Merrill v. Wright, 65 Neb. 794, 101 Am. St. Rep. 645. Two things are indispensable to give the doctrine effect. First, the litigation must be about some specific thing necessarily affected by the termination of the suit; second, the particular property involved must be so pointed out by the proceeding as to warn the whole world that they intermeddle with it at their peril: Morange v. Doe, 143 Ala. 459, 111 Am. St. Rep. 52. Parties who, after the commencement of the suit, acquire title to real property, are charged with notice of such commencement: Neff v. Elder, 84 Ark. 277, 120 Am. St. Rep. 67.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

**BOARD OF TRUSTEES OF FORDSVILLE SCHOOL v.
POSTEL.**

[121 Ky. 67, 88 S. W. 1065.]

TRUST FUNDS—Right to Follow.—A Statute changing the rule that a constructive trust arises where a deed is made to one person when the consideration is paid by another does not affect the equitable doctrine that equity follows a fund and compels restitution to the true owner as long as it can be identified. (p. 188.)

TRUST FUNDS—Right to Follow.—The True Owner of a fund may pursue it in equity where it is clearly identified, equally whether it has been transmuted by the holder into personalty or realty. (p. 188.)

TRUST FUNDS—Right to Follow as Against Municipality.—The right of the true owner of a fund to pursue it in equity, so long as it can be clearly identified, obtains as against municipalities. Hence, the holders of school bonds, void because issued in violation of the constitutional provision limiting municipal indebtedness, are entitled to relief, on showing that the proceeds of the bonds have been invested in a lot, schoolhouse, and school furniture. (p. 188.)

Glenn & Ringo, for the appellants.

E. B. Anderson, George W. Jolly and G. B. Likens, for the appellees.

⁷¹ **HOBSON, C. J.** In the year 1897 the trustees of the Fordsville Graded Common School District issued bonds to the amount of four thousand dollars on behalf of the district for the purpose of providing it with a lot, schoolhouse and suitable furniture. The bonds were sold and the trustees used the proceeds of the sale in buying a lot, building a schoolhouse, and furnishing it; but no vote of the legal voters of the district was taken before the issual of the bonds, and they were adjudged void under section 157 of the state

constitution: "No county, city, town, taxing district or other municipality shall be authorized or permitted to become indebted in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforceable by the persons with whom made; nor shall such municipality ever be authorized to assume the same."

The holders of the bonds, being in part the original purchasers and in part persons who had bought the bonds from them, instituted this action in equity, asking that the lot, house and furniture which was purchased with the proceeds of the bonds be transferred to them; and the court having adjudged them the relief sought the school district appeals.

Appellant relies on *Grady v. Pruitt*, 111 Ky. 100, 23 Ky. Law Rep. 506, 63 S. W. 283. In these cases the contractor who had built the schoolhouse, and to whom a balance of six hundred and four dollars was due, sought, in the first case, to hold the trustees personally liable, and, in the second, to remove ⁷² the house or such part of it as would be of value six hundred and four dollars, or place the house in the hands of the receiver. The district had paid him two thousand one hundred and seventy-three dollars on the contract. It was held in the first case that the trustees were not personally liable, and in the second that, the building being a single structure, a part of it could not be removed without injury to the remainder, and, the district having paid two thousand one hundred and seventy-three dollars on the building, the chancellor could not destroy two thousand one hundred and seventy-three dollars' worth of property belonging to the district to give the contractor six hundred and four dollars. It was also held in these cases that the contract being void under the constitution could not be enforced, directly or indirectly, and therefore that the property could not be placed in the hands of a receiver. To the same effect is the opinion of the supreme court of the United States in *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. Rep. 820, 29 L. ed. 132. In that case the city of Litchfield had issued bonds which were void under the constitution, and with a part of the proceeds of the bonds and other funds had constructed a system of waterworks for

the city. The land on which the works were constructed was bought before the bonds were issued. The streets through which the pipes were laid were public property then owned by the city, and much of the expense of the construction of the waterworks was paid by taxation or other resources of the city. The plaintiffs were unable to identify the property which represented the money they had paid, so that it could be reclaimed and delivered without taking other property or injuring other persons or interfering with their rights. The bill was dismissed.

The case before us is distinguishable from these cases. The money which the plaintiffs paid is distinctly traced into the schoolhouse, the lot and furniture, and no other money went into them. This property ⁷³ can be reclaimed, without taking any other property with it or injuring any other person or interfering with his rights.

In *Chapman v. Douglas County*, 107 U. S. 348, 2 Sup. Ct. Rep. 62, 27 L. ed. 378, land was conveyed to a county for a poorhouse. The county had no authority under the law to buy the land. It was held that the county must give up the land to the vendor when it failed to comply with its contract; in other words, that it could not keep the land which it had received under the illegal contract.

In *Geer v. School District*, 111 Fed. 682, 49 C. C. A. 539, it was held by the circuit court of appeals of the United States of the eighth circuit that where a school district issued bonds without authority and used the proceeds to pay a debt which it owed, the bondholders were entitled to be subrogated to the rights of the creditors whose debts their money had paid, the bonds being void. The same principle was followed by the same court in *Kearny County v. Irvine*, 126 Fed. 689, 61 C. C. A. 607, where a county issued bonds and used the proceeds to pay off the outstanding county warrants which it was authorized to issue. The bonds being void under a constitutional provision similar to ours, it was held that the bondholders were entitled by subrogation to the rights of the holders of the county warrants which had been paid off with the proceeds of the bonds.

No liability, direct or indirect, may be imposed upon the school district under the bonds in question. It is not liable on the bonds, nor can it be made liable by indirection in any way. But if we ignore the bond transaction altogether,

what have we? The district received four thousand dollars from the bondholders. The bonds being void, the district should have returned the money to the bondholders. If the bondholders ⁷⁴ had learned of the invalidity of the bonds while the district still had the four thousand dollars in its treasury which they had paid to it, manifestly a court of equity would have required the district to pay back their money to them. It was money obtained by a mutual mistake. While under the constitution no liability would attach to the district for the money if it had lost it or if it had spent it, and the fund could not be identified and followed, where it may be followed and identified, there is no more reason why property which represents the fund should not be returned than there would be for not returning the money, if it had been placed in a bag and the district had the bag locked up in its safe. The purpose of the constitution is not to enrich municipalities at the expense of innocent people who deal with them, and when they repudiate their bonds they must act honestly. A loss must not be placed upon the district; but when justice may be done without inflicting any loss upon the district, equity will lay hold of the conscience of the parties and make them do what is just and right. To illustrate: If, while the common-law disability of coverture was in force, a married woman had borrowed four hundred dollars and given her note for it, and, when sued on the note, had pleaded her coverture, if she still had the four hundred dollars in bank, equity would have required her to surrender the money, or if she had invested the four hundred dollars in a horse, and the fund could be clearly identified, equity would compel her to surrender the horse. In other words, as has been held, coverture is a shield, not a sword, and a married woman is never allowed to use her coverture to enrich herself at the expense of others: *Chilton v. Braiden*, 2 Black, 458, 17 L. ed. 304. The same rule has been applied in the case of infants: ⁷⁵ *Ison v. Cornett*, 116 Ky. 92, 25 Ky. Law Rep. 366, 75 S. W. 204, and cases cited.

Section 2353, Kentucky Statutes of 1903, is relied on for appellants: "When a deed shall be made to one person, and the consideration shall be paid by another, no use or trust shall result in favor of the latter, but this shall not extend to any case in which the grantee shall have taken a deed

in his own name without the consent of the person paying the consideration, or where the grantee, in violation of some trust, shall have purchased the lands deeded with the effects of another person."

This statute was not intended to affect the equitable doctrine that equity would follow a fund and compel restitution as long as it could be identified and followed. It was not the aim of the statute to enable one person to keep the money of another, and thus be enriched at his expense, simply because, instead of holding the money in specie, he has invested it in a tract of land. The true owner of a fund may in equity pursue it, where it is clearly identified, equally whether it has been transmuted by the holder into personality or realty. Properly, under the statute, he should not be adjudged the land, but a sale of it to satisfy his claim. But in this case appellants are not prejudiced by the form of the judgment, as the property is not of value more than the fund. We see no reason why the right to follow a fund should not be applied against municipalities under the clause of the constitution above quoted, just as it is against other persons obtaining the property of another under a void contract, where the fund may be identified and is separated from other property of the municipality. The present holders of the bonds stand by subrogation in the shoes of the original purchasers from whom they bought, and under the code the action ⁷⁶ may be maintained in the name of the real party in interest. The judgment complained of does justice between the parties, and we see no reason for disturbing it.

Judgment affirmed.

The Right to Follow Trust Funds when they have been misapplied by the trustee is discussed in the notes to *Ferchen v. Arndt*, 46 Am. St. Rep. 608; *Union Nat. Bank v. Goetz*, 32 Am. St. Rep. 125. The general rule is that equity will follow a fund through any number of transmutations, and preserve it for the owner, so long as it can be identified: *Midland Nat. Bank v. Brightwell*, 148 Mo. 358, 71 Am. St. Rep. 608; *Ober v. Cochran*, 118 Ga. 396, 98 Am. St. Rep. 118.

COMMONWEALTH v. MOORE.

[121 Ky. 97, 88 S. W. 1085.]

HOMICIDE.—In Order that One may be Guilty of homicide, the act must be done by him actually or constructively, and that cannot be, unless the crime is committed by his own hand, or by the hands of some one acting in concert with him, or in furtherance of a common purpose. (pp. 190, 191.)

HOMICIDE—Accidental Killing of Bystander.—Where one, in defending himself against robbery, accidentally shoots an innocent bystander, the robbers are not guilty of homicide. (p. 192.)

N. B. Hays, attorney general, and C. H. Morris, for the appellant.

⁹⁷ BARKER, J. The appellees, John Moore and John Kelly, were indicted by the grand jury of Knott county, charged with the offense of willful murder. As the question of law arising upon the face of the indictment has ⁹⁸ never been adjudicated in Kentucky, we give the indictment in its entirety: "The grand jury of Knott county, in the name and by the authority of the commonwealth of Kentucky, accuse John Moore and John Kelly of the crime of willful murder committed as follows: The said defendants, on the twentieth day of March, 1905, in the county and circuit aforesaid, did unlawfully, willfully, maliciously, feloniously and of their malices aforethought, kill, slay and murder Anderson Young, by causing said Young to be shot with a rifle gun, loaded with powder and leaden ball or other hard and explosive substances. The said gun was at the time in the hands of John Young, who at the time being assaulted by the defendant, John Moore, with the felonious intent to rob and kill the said John Young, who shot or discharged the said gun at said Moore in his necessary self-defense and in the defense of his house, and killed the said Anderson Young. The said defendants unlawfully, willfully, feloniously did conspire, band and confederate themselves together for the purpose of committing robbery upon the person of John Young, and in pursuance of said conspiracy and confederacy, and while the same was existing, the said defendant, John Moore, willfully, maliciously and feloniously went to the house of said John Young and assaulted and robbed the said Young, and the said Young, in order to defend himself and his house from the unlawful acts of said Moore, he

shot and killed the said Anderson Young, as aforesaid; that the said defendant, John Kelly, did willfully, feloniously and of his malice aforethought, counseled, advised and encouraged the said defendant, Moore, to commit said robbery against the peace and dignity of the commonwealth of Kentucky."

⁹⁹ A general demurrer to the indictment was interposed by the defendants and sustained by the court, and the indictment dismissed, from which judgment the commonwealth appeals.

It is unquestionably true that, where two or more persons conspire or confederate together to commit a felony, each is criminally responsible for every crime committed by his co-conspirators done in pursuance of the original conspiracy, and which naturally or reasonably might be anticipated to result from it. Therefore, if either of the defendants, in attempting to commit the robbery for which they conspired, had shot and killed John Young, or had shot at John Young and, missing him, had killed a bystander, both would have been guilty of murder.

In 1 Hale's Pleas of the Crown, 441, the rule is thus stated: "If divers persons come in one company to do any unlawful thing, as to kill, rob or beat a man, or to commit a riot, or to do any other trespass, and one of them in doing thereof kill a man, this shall be adjudged murder in them all that are present of that party abetting him and consenting to the act or ready to aid him, although they did but look on."

And in 1 East's Pleas of the Crown, 257, it is said: "Where divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it with violence, or in such a manner as naturally tends to raise tumults and affrays, as by committing a violent dissension with great numbers, or going to beat a man, or rob a park, or standing in opposition to the sheriff's posse, they must at their peril abide the event of their actions."

But this is not the case we have at bar. Here the homicide was not committed by the conspirators, ¹⁰⁰ either in the pursuance of the conspiracy or at all; but it was the result of action on the part of John Young, the proprietor of the house, in opposition to the conspiracy, and entirely contrary to the wishes and hopes of the conspirators. In order that one may be guilty of homicide, the act must be done

by him actually or constructively, and that cannot be, unless the crime be committed by his own hand, or by the hands of some one acting in concert with him, or in furtherance of a common object or purpose. The defendants can in no sense be said to have aided or abetted John Young, for he was firing at them; and to hold them responsible criminally for the accidental death of a bystander, growing out of his bad aim, would be carrying the rule of criminal responsibility for the acts of others beyond all reason. Suppose, instead of killing an innocent bystander, Young had killed Moore, one of the robbers, would the survivor have been guilty of murder? And yet, if the principle sought to be maintained by the commonwealth be sound, the survivor would necessarily be guilty of murder, because the owner of the house to be robbed had killed his companion, for he could just as truly be said to have aided and abetted the owner of the house in that case as in this. Indeed, the matter could be carried still further. The dead robber would also be guilty of murder, because his part in the causation of the homicide of which he was the victim would have been precisely the same as that which resulted in the death of Anderson Young. In other words, the acts of the defendants provoked and justified the shooting on the part of John Young, and if they are criminally responsible for the accidental death of a bystander shot by Young, they would also be guilty of murder if he had killed ¹⁰¹ one of themselves. The illustration carried to this extreme exposes the unsoundness of the position of the commonwealth in the matter in hand.

While, as we have heretofore said, this is a question of first impression in Kentucky, we are not without high authority in support of the position we seek to maintain in this opinion.

In the case of *Commonwealth v. Campbell*, 7 Allen, 541, 83 Am. Dec. 705, it appears that the defendants had conspired to create a tumult or riot, and in quelling it the officers by accident killed an innocent bystander. In a learned opinion the supreme court of Massachusetts held that the conspirators were not guilty of murder, and in the argument the identical case we have here is supposed and used to illustrate the unsoundness of the position of the commonwealth of Massachusetts in regard to the guilt of the parties. Said the court: "Suppose, for example, a burglar attempts to break into a dwelling-house, and the owner or occupant, while

striving to resist and prevent the unlawful entrance, by misadventure kills his own servant, can the burglar in such case be deemed guilty of criminal homicide? Certainly not. The act was not done by him, or with his knowledge or consent; nor was it a necessary or natural consequence of the commission of the offense in which he was engaged. He could not, therefore, have contemplated or intended it."

In the case of *Butler v. People*, 125 Ill. 641, 8 Am. St. Rep. 423, 18 N. E. 338, 1 L. R. A. 211, several had banded themselves together to create a riot at a circus in Prairie City. The four defendants attacked the city marshal, and made it necessary for him in self-defense to fire at his assailants, and in so doing he missed them and killed an innocent bystander.¹⁰² The supreme court of Illinois reversed a judgment of conviction against the conspirators had under these facts, holding that the death of the bystander was not within the scope of the original conspiracy, but in opposition to it, and, therefore, the defendants were not guilty.

In Bishop's New Criminal Law, volume 1, section 637, it is said: "If those suppressing a riot accidentally kill an innocent third person, the rioters are not guilty of the homicide; for in no way did they concur in or encourage the act which caused death."

No authority is cited in support of the opposing principle, and we therefore deem, both in reason and authority, the judgment of the circuit court dismissing the indictment must be affirmed, and it is so ordered.

For Authorities on the question decided in the principal case, see the note to Johnson v. State, 90 Am. St. Rep. 577. If two men engage in shooting at each other in a crowded waiting-room, and a bystander is killed, both are guilty of murder, one as principal and the other as aiding and abetting: State v. Lilliston, 141 N. C. 857, 115 Am. St. Rep. 705.

AULTMAN & TAYLOR CO. v. MEADE.

[121 Ky. 241, 89 S. W. 137.]

CONFESSION OF JUDGMENT—Absence of Jurisdiction.—If the maker of a note, before suit thereon is filed, signs an answer entering his appearance and confessing judgment, a judgment rendered thereon, without service of process or other appearance, is void. (p. 193.)

IRREGULAR FORECLOSURE—Accounting by Mortgagee.—If a mortgagee forecloses by virtue of a stipulation in the mortgage, when his action in so doing is prohibited by statute, he must account to the mortgagor for the actual value of the property. (p. 195.)

IRREGULAR FORECLOSURE—Action for Deficiency.—Where a mortgagee, by virtue of the mortgage contract, takes the property and does not apply it to the mortgage debt, his failure to so apply it is a defense to a suit for the balance of the debt. (p. 196.)

IRREGULAR FORECLOSURE.—The Mortgagor is not Estopped, as against the mortgagee, to question the validity of a foreclosure made in violation of the statute, on the ground that he did not object to the sale and even helped the purchaser to remove the property. (p. 197.)

John I. Williamson, Williamson, Brooker, Tryee & Adams and R. L. Greene, for the appellant.

Salyers & Barker and Dushman & Dushman, for the appellees.

²⁴³ O'REAR, J. In October, 1883, appellant sold to appellees a steam sawmill for nineteen hundred dollars. They paid three hundred and five dollars cash and executed notes for fifteen hundred and ninety-five dollars, secured by mortgage on the mill and fixtures and on certain real estate in Letcher county. Appellees having made default in certain of the payments when they became due, appellant elected to treat all of the notes due, as it was provided in the mortgage it might do. Thereupon appellant sent the notes to its attorney at Prestonburg for collection and for enforcement of the mortgage lien. Before the suit was filed the attorney ²⁴⁴ procured appellees to sign an answer, entering their appearance and confessing judgment upon the notes. The effect of this arrangement was equivalent to the giving of a power of attorney to confess judgment, which under our statutes was illegal and void: Ky. Stats. 1903, sec. 416. The judgment rendered thereon, without service of process or other appearance, was void, and gave no authority to appellant or

to the master commissioner, who was directed by the judgment to sell the mortgaged property, to execute it. Notwithstanding, the commissioner, acting under the judgment of the Floyd circuit court, sold the mill property for seven hundred dollars at public auction. This sale was also void as a judicial sale: See former opinion, 109 Ky. 583, 22 Ky. Law Rep. 1189, 60 S. W. 294.

The suit was to enforce the mortgage lien upon the land in Letcher county for the balance of the notes, after crediting certain admitted payments and the seven hundred dollars realized at the commissioner's sale of the mill. Appellees defended on numerous grounds. But the only one that seems to have any merit, or to have been sufficiently pleaded, was the counterclaim asserted by appellees against appellant for the conversion of the sawmill under the proceedings in the Floyd circuit court. To this claim appellant interposed the plea of limitation. Appellant's contention is that, though its judgment in the Floyd circuit court was void, and that in consequence it has no protection by virtue of it, the conversion of the mill by those proceedings was a tort, for which appellees had then a cause of action, which was barred by the five-year statute of limitation: Ky. Stats. 1903, sec. 2515. That appellant was then, and has ever since been, a nonresident of the state of Kentucky, cannot relieve the running of the statute, if ²⁴⁵ it began to run at all; for by section 2532, Kentucky Statutes of 1903, which saves the right of action as against debtors who obstruct the action or conceal themselves so that they cannot be sued, it applies only as "against residents of this state": *Seldon v. Preston*, 11 Bush, 191; *O'Bannon's Admr. v. O'Bannon*, 13 Bush, 583.

While appellees' claim against appellant might be properly a counterclaim in this suit upon the notes (Civil Code Practice, sec. 96), as it may be said to be connected with and grows out of the transaction or cause of action sued upon, it is also more than a counterclaim. It is a defense. Appellant, having a mortgage upon the mill to secure these notes, took possession of the mill by virtue of the contract shown by the mortgage, and converted it, not as a trespasser or stranger, but under the agreement of the parties that it might do so. For, while the judgment of the Floyd circuit court was void, as has been stated, the mortgage was not. Whatever lien it conferred remained unaffected by the judgment.

The rights of the parties were precisely what they were before the judgment was rendered. Appellant, by the master commissioner of the Floyd court, sold the mill in satisfaction of the notes and mortgage lien, so far as its value would go. The proceeding was instigated and controlled by appellant throughout, who received and applied the proceeds of the sale. It will not be heard to say that the commissioner was not acting for it. Its liability in this aspect of the case is the same as if it had procured an execution upon a void judgment to be issued and levied upon appellees' property, where the execution plaintiff is liable, whether or not the officer would be: Freeman on Executions, sec. 273.

In this state it is forbidden to foreclose a mortgage: ²⁴⁶ Civ. Code Practice, sec. 375. The remedy of the mortgagee is instead to enforce his lien in a court of competent jurisdiction. If, nevertheless, the mortgagee does foreclose by virtue of the express stipulation to that effect in the mortgage, his action, being prohibited by statute, would be on the same footing as a sale under the mortgage by virtue of a void judgment. Neither such judgment nor the stipulation in the mortgage conferred any rightful authority upon the mortgagee to seize and sell the mortgaged property. Still such mortgagee ought not to occupy a better standing in court, after having done that which is prohibited by our statute, than if he had done the same thing, being allowed to do so by law. Which brings us to consider what would have been the respective rights of these parties if the proceeding, virtually a foreclosure of a mortgage, had been allowed by our statutes, as it is allowed in many jurisdictions. A mortgagee who sells the mortgaged property upon a default of the mortgagor under express power of sale is bound to fairly conduct it, so as to reasonably produce the best price. Failing in this, he is not protected by the clause of the mortgage giving him the right to sell upon default, but will have to account to the mortgagor for the actual, instead of the selling, value of the mortgaged property. This is not alone because of the supposed tort of the mortgagee, but because of his breach of the implied undertaking that he, as trustee for the mortgagor, will apply to the mortgage debt the full, fair proceeds of the mortgaged property. While the test of such value is generally held to be the price realized at a duly advertised and fairly conducted sale, such presumption of fair value will not obtain where the conditions under which it is

to be applied did not exist: *Kilgour* ²⁴⁷ v. *Scott* (C. C.), 101 Fed. 359; *Waite v. Dennison*, 51 Ill. 319. Then the test of value is the evidence thereof aliunde. What that value is, is the thing to be ascertained.

Now the question recurs: If such mortgagee, by virtue of his mortgage contract, and not as a tort-feasor, takes the mortgaged property to be applied upon the mortgage debt, is it not his agreement, as part of the mortgage contract, to so apply it? And if he fails to do so, is not that a matter purely of defense in a suit to recover the balance of the mortgage debt, as much as would be a plea of payment? We think it is. Having reached this conclusion, the disposal of the plea of limitation becomes simple. For, admitting that the statute applies strictly to matters of setoff and counterclaim (*Williams v. Gilchrist*, 3 Bibb, 49; *Gilchrist v. Williams*, 3 A. K. Marsh. 235), still, as is well known, it does not affect the merits of the controversy. It only closes the doors of the courts to the bringing of suits on such stale claims. It applies alone to the plaintiff's cause of action, and not at all to the defense; for, obviously, so long as the courts will hear the plaintiff's case, time cannot bar the defendant's answer: *Edwards v. Kinsey's Admr.*, 14 Ky. Law Rep. 925; *Grover's Exr. v. Tingle*, 21 Ky. Law Rep. 885, 53 S. W. 281.

The case, then, stands thus: Appellant, having a mortgage lien upon appellees' sawmill to secure a debt took the mill under the provisions of the mortgage, express and implied, to be applied on the debt. Appellant has accounted for seven hundred dollars only as the value of the property so taken and applied. The plea is, and so is the drift of the proof, as found both by a jury and the judge, that the real market value at the time of the taking was more than seven hundred dollars—was, in ²⁴⁸ fact, about twelve hundred dollars. Appellant's implied undertaking having been to apply this value upon the debt, the sole question to be tried was, Had it done so? Appellant contends that, as seven hundred dollars was the value, it had so applied it. Appellees contend that as only seven hundred dollars was applied, and as the actual and fair cash value was much greater, and was as much as twelve hundred dollars, it had not. The proof, while conflicting, is such as to sustain the verdict of the jury and the finding of the judge. The nature of the defense is, when reduced, an equivalent to a plea of

accord and satisfaction. The court is invoked to compel the application of the satisfaction under the implied agreement, just as if it might have been asked to compel the credit of a payment under a plea of payment.

One other question is raised by appellant. It asserts that appellees are estopped to question the validity of the commissioner's sale, because they stood by and saw the property sell without objection, and even helped the purchaser to move it away. If this were a controversy between appellees and the purchaser, there would be greater force in the position; for it can be seen that appellees might have induced the purchaser to alter his condition by their conduct, which is of the essence of estoppel. An estoppel is never consistent with the truth of the matter. It essentially admits that the thing is different in fact from what it appeared to be, but that, as the false appearance was brought about by the knowledge and acquiescence of the party now asserting the contrary truth, in good conscience he ought not to be heard to deny as true what he had before induced an innocent third person to believe was true, when the latter has so acted on such belief as to have changed his condition with respect to the thing. But, to a party who has not been so misled, ²⁴⁹ who has not been induced to do anything by reason of the conduct pleaded in estoppel, the rule ought not to, and does not, apply. If it be admitted that appellees stood by and saw appellant sell the mill under the mortgage, without objection, we do not see how appellant was deceived thereby. As foreclosure of a mortgage is prohibited by statute, mere acquiescence in it cannot legalize it. That would accomplish by indirection, and that by the mere silence of the person aimed to be protected by the statute, what was positively forbidden. In principle a mortgage debtor can no more validate such a transaction, so as to close his mouth as against his creditor, than he could by waiving in advance the issual of a summons in the suit brought to enforce the mortgage lien. Nor can it be at all material, as affecting appellant's plea of estoppel, that some months afterward appellees helped the purchaser to remove the mill.

Perceiving no error prejudicial to appellant, the judgment is affirmed.

Petition for rehearing by appellant overruled.

If Mortgaged Property is of sufficient value to pay the mortgage debt, and the mortgagee permits the property to be sold under foreclosure in order that his representative may purchase it for less than its fair market value, he is estopped from recovering the balance due on the mortgage note: *Island Sav. Bank v. Galvin*, 20 R. L. 158, 78 Am. St. Rep. 846.

On the Estoppel of a Mortgagor to assert the invalidity of a foreclosure sale when he has accepted the surplus proceeds, see *Lanier v. McIntosh*, 117 Mo. 508, 38 Am. St. Rep. 676; *Brewer v. Nash*, 16 R. L. 458, 27 Am. St. Rep. 749.

MASONIC LIFE ASSOCIATION OF WESTERN NEW YORK v. POLLARD.

[121 Ky. 349, 89 S. W. 219.]

LIFE INSURANCE—Presumption Against Suicide.—The law indulges a presumption that the death of an insured person was not self-inflicted. (p. 199.)

LIFE INSURANCE—Suicide of Insured.—If an insured person intentionally takes his own life at a time when his mind is so far gone that he is unconscious that he is taking his life, the act is not deemed his but in law is regarded as an accidental killing; conversely, although his mind may be deranged, still if he has mind enough to know the act will probably result in death, and if he inflicts it with that intention, it is his act and absolves the insurance company from liability. (p. 200.)

Robert Crenshaw and Harry D. Williams, for the appellant.

James B. Garnett, J. W. Kelly and R. A. Burnett, for the appellee.

351 O'REAR, J. This is an action on a policy of life insurance. Appellant insured the life of N. B. Pollard in the sum of two thousand dollars. One of the conditions named in the policy upon which it was to be avoided is, if the insured should "die by his own hand or act, sane or insane, within three years from the date of issue of this certificate, then this agreement shall cease and be of no effect." Within three years from the date of the policy the assured killed himself. The act occurred in his office in the town of Cadiz, in the presence of one person, and so nearly in the presence of at least two others that they saw his body before it had fallen after the fatal shot was fired into his head. N. B. Pollard was at the time the sheriff of Trigg county. The suicide occurred on December 2, 1901. At the previous

October term of the fiscal court of Trigg county ³⁵² he had failed to complete the settlement of his accounts as sheriff, and a called term of the fiscal court, was to be held on that day, December 2d, to complete the settlement. The commissioner appointed by the court had reported a deficit amounting to several thousand dollars in the accounts of the sheriff. As a matter of fact, as was shown by the judgment in favor of the county against the sureties of N. B. Pollard as sheriff, subsequently rendered, he was in default to the county about two thousand three hundred dollars. It also appears that he was at the time a candidate for the office of county court clerk of Trigg county. About a week before his death he handed his life insurance policy and his will to a friend, to be deposited in his vault, with the request that "if anything happened to him" he wanted this friend to see that his children got those papers for the benefit of them. Nothing in the action of Pollard had indicated any mental derangement then. He was about his business as usual. On the morning of the suicide he transacted business with a number of persons. He collected taxes and gave receipts therefor. He wrote business letters and mailed them, and inclosed checks—one of four thousand dollars being inclosed to the state auditor in payment of the state revenue collected by him as sheriff. He deposited about fourteen hundred dollars in bank that morning. In all he did, and in all he said, so far as the record discloses, he was in full possession of his mental faculties. His domestic relations were pleasant. He had no disease, nor was there any sickness or other cause of disturbance in his family, so far as the record shows. After completing certain business transactions, including those above mentioned, and shortly before the hour at which the fiscal court was to convene to complete his settlement, he deliberately shot himself through the head; ³⁵³ at least, such is the inevitable conclusion from the proof in this case, all of which is one way.

At the conclusion of the evidence appellant asked that the jury be peremptorily instructed to find for it. But the motion was overruled. This was error. The law presumes every man to be sane until the contrary is shown. Likewise the law indulges a presumption against suicide as being unnatural and immoral. But presumptions of this nature are indulged necessarily in the absence of proof. When the evidence shows and the fact is that the act of suicide was com-

mitted when the person was in sound mind, no presumption whatever can be indulged. It ceases to be a presumption and becomes a proven fact. Where the dead body is discovered in the presence of the implement of death, and the surroundings are such as admit of the conclusion either that it was self-inflicted or not, or was intentionally done or not, the evidence being wholly circumstantial, then the presumption against suicide, that is intentional self-destruction, applies. Where, however, there are eye-witnesses to the occurrence, whose testimony established the fact to be that the act was intentional; that the person was in a normal condition of mind; that he was not insane; that the motive probably influencing his action was the fear of disgrace, or of punishment for some past act, about to be disclosed, or which had been recently discovered, then it would be illogical and contrary to the judgment and observation of mankind to say that the act was to be presumed in law to have been unintentional or the result of that insanity which deprives the mind of its knowledge of the probable effect of the act upon life. When all the evidence is one way, the natural result of which is to establish a fact in controversy, ³⁵⁴ there is nothing to be submitted to the jury, as only controverted propositions are submitted to them; that is, propositions about which there is a conflict in the evidence.

The court instructed the jury in this language: "The court instructs the jury that they will find for plaintiff the sum of two thousand dollars, with interest from the second day of April, 1902, unless they shall believe from the evidence that the insured, N. B. Pollard, intentionally took his own life, and that at the time he did so he had sufficient mind to contemplate the consequences of the act resulting in his death, in which case they will find for the defendant." The instruction is erroneous. On the contrary, the law is that if the insured intentionally took his own life, at a time when his mind was so far gone as to render him unconscious that he was taking his life, the act will not be deemed his, but will be regarded in law as an accidental killing. The converse is equally true—that although his mind may have been deranged, still if he had mind enough to know that the act would probably result in his death, and if he inflicts it with that intention, it is his act in law, for which the company is not responsible under the clause of this policy: *Mutual Ben. Life Ins. Co. v. Daviess' Exr.*, 87 Ky. 541, 10 Ky. Law Rep. 577,

9 S. W. 812; Manhattan Life Ins. Co. v. Beard, 112 Ky. 455, 23 Ky. Law Rep. 1747, 66 S. W. 35; Supreme Council v. Heineman, 25 Ky. Law Rep. 1604, 78 S. W. 406; Bigelow v. Berkshire Life Ins. Co., 93 U. S. 284, 23 L. ed. 918.

Wherefore the judgment is reversed and cause remanded, with directions to grant appellant a new trial under proceedings not inconsistent herewith.

In the Case of the Death of an Insured Person the presumption of law is against suicide, and if the insurer relies on self-destruction as a defense to an action on the policy, it has the burden of proof; Equitable Life Ins. Co. v. Hebert, 37 Ind. App. 373, 117 Am. St. Rep. 324; Lindahl v. Supreme Court, I. O. F., 100 Minn. 87, 117 Am. St. Rep. 666.

The Insanity of an Insured Person as Affecting the Defense of Suicide in action to recover his life insurance is discussed in the note to Supreme Conclave v. Miles, 84 Am. St. Rep. 546.

MALLON v. BUSTER & ALLIN.

[121 Ky. 379, 89 S. W. 257.]

JUDICIAL SALE.—A Parol Agreement Between Bidders at a judicial sale to buy the land in partnership and then divide it is not inimical to the statute of frauds. (p. 202.)

JUDICIAL SALE—Contract to Chill Bidding.—An agreement between bidders at a judicial sale, when each desires only a part of the tract on sale, made after they have bid the property to a price above its actual value, to stop competing and buy the land together, each taking and paying for the portion that he desires, is not against public policy. (p. 203.)

E. H. Gaither, for the appellant.

J. T. Wilson, for the appellee.

²⁸¹ BARKER, J. The facts out of which grew this litigation are, briefly, as follows: At a judicial sale had in the case of Marimon v. Marimon, pending in the Mercer circuit court, a certain lot of land in the city of Harrodsburg was being auctioned off. Under the judgment this property, which really consisted of two lots, was offered separately, and then as a whole; the bid producing the most money to be accepted. One of these lots (the property being divided) adjoined that of J. G. Mallon. The other was coterminous with the mill property of Buster & Allin. When offered separately, each of these parties purchased the lot adjoining their

own property; one lot bringing two hundred dollars, and the other two hundred and forty dollars. When the property was offered as a whole the parties litigant here became bidders, and between them raised the price to five hundred and sixteen dollars. Some little time before this bid was reached the opposing bids had been going up about a dollar at a time. At this period in the sale Mr. Allin, who had been doing the bidding for Buster & Allin, said to Mallon, substantially: "You want only one of these lots, and we want one. Why not quit bidding against each other and buy them together, paying for them equally and sharing them equally? You take the one next to you, and we the one next our mill property." To which Mallon responded: "All right; why did you not say so sooner?" Mallon does not admit this ³⁸² conversation precisely as detailed here; but what he does admit is substantially that. The lot was knocked down to Mallon, who afterward procured the sale to him to be confirmed by the court and executed bond for the purchase money, but refused to divide with the appellees, except upon a price in excess of that which he had paid at the judicial sale. Whereupon Buster & Allin instituted this action for a specific performance of the contract. Upon final hearing the court adjudged that the verbal contract with reference to the lot was made substantially as alleged by Buster & Allin, and that they were entitled to the half lying next to their property. From this judgment Mallon has appealed.

Without stating the facts with any circumstantiality we think the chancellor correctly ascertained that the contract as detailed here was made. Assuming this to be true, appellant presents two legal defenses:

First, that the contract was verbal, and therefore within the statute of frauds. This contention is disposed of by the opinion in the case of *Garth v. Davis & Johnson*, 120 Ky. 106, 117 Am. St. Rep. 571, 27 Ky. Law Rep. 505, 85 S. W. 692, where it was held, after a review of a great many authorities, that a partnership for the purchase of real estate at an auction may be made by parol, and is not inimical to the provisions of the statute of frauds with reference to the sale of land. This case is so recent, and so thoroughly covers the question in issue, that it is only necessary to refer to it as decisive of the same question here.

Second, it is urged that the contract was contrary to public policy, as preventing free and untrammelled competition

at judicial sale and therefore, although made, the parties being in *pari delicto*, equity will leave them where it finds them, and consequently the position of the defendants is the better of the two. ³⁸³ It may be conceded, as a general proposition, that contracts which have a tendency to destroy free competition in the bidding at judicial sales are contrary to public policy where they are made for that purpose; but this general principle is limited and controlled by the particular facts of the case to which it is sought to be made applicable. The parties here did not enter into a wrongful conspiracy for the purpose of buying the property in question at a cheaper price than its market value. They had freely competed beyond the actual value of the property, as is shown by the difference between the price realized when the lots were sold separately and that realized when they were sold jointly. Separately they produced four hundred and forty dollars. Jointly they sold for five hundred and sixteen dollars. The reason for this was because the respective bidders only needed the lot next to his own property, and when that alone was being sold he purchased it at its real value at open competitive sale. When, however, the two lots were sold together, each party was forced to bid more than the property was worth in order to get the particular part that he needed.

There is no principle of law that requires parties so situated to unnecessarily injure themselves in order to promote the interest of the beneficiaries of a judicial sale; and a contract between bidders, made for the purpose of protecting themselves against what may be called opportunism growing out of the facts existing at the time of the sale, is not opposed to public policy. All that the beneficiaries of a public sale can require is that their rights shall not be trespassed upon by an unlawful conspiracy which has the effect, or tends to have the effect, of acquiring the property below its market value. In the case at bar, demonstrably the contract in question was ³⁸⁴ only made after this point was reached, and when it was impossible that its effect should have been to acquire the property below its real worth. This being true, the contention of appellant that the contract was void as opposed to public policy is untenable.

In the case of *Garth v. Davis & Johnson*, 120 Ky. 106, 117 Am. St. Rep. 571, 27 Ky. Law Rep. 505, 85 S. W. 692, this phase of that case, while not enunciated in the opinion, was discussed by the court more than once, and the conclusion

reached that the contract between the parties there was not opposed to public policy.

In the case of *Butler v. Prewitt*, 21 Ky. Law Rep. 813, 53 S. W. 20, a similar contract to that involved here with reference to the purchase of land at judicial sale was specifically enforced.

The principle we have undertaken to enunciate in this opinion is thus stated in *Lawson on Contracts*, 307: "But, on the other hand, if the arrangement is entered into for no such fraudulent purpose, but for the mutual convenience of the parties, as with the view of enabling them to become purchasers, each being desirous of purchasing a part of the property offered for sale and not an entire lot, and induced by any other reasonable and honest purpose, such agreement will be valid and binding; and an association formed for the purpose of bidding at an auction sale is lawful, and may become the purchaser, unless formed for the purpose of preventing competition."

The judgment of the chancellor, specifically enforcing the contract in question, is affirmed.

The Effect of Verbal Contracts between two or more persons to purchase land of another at judicial sales or otherwise, is discussed, in relation to the statute of frauds, in the note to *McCoy v. McCoy*, 102 Am. St. Rep. 239. It has recently been held that if two persons make an oral agreement to form a partnership and each to buy in his own name certain town lots, both thereafter to pay for and own them as partners, the agreement constitutes a partnership and is not within the statute of frauds: *Garth v. Davis*, 120 Ky. 106, 117 Am. St. Rep. 571. Compare *Norton v. Brink*, 75 Neb. 575, 121 Am. St. Rep. 822. As to the validity of a parol contract of agency whereby the agent agrees to purchase for the principal land to be sold at execution sale, see *Schmidt v. Beiseker*, 14 N. Dak. 587, 116 Am. St. Rep. 706; *Bryan v. Douds*, 213 Pa. 221, 110 Am. St. Rep. 544. And as to the validity of parol contracts of partnership to deal in land, see *Miller v. Ferguson*, 107 Va. 249, 122 Am. St. Rep. 840.

Not Every Combination of Bidders at a Judicial Sale is illegal as calculated to chill bidding: *Venner v. Denver Union Water Co.*, 40 Colo. 214, 122 Am. St. Rep. 1036.

ILLINOIS CENTRAL RAILWAY COMPANY v. HOUCHINS.

[121 Ky. 526, 89 S. W. 530.]

REMOVAL OF CAUSES—Resident and Nonresident Parties.—

When a complaint states a cause of action in tort against a nonresident and a resident jointly, the nonresident is not entitled to a removal of the cause to a federal court. (p. 207.)

RAILROAD—Joint Liability with Engineer for Negligence.—

When the negligence of a railroad engineer results in injury to a mail clerk on the train, the railroad company and the engineer are jointly liable and may be sued jointly or severally. (p. 208.)

DAMAGES—Personal Injuries—Life Expectancy.—

The probable expectancy of his life is admissible on the issue of damages in an action by a person for personal injuries which impair his capacity to earn money. (p. 209.)

EVIDENCE.—The American Mortality Table is admissible to

show the expectancy of life. But it shows only the probable continuance of life of healthy persons who are insurable risks, and not the duration of ability to earn money, and the court should instruct the jury accordingly. (p. 210.)

EVIDENCE Admissible Against One of Two Defendants.—

In an action against two defendants, evidence may be admitted, notwithstanding it is competent as against only one of them, but the court must admonish the jury against whom the evidence may not be considered. (p. 211.)

EVIDENCE to Discredit Witness.—The Court Should Tell the

Jury that evidence introduced to discredit a witness is not to be considered as substantive testimony. (p. 211.)

PUNITIVE DAMAGES.—When an Instruction is given as to

punitive damages, the court should clearly tell the jury that the giving of such damages is a matter of discretion. (p. 211.)

DAMAGES—When Excessive for Personal Injuries.—

A verdict for ten thousand five hundred dollars for personal injuries is excessive, where the evidence is uncertain as to the extent of the plaintiff's injuries or as to what his condition will permanently be. (pp. 211, 212.)

Johnson & Wickliffe, J. S. Wortham, J. M. Dickinson and Trabue, Doolan & Cox, for the appellants.

B. F. Proctor, G. M. Herdman, Greene & Van Winkle and S. D. Hines, for the appellees.

⁵²⁷ HOBSON, C. J. J. E. Houchins was a postal clerk on a mail train running between Paducah and Louisville on the Illinois Central Railroad. On November 7, 1902, at 11:36 A. M., the train on which Houchins was collided ⁵²⁸ with an engine and tender in the yards at Central City. By reason of the collision Houchins was thrown against the end of

the car. At first it was not thought that he was very much hurt, as there was no apparent injury of a serious character. He was taken to his home at Leitchfield and was confined to his bed about twenty days. After that he went about on crutches for a while, and then with a cane. Some time afterward he undertook to go back to work on the road, and found that he could not stand the work on the train, and took a place in Louisville as transfer clerk, where he has since been employed, which pays him nine hundred dollars a year. His salary as postal clerk was one thousand dollars, and his living in Louisville is more expensive than at Leitchfield. There is a limp in his walk, but the proof is very conflicting as to the extent of his injuries. The trial occurred in January, 1904, or about fifteen months after he was hurt. A number of physicians testified on the trial for the railroad company that they had examined him carefully and with the aid of the X-rays, but could find nothing wrong; that he was a fine insurance risk and normal in every way. On the other hand, a number of physicians testified that his spine was injured and that a lump had formed in his hip joint, causing lameness and permanently disabling him from following his vocation as postal clerk. According to the evidence for him he was to a large extent a nervous wreck, while according to the evidence for the railroad company he is a healthy man and in normal condition. The jury found a verdict in his behalf for ten thousand five hundred dollars against the railroad company and the engineer in charge of the engine with which the train collided, and the defendants appeal.

Williams, who had charge of the engine with which the train collided, had taken his engine off the sidetrack ⁵²⁹ and was going down the main track to get to his train, which was due to leave shortly. As he was going out on the main track his attention was called to the fact that the passenger train was about due, and he said that it was not due yet, that he had just looked at his time-card, that the passenger train was due at 11:55, and that it was then only 11:35. He went out on the track, and just after he got on the track the passenger train came around the curve and ran into him. The fact was the passenger train was due at 11:35, and he had made a mistake in reading his time-card and had taken the leaving time of the passenger train, which was 11:55, for its arriving time, which was 11:35. Those in charge of the passenger train were in no way in fault for the collision. The train was

on time, and the trouble was wholly due to Williams making the mistake in the reading of his time-card. The engineer of the train was killed; the fireman was badly hurt, and so were several other persons. The railroad company filed its petition for a removal of the case to the circuit court of the United States, aptly alleging that Williams was fraudulently joined as a defendant for the purpose of preventing a removal of the case to the United States circuit court, and that the allegations of the plaintiff's petition were known to him to be untrue, and that he did not expect to prove them when he made them, and that they were made solely for the purpose of preventing a removal of the case to the United States circuit court. The court overruled the motion to remove the case, and the railroad company then filed an answer, in which it admitted that the collision was by reason of the ordinary negligence of Williams, the engineer in charge of the ⁵²⁰ switch engine, and confessed to liability to Houchins in the sum of two hundred and fifty dollars.

It is insisted that the court erred in refusing to remove the case to the circuit court of the United States, on the idea that the company cannot be sued jointly with the servant whose negligence caused the injury where it was not independently at fault, that under the allegations of the petition for removal the railroad company had a right to remove the case, and that the circuit court of the United States must determine the questions arising on the allegations of the petition for removal. We cannot accede to this view. The plaintiff's petition stated a cause of action within the jurisdiction of the state court. The joint cause of action so stated by him in his petition was not removable to the federal court under the act of Congress. That court had no jurisdiction over the case, and any order it made in a case of which it had no jurisdiction was void. Consent cannot confer jurisdiction, and if the railroad company had been beaten in that court it might at the end of the litigation have raised the question of jurisdiction. It was not contemplated by the act of Congress that every case, whether removable or not, should be subject to the control of the federal courts. If the course urged in this case is to be approved, then every case to which a nonresident is a party, although liable jointly with the others, may be removed to the federal court. The action was properly brought in the state court. That court admittedly had jurisdiction and it certainly cannot be maintained that it

should have surrendered jurisdiction over the case and sent it to a court for trial which on the face of the papers was without jurisdiction to make any order in it.

⁵³¹ It is settled that under the law of Kentucky, Williams and the railroad were jointly liable to Houchins for his injury, and might be sued jointly or severally: Chesapeake etc. R. R. Co. v. Dixon's Admx., 104 Ky. 608, 20 Ky. Law Rep. 792, 47 S. W. 615; Cincinnati etc. R. R. Co. v. Cook, 113 Ky. 161, 67 S. W. 383; Illinois etc. R. R. Co. v. Coley, 121 Ky. 385, 28 Ky. Law Rep. 336, 89 S. W. 234, 1 L. R. A., N. S., 370.

Is this action, which confessedly lies in the state court under the laws of the state, to be controlled by the federal court, and may that court, if of opinion that a joint action does not lie, take jurisdiction of the case? Such a rule would deprive the litigant of his right to try his case under the laws of the state, and would compel him to go into the merits of his case before a tribunal without jurisdiction to sit in it. If the state court makes a mistake, an appeal may be taken to this court; and if the railroad company feels aggrieved by the decision of this court it may in every case prosecute an appeal to the supreme court of the United States on the question. So it is not without remedy, and there is no possibility of its rights not being properly protected.

Houchins proved on the trial that he was twenty-nine years of age at the time of the injury. He introduced on his behalf W. T. Morgan, who, over the objections of the defendants, was allowed to testify as follows:

“Q. According to the American Tables of Mortality, what is the probable expectation of the life of a man twenty-nine years of age? A. This is a book of the Mutual Life Insurance Company of New York. Take a man at the age of twenty-nine, the probable expectancy of life for him would be thirty-six and two-tenths years; a man in good health and twenty-nine years old, his expectation of life would be thirty-six and two-tenths years.

⁵³² “Q. That is the American Table of Mortality? A. Yes, sir.”

“Q. This book is gotten out by the Mutual Life Insurance Company of New York? A. Yes, sir; that book was sent me this year.”

According to Dr. Wigglesworth's Table, which has been adopted by this court, the expectancy of life of a man at

twenty-nine years old is thirty and sixty-six hundredths years, The evidence objected to showed that the expectancy of life at twenty-nine years was nearly six years longer. When the action is to recover for the death of a person injured, as the measure of recovery is the value of his capacity to earn money, standard tables, showing the ordinary expectancy of life, are held to be competent. Where, as in this case, there is proof tending to show that the plaintiff's capacity to earn money is impaired or partially destroyed, the probable expectancy of life is equally competent; for the measure of recovery here is in part compensation for the impairment of his capacity to earn money. If, as is conceded, evidence of the ordinary expectation of life may be received where the capacity to earn money is destroyed by death, it is hard to see why such evidence cannot be equally received where the capacity to earn money is partially destroyed; for in either case the jury are, in making up their verdict, to be governed by the capacity to earn money which has been destroyed, and whether this is a partial or total destruction is not material: *Greer v. Louisville etc. R. R. Co.*, 94 Ky. 169, 42 Am. St. Rep. 345, 14 Ky. Law Rep. 876, 21 S. W. 649.

The Carlisle Mortality Tables are based upon actual observation in the towns of Northampton and Carlisle, England. The deaths were taken, not from selected lives, but from the population generally. ⁵³⁸ These tables have been very generally admitted by the courts of this country: *Lincoln v. Power*, 151 U. S. 436, 14 Sup. Ct. Rep. 387, 38 L. ed. 224; 17 Am. & Eng. Ency. of Law, 900. The field, however, was so narrow that they have never been regarded as satisfactory. It is a matter of common knowledge that the expectancy of life is increasing. The American Table of Mortality has been made out from the combined experience of the life insurance companies of America, and is now regarded as the standard throughout the United States. It is true that it is based on insurable lives or healthy persons. Still, there is no great difference between it and the Carlisle Table, as by the Carlisle Table the expectancy of life of a person twenty-nine years old is thirty-five years. In cases of this character the aim of the court is to get the best information attainable. The American Tables of Mortality have been recognized by many of the courts of the country as perhaps the best means of arriving at the expectancy of life. The Wigglesworth Tables

were made before 1858. Since then there has been great advance in medical science, and the data upon which such tables are calculated are much fuller now than then. The court, as information increases, will use that table which is the best and most reliable. The American Mortality Table was held competent in the case of *Greer v. Louisville etc. R. R. Co.*, 94 Ky. 169, 42 Am. St. Rep. 345, 14 Ky. Law Rep. 876, 21 S. W. 646, and this case was followed in *Louisville etc. R. R. Co. v. Gordan*, 24 Ky. Law Rep. 1819, 72 S. W. 311. After maturely reconsidering the subject we have reached the conclusion to follow the rule heretofore laid down, and to hold that in each case the expectancy of life may be shown, as any other fact, by the best evidence obtainable, and that, as improved tables ⁵³⁴ come into use which are of standard authority, they may be given in evidence, instead of the older tables which they supersede.

Such tables show only the probable continuance of life, and not the duration of ability to earn money. They show the probable duration of life of healthy persons who are insurable risks, and the court, when requested, should tell the jury what the table shows, and that it is to be considered by them, in connection with the other proof in the case, for what it may be worth, considering the plaintiff's estate of health and circumstances, in determining the probable duration of his capacity to earn money: 3 Wigram on Evidence, sec. 1698; *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813.

The court allowed the plaintiff to prove by a witness that Williams, long after the accident, acknowledged to backing his engine out on the main track on the time of the train, saying he forgot the dead time the train had there. This was no part of the *res gestae*, and the admission by the servant was incompetent against the master: *Chesapeake etc. R. R. Co. v. Smith*, 101 Ky. 111, 18 Ky. Law Rep. 1079, 39 S. W. 832. The evidence was, however, competent against Williams, who was sued jointly with the railroad company; but, when it was admitted by the court without any admonition, the jury would understand it to be competent against all the defendants. In admitting the evidence the court should have cautioned the jury that it could only be considered against the defendant Williams, and not against the other defendant: *Cincinnati etc. R. R. Co. v. Cook*, 113 Ky. 161, 67 S. W. 383. It often happens, in suits against two defendants, that evidence of admissions is competent against the one who

⁵³⁵ made them and not competent against his codefendant; yet is it every-day practice to admit it, with proper admonition to the jury as to the defendant against whom it may be considered. There is nothing in this class of cases to except it out of the general rule, but it is a serious error for the court to admit the evidence without cautioning the jury as to the person against whom it may be considered: Illinois etc. R. R. Co. v. Winslow, 119 Ky. 877, 27 Ky. Law Rep. 329, 84 S. W. 1175. The statement was made in a deposition. The writing is the best evidence. If proper foundation was laid, the statement might be used to discredit Williams as a witness; but the court should tell the jury it is not in this event to be considered as substantive testimony.

On the question of damages the court, after directing the jury to find compensatory damages, added these words to the instruction: "If the jury believe from the evidence that the said collision was caused by the gross negligence of the defendant railroad company's agents or servants in charge of the engine with which passenger train collided on the occasion in controversy, then and in that event the jury may, in addition to compensatory damages, if any, award the plaintiff punitive damages against said defendant Illinois Central Railroad Company, not exceeding, however, in the aggregate fifteen thousand dollars, the amount claimed."

As to whether there was enough in the evidence to warrant the awarding of punitive damages the court is equally divided. But when an instruction is given as to punitive damages the court should clearly tell the jury that the giving of punitive damages is a matter of discretion, and in this case the court should tell the jury that if they believe, from the evidence, ⁵³⁶ that the collision was caused by the gross negligence of the railroad company or its servants in charge of the engine, then, in addition to compensatory damages, if any, the jury may or may not, in its discretion, award the plaintiff punitive damages in such sum as, under all the evidence, they deem right, not exceeding, however, fifteen thousand dollars, the amount claimed in the petition. On another trial the first and second instructions will be combined in one instruction, as this will simplify the matter somewhat for the jury.

It is earnestly insisted that the verdict of the jury is palpably excessive, the result of passion and prejudice. In view of the uncertainty of the evidence as to the extent of

the plaintiff's injuries, or as to what his condition will permanently be, we are of opinion that the verdict is excessive, and that, on the whole case, a new trial should be awarded.

Judgment reversed, and cause remanded, for further proceedings consistent herewith.

A Railroad Company and Its Engineer are Jointly Liable when the sole ground of liability is a negligent act or misfeasance on the part of the engineer: *Southern Ry. Co. v. Grizzler*, 124 Ga. 735, 110 Am. St. Rep. 191.

A Removal of the Cause to a federal court cannot be demanded by a foreign railroad company when it and its engineer, who is a resident of the state, are sued jointly for his negligence: *Southern Ry. Co. v. Grizzle*, 124 Ga. 735, 110 Am. St. Rep. 191.

The Admissibility in Evidence of Mortality Tables in actions for negligence resulting in death or permanent personal injuries is considered in *Greer v. Louisville etc. R. R. Co.*, 94 Ky. 169, 42 Am. St. Rep. 345; *Steinbrunner v. Pittsburgh etc. Ry. Co.*, 146 Pa. 504, 28 Am. St. Rep. 806; *Damm v. Damm*, 109 Mich. 619, 63 Am. St. Rep. 601.

SOPER v. IGO, WALKER & CO.

[121 Ky. 550, 89 S. W. 538.]

MOTHER'S ACTION for Enticing Child from Home.—While the father and mother of a child reside together, she cannot maintain an action against one who entices the child from home. (p. 213.)

G. E. Lilly, for the appellant.

J. A. Sullivan and J. T. Cobb, for the appellee.

551 NUNN, J. This is an appeal from a judgment of the lower court sustaining a demurrer to the petition of appellant. The petition is as follows: "The plaintiff says that she is a married woman, and her husband, Charles Soper, is now living with her; and they were married in the year 1880. By this marriage they have several children, one of whom is named Thomas Daniel Soper, hereinafter called 'Dan.' On the second day of June, 1903, this infant boy, then aged about eighteen years, was induced, persuaded, enticed, helped, aided and assisted by certain designing persons to leave the home, bed and board of this plaintiff, all of which was against the knowledge will and consent of herself and her husband, and the said Dan did, by reason of said wrongful acts, leave the home, bed and board of plaintiff, against her will, knowl-

edge and consent, and against the knowledge, will or consent of her husband, by reason of which this plaintiff has lost the society and companionship of said infant and has suffered much mental distress and pain therefrom. Her said son has been kept by these defendants since said day in June until the present time against their will and consent, and said defendants and each of them knew that the said Dan had been induced, enticed, ⁵⁵² persuaded, helped, aided and assisted away from this plaintiff's home without their knowledge, and against the will and consent of herself and her husband, and, knowing this, the said defendants wrongfully kept and harbored said Dan, in conjunction with C. H. Chenault, and gave him employment, all of which was against plaintiff's and her husband's will and consent, which wrongful harboring and keeping deprived, and now deprives, this plaintiff of his society and companionship, and from all of which she has suffered much mental distress and pain, and has expended money to recover the possession of her said son, in all to the sum of five thousand dollars, for which she prays judgment, and for all proper relief."

The only question involved on this appeal is whether the mother can maintain an action like this when her husband and the father of her child is alive and resides with her. Ever since the marriage relation existed, the law has recognized the husband as the head of the family and enjoined upon him the duty of maintaining, educating and protecting his children, and in return for these duties he is entitled to their services, and it has always been the law that, if anyone wrongfully abducts from the father one of his children, he can maintain an action against the wrongdoer for damages, based upon the principle that the father has the right to the services of his child, it matters not whether the child renders such services, and, having such a right upon which to base his action, he is not confined in a recovery to the loss of services alone, but may recover damages for injury to his feelings and the loss of the companionship of his child. We have been unable to find any case where a mother has been permitted to recover where her husband was alive and residing with her. It is true her suffering may ⁵⁵³ be as great or greater than that of her husband in being separated from her child, but the law has never recognized her right to the services of the child as against the right of the husband so long as they are living together. It is contended that they both

should be permitted to sue and recover—the wife for her mental suffering, and the husband for loss of service and also mental suffering. This appears plausible; but the rule against it has existed for so long that it should not be changed, except by legislative enactment. If this court should sustain appellant's contention, and change the rule, and permit the appellant to recover in this action, it would, in effect, permit not only the mother, but the brothers and sisters, of the child each to recover damages for mental suffering and loss of companionship.

In the case of *Jones v. Tevis*, 4 Litt. 25, 14 Am. Dec. 98, the court said: "The parent is bound to maintain, protect and to educate his children, and in return he is entitled to their obedience and service. It is upon this principle he has been allowed to maintain an action for a loss of service, occasioned by beating or imprisoning his child, . . . and upon the same principle he must have a right to recover for a loss of service occasioned by the abduction of his child. The right to maintain an action for injuries of this sort no doubt belongs exclusively to the father during his life; but after his death, the mother, being the only parent, is, in contemplation of law guardian by nature to the children, in which relation she is bound to them by the same duties, and has in them the same rights, as the father during his life": *Trimble v. Spiller*, 7 T. B. Mon. 394, 18 Am. Dec. 189; *Union News Co. v. Morrow*, 20 Ky. Law Rep. 302, 46 S. W. 6.

Wherefore, the judgment is affirmed.

Petition by appellant for rehearing overruled.

For Authorities bearing upon the principal case, see Gilley v. Gilley, 79 Me. 292, 1 Am. St. Rep. 307; *Atlantic etc. Ry. Co. v. Gravitt*, 93 Ga. 369, 44 Am. St. Rep. 145; *Rowe v. Rugg*, 117 Iowa, 606, 94 Am. St. Rep. 318.

WATERS v. CLINE.

[121 Ky. 611, 85 S. W. 209.]

STATUTE OF FRAUDS.—Part Performance does not take a contract out of the statute of frauds. (p. 217.)

STATUTE OF FRAUDS.—A Defendant Who Relies on the statute of frauds must restore what he has received under the contract. (p. 217.)

STATUTE OF FRAUDS—Contract to Make Will.—When a girl leaves her parents, goes to live in her uncle's family, and there performs the duties of a daughter, under his oral promise to devise her land, she is entitled, upon his dying intestate, to recover from his estate the value of the land which he promised to will her, notwithstanding specific performance cannot be had because of the statute of fraud. (p. 218.)

STATUTE OF FRAUDS—Contract to Make Will—Evidence.—In an action to enforce an alleged oral contract to make a will in consideration of personal services, evidence that the promisor paid the promisee wages while performing the services is admissible to disprove the contract. (p. 218.)

Horace W. Root and George H. Ahlering, for the appellant.

Lawrence Maxwell, Jr., James C. Wright, L. J. Crawford, Benjamin A. Wright and Joseph F. Grayson, for the appellees.

615 HOBSON, C. J. Appellant, Martha Waters, was the niece of the wife of John Cline, of Kenton county, Kentucky. The Clines had no children. In March, 1872, Cline and wife went on a visit to Mrs. Cline's sister, Mrs. Rogers, near Brookville, Indiana. Mrs. Rogers and her husband and their daughter Mattie (now Mrs. Waters), constituted the family. Mrs. Cline was in poor health—had heart trouble and asthma—and she and her husband were both very fond of Mattie, who was then a girl about thirteen years old. They proposed to her parents that if they would let her come and live with them, just the same as their own child, and stay with them until she was twenty-one years old, they would clothe her, and give her a musical education; and he also agreed that by his will at his death he would give her a farm known as the "Alfred Gregg Farm," and put buildings on it and stock it at an expense of four thousand dollars, and give her five thousand dollars to run it with. The Gregg farm lay in the county where they lived, about a mile from them, and was worth about eight thousand dollars.

Finally, after much persuading, the parents agreed to the proposition; and they took the child home with them, to be just the same as if she was their own child. She lived with them until she was twenty-four years old; nursing and taking care of her aunt, and being treated as a daughter by Cline and his wife. In the year 1883, when she was twenty-four years old, she married Richard Waters, and has since lived with her husband. Cline faithfully carried out his contract as to the girl, except that he died in August, 1902, without making the provision for her by his will as he had agreed to do. He left a large estate, which went to his collateral kindred, as he died intestate. In the suit to settle up his estate, Martha Waters filed her petition, setting up the above facts, and alleging that ⁶¹⁶ his estate was worth from five hundred thousand dollars to seven hundred thousand dollars, and praying judgment against the estate for the sum of eight thousand dollars, the value of the farm, also the further sum of four thousand dollars, which Cline had agreed he would spend in putting buildings on it, and the further sum of five thousand dollars for her to run it with. The allegations of her petition were denied. The case was set for trial by a jury, and, at the conclusion of the evidence on both sides, the court instructed the jury to find for the defendants, and Mrs. Waters appeals.

The court gave a peremptory instruction on the idea that the contract relied on was within the statute of frauds: Ky. Stats. 1903, sec. 470. An agreement to devise lands is within the statute of frauds, which requires agreements for the sale of lands to be in writing. The rule in Kentucky is that part performance of a contract will not take it out of the statute: *Grant's Heirs v. Craigmiles*, 1 Bibb, 203; *Hayden v. McIlvain*, 4 Bibb, 57; *Worley v. Tuggle*, 4 Bush, 168; *Holtzclaw v. Blackerby*, 9 Bush, 40; *Dean v. Cassiday*, 88 Ky. 572, 11 Ky. Law Rep. 105, 11 S. W. 601. But the court has also uniformly held that the statute is a shield, not a sword, and that where the party has received the consideration of the contract the court will not allow him to rely upon the statute and keep the consideration: *Roberts v. Tennell*, 3 T. B. Mon. 247; *Montague v. Garnett*, 3 Bush, 297; *Bethel v. Booth & Co.*, 115 Ky. 145, 24 Ky. Law Rep. 2024, 72 S. W. 803; *Weber v. Weber*, 25 Ky. Law Rep. 908, 76 S. W. 507. In applying this rule in cases where the party who has per-

formed the contract cannot be restored to the situation in which he was before the contract was made, and it is impossible to estimate by any pecuniary standard the value of what the other party has received, this court has adopted ⁶¹⁷ the rule that in such cases the contract itself is the best evidence of the value of what has been received, and, while it will not enforce specific performance by decreeing a conveyance of the land, it will adjudge compensation for what has been received by the defendant under the contract, measured by the consideration which, by the contract, he agreed to as the value of what he received. This rule was first announced in *Berry v. Graddy*, 1 Met. 553. It was followed in *Benge v. Hiatt's Admr.*, 82 Ky. 666, 56 Am. Rep. 912, 6 Ky. Law Rep. 714, *Usher's Exrs. v. Flood*, 12 Ky. Law Rep. 722, 17 S. W. 132, *Jones v. Comer*, 25 Ky. Law Rep. 773, 76 S. W. 392, and *Doty's Admr. v. Doty's Guardian*, 118 Ky. 204, 26 Ky. Law Rep. 63, 80 S. W. 803, 2 L. R. A., N. S., 713. It was also recognized in *Brewer v. Hieronymus*, 19 Ky. Law Rep. 645, 41 S. W. 310, and *Story v. Story*, 22 Ky. Law Rep. 173, 61 S. W. 279.

It is earnestly insisted that the rule thus laid down is unsound, and that the cases above referred to should be overruled on the ground that they are inconsistent with the line of cases holding that part performance of a contract is not sufficient to take it out of the statute of frauds. There is no conflict between the cases. It is conceded in all the cases that part performance does not take a contract out of the statute of frauds. It is also conceded in all the cases that, where the statute is relied on, the defendant must restore what he has received under the contract. The cases above referred to, following *Berry v. Graddy*, 1 Met. 553, rest on the idea that the defendant, having received the consideration of the contract, will not be permitted to retain what he has thus received, when he repudiates the contract, and that in this character of cases the contract measure of the consideration ⁶¹⁸ which the defendant has received is the only measure which will approximate justice between the parties. Under the rule of *stare decisis*, we cannot recede from the doctrine so often laid down. By the arrangement the girl gave up her home, her father and her mother. The father and mother gave up their child. Cline secured for himself and his sick wife a daughter in the home. Money can secure the services of strangers, but the love and tender ministrations

of a daughter are not to be bought in this way. They had long known and loved the girl. Her presence in their home, with her music, joyousness and dutiful attention, transformed it. Who can measure this in dollars and cents? It is presumed that Cline knew what it was worth to him. He had long been trying to get the girl's parents to give her to him, and, when he finally secured what he wanted, we know of no adequate standard to value the consideration which he enjoyed under the contract, except that he himself fixed. For authorities in other states, see the following: *Sutton v. Hayden*, 62 Mo. 101; *Sharkey v. McDermott*, 91 Mo. 647, 60 Am. Rep. 270, 4 S. W. 107; *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369; *Brinton v. Van Cott*, 8 Utah, 480, 33 Pac. 218; *Quinn v. Quinn*, 5 S. D. 328, 49 Am. St. Rep. 875, 58 N. W. 808; *Rhodes v. Rhodes*, 3 Sand. Ch. (N. Y.) 279; *Parsell v. Stryker*, 41 N. Y. 480; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773; *Wright v. Wright*, 99 Mich. 170, 23 L. R. A. 196, 58 N. W. 54; *Kofka v. Rosicky*, 41 Neb. 328, 43 Am. St. Rep. 685, 59 N. W. 788, 25 L. R. A. 207.

We do not mean to pass on the merits of appellant's claim. We only hold that the evidence introduced by her tended to sustain her claim as above stated, and that the case should have been submitted to the jury.

⁶¹⁹ Judgment reversed and cause remanded for a new trial.

EXTENDED OPINION BY CHIEF JUSTICE HOBSON.

The evidence introduced by appellees tending to show that wages were paid appellant during the time she remained at the home of John Cline was properly admitted. This fact, if true, was a circumstance tending to show that the contract relied on by appellant was not made. The case was properly set for a jury trial under section 12 of the Code of Practice. The exceptions to questions 28, 29, 35, 36, 37, 38, 47, 48, 61, 62 and 67, should have been overruled: *Hunter v. Marsh*, 2 Ky. Law Rep. 241. The answer of the witness in connection with the questions show that the witness was not in fact led by the questions.

The opinion is extended as above indicated.

An Express Verbal Promise to Devise Land in consideration of services rendered by a foster child, though itself unenforceable under the statute of frauds, removes the presumption that the services

were rendered gratuitously, and clears the ground for a recovery of their reasonable value against the estate of the deceased promisor: Taylor v. Thieman, 132 Wis. 38, 122 Am. St. Rep. 943, and see the cases cited in the cross-reference note thereto.

CITY OF COVINGTON v. KANAWHA COAL AND COKE COMPANY.

[121 Ky. 681, 89 S. W. 1126.]

CUSTOM—Evidence of to Vary Contract in Case of Strike.—One who makes a contract, clear and unequivocal in its terms, cannot, in case he is prevented from fulfilling it because of a strike, plead a custom to the effect that such contracts are made subject to strikes at the mines. (p. 223.)

F. J. Hanlon, city solicitor, for the appellant.

Martin M. Darrett and Frank M. Tracy, for the appellee.

HOBSON, C. J. The Kanawha Coal and Coke Company made a contract with the city of Covington to furnish it coal from September 1, 1901, to September 1, 1902. The contract was in writing and is as follows:

“Cincinnati, Ohio, Dec. 4, 1901.

“The Waterworks Commissioners, Covington, Ky.

“Gentlemen: We hereby propose to furnish you with what coal you may require from September 1, 1901, to September 1, 1902, as follows: Acme nut and slack at \$1.45. Kanawha nut and slack at \$1.35. All per ton of 2,000 pounds. The grade of coal to be furnished as requested by the superintendent of the waterworks, and same to be delivered at Covington pumping station, Ft. Thomas, Ky.

“THE KANAWHA COAL & COKE CO.,

“T. S. GARRISON, Prest.

“Accepted by waterworks commissioners Dec. 4, 1901.

“D. B. BAYLESS.

“HENRY BRINKER.

“W. S. NOCK.”

The coal company failed to furnish the city with coal as provided in the contract, and the city had to buy coal at a higher price. On July 2, 1903, the city brought this suit against the coal company to recover damages for its failure

to comply with its contract. The coal company pleaded that there was a general custom among merchants in relation to the subject matter of the contract, which prevailed in Covington, Kentucky, Cincinnati, Ohio, and the vicinity, and controlled ⁶⁸⁴ such contracts, to the effect that the contract was made subject to a strike at the mines from which the coal contracted for was to be shipped, and all other causes beyond the seller's control whereby the seller would be prevented from obtaining the coal contracted for; that this custom was well known to the city, and it entered into the contract, agreeing that the custom should be part of it; that the coal contracted for was to be obtained from coal mines in the state of West Virginia, in what is known as the "Kanawha District"; that on June 11, 1902, a general strike was declared and went into effect throughout the whole of the Kanawha district, rendering it impossible after that date for the defendant to obtain any of the coal contracted to plaintiff until the strike was ended on October 7, 1902; that the strike was wholly beyond its control; and that by reason of this alone it failed to furnish the coal. It also pleaded that the city recognizing the custom, and recognizing that the defendant was not bound to furnish it coal during the existence of the strike, paid it in full for all the coal it furnished, except one car, valued at sixty dollars, payment of which was refused on the ground that the coal was not received; that the city also requested it to purchase other coal for it in the open market; and that in accordance with this request it did during the continuance of the strike purchase for plaintiff a large amount of coal, which the city paid for without protest. The city demurred to this part of the answer. The demurrer was overruled.

Proof was introduced on the trial by the defendant tending to sustain the allegations of the answer, and at the conclusion of all the evidence the court instructed the jury that they should find for the plaintiff unless they believed from the evidence that there was ⁶⁸⁵ a general strike in the Kanawha coal district, by reason of which the defendant was unable to supply the coal, and that it was a custom or usage in the vicinity where the contract was made, among persons engaged in buying and selling coal in carload lots, that all contracts with reference thereto are made subject to strikes beyond the control of the parties selling the coal, and that in this event the defendant was excused from carry-

ing out its contract and they should find for it. The jury found for the defendant, and the city appeals.

The rule as to the admission of usage or custom to interpret or explain written contracts is thus stated in 2 Greenleaf on Evidence, section 292: "Proof of usage is admitted, either to interpret the meaning of the language of the contract, or to ascertain the nature and extent of the contract, in the absence of express stipulations, and where the meaning is equivocal and obscure. Thus, upon a contract for a year's service, as it does not in terms bind the party for every day in the year, parol evidence is admissible to show a usage for servants to have certain holidays for themselves. So, where the contract was for performance as an actor in a theater for three years at a certain sum per week, parol evidence was held admissible to show that according to uniform theatrical usage the actor was to be paid only during the theatrical season, namely, during the time while the theater was open for performance in each of those years." Again, in section 294, it is said that parol evidence or usage or custom is admissible to annex incidents or to show what things are to be treated as incidental to the principal thing which is the subject of the contract. Then this language is used: "This evidence is admitted on the principle that the parties did not intend to express in writing ⁶⁸⁶ the whole of the contract by which they were to be bound, not only to make their contract with reference to the known and established usages and customs relating to the subject matter. But in all cases of this sort the rule for admitting the evidence of usage or custom must be taken with this qualification: that the evidence be not repugnant to, or inconsistent with, the contract; for otherwise it would not go to interpret and explain, but to contradict, that which is written. This rule does not add new terms to the contract, which, as has already been shown, cannot be done; but it shows the full extent and meaning of those which are contained in the instrument."

In the case at bar there is nothing equivocal or obscure in the contract. The evidence offered does not show that any word in the contract was employed in a sense different from its usual or natural meaning. The evidence does not annex an incident to the contract, within the proper meaning of this term. The contract on its face obligates the coal company absolutely to furnish the city with all the coal it may require, as requested by the superintendent of the water-

works, at the price named in the contract. The evidence offered, if admitted, was in effect that there was not an absolute contract to furnish the coal, but only a conditional engagement to furnish it, provided the coal company was not prevented from doing so by strikes or other causes beyond its control, which disabled it from getting the coal from the coal district. This evidence is repugnant to and adds new terms to the contract. It does not go to interpret or explain, but to contradict, what is written. If the party entering into a contract of this sort desires to protect himself against contingencies, it is incumbent on him to express the contingency in his contract; and ¹⁸⁸⁷ if he fails to do this, in the absence of fraud or mistake, he cannot show a custom to the effect that his absolute written contract is not what it reads, but only a conditional engagement.

In *Finnie v. Clay*, 2 Bibb, 351, this court held that a patent must be run out according to the direction of the magnetic needle, and not according to the true meridian. The evidence that by custom the magnetic needle was always used and referred to simply showed what the parties meant by the terms they employed. In other words, the evidence was admitted to show what the parties meant by the words "north" and "south." But there is no difficulty of that kind in the contract here: See, also, to same effect, *Rochester German Ins. Co. v. Peaslee-Gaulbert Co.*, 120 Ky. 752, 27 Ky. Law Rep. 1155, 87 S. W. 115, 89 S. W. 3. In *Kendall v. Russell*, 5 Dana, 501, 30 Am. Dec. 696, Russell bound himself to lay for Kendall, brick at eight dollars a thousand. Russell contended that by a custom the openings in the wall were to be counted as though filled with brick. The court held that the actual number of brick laid controlled, on the ground that the stipulations of the contract were clear and explicit, and could not be varied by proof of custom, by which an obligation would be imposed contrary to the express terms of the contract. The principles announced in this case were followed in *Castleman v. Southern Mutual Life Ins. Co.*, 14 Bush, 197, and *Capital Gas & Electric Co. v. Gaines*, 20 Ky. Law Rep. 1464, 49 S. W. 462.

In *Orient Mut. Ins. Co. v. Wright*, 1 Wall. 456, 17 L. ed. 505, the United States supreme court after stating that a written contract cannot be controlled by usage or custom, as this would be to allow mere implication to vary or contradict the deliberate written declarations of the parties, adds: "No

usage ⁶⁸⁸ can be incorporated into a contract which is inconsistent with the terms of the contract." In *Tilley v. Chicago*, 103 U. S. 155, 26 L. ed. 374, the court thus states the rule: "Proof of usage can only be received to show the intention or understanding of the parties in the absence of a special agreement or to explain the terms of the written contract (citing authorities). In all cases where evidence of usage is received, the rule must be taken with this qualification: that the evidence be not repugnant to or inconsistent with the contract." In the subsequent case of *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 3 Sup. Ct. Rep. 207, 27 L. ed. 932, the court, after restating the rule, adds this: "This rule is based upon the theory that the parties, if aware of any usage or custom relating to the subject matter of their negotiations, have so expressed their intention as to take the contract out of the operation of any rules established by mere usage or custom."

Where for any reason, the parties have, by mistake, not correctly stated their contract in writing, upon an allegation and proof of mistake, the truth may be shown, and the real contract enforced. But in the absence of fraud or mistake, when the parties have deliberately put their engagement in writing, expressed in terms clear and unequivocal, proof of a custom to vary or contradict the writing cannot be received.

Judgment reversed and cause remanded, with directions to sustain the demurrer to the answer and for further proceedings consistent herewith.

Custom or Usage is not admissible to vary or contradict a contract the terms of which are free from ambiguity: *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989; *Cummings v. Blanchard*, 67 N. H. 268, 68 Am. St. Rep. 664; *Mutual Assur. Soc. v. Scottish etc. Ins. Co.*, 84 Va. 116, 10 Am. St. Rep. 819; *Hopper v. Sage*, 112 N. Y. 530, 8 Am. St. Rep. 771.

EHRMANN v. STITZEL.

[121 Ky. 751, 90 S. W. 275.]

PARTNERSHIP SETTLEMENT—Parol Evidence to Vary Date.

In an action to correct a partnership settlement on the ground of mistake or fraud, parol evidence is admissible to show that the true date of the transaction is other than the date written in the instrument of settlement. (pp. 226, 227.)

PARTNERSHIP SETTLEMENT—Relief in Case of Fraud.—

Where one partner sells his interest in the firm to his copartner, and in so doing relies implicitly on the integrity and superior knowledge of the latter to calculate the value of the property, he may maintain an action to surcharge the settlement to the extent of errors committed in arriving at the amount of the consideration, which are the result of fraud or mistake on the part of the purchasing partner. (p. 232.)

O. A. Wehle and Louis B. Wehle, for the appellant.

Morris B. Gifford and A. E. Wilson, for the appellees.

⁷⁵³ SETTLE, J. This is an appeal from a judgment of the lower court sustaining a general demurrer to appellant's petition and dismissing the action, which was one in equity to surcharge a partnership accounting made six months and fifteen days before the filing of the petition. It appears from the averments of the petition: That appellant, Hilmar Ehrmann, and appellee, A. P. Stitzel, had been partners for more than a year in the wholesale and retail liquor business in Louisville, and that the partnership was to continue ten years; that appellant had contributed to the partnership capital \$30,000, and appellee \$10,000, and that the profits and losses of the business were to be divided between the partners in the same proportion. But, notwithstanding the fact that only a short part of the time for which the partnership was to run ⁷⁵⁴ had expired, the partners on July 31, 1902, agreed on a dissolution thereof upon the following terms: That appellant should take all the assets and assume all the liabilities of the partnership; that appellee, who had been in charge of the books and is a competent bookkeeper, should make an accurate inventory and valuation of the assets and statement of the liabilities of the firm, and that on the basis of such inventory, valuation and statement by appellee, the profits would be ascertained, the balance struck, and the settlement between the partners made; that such inventory, valuation and statement were made by appellee and

represented by him to be correct, upon which appellant implicitly relied, and that the statement of appellee showed the profits of the partnership business to be \$12,799.20, and appellee's share thereof \$3,199.80, which, together with the \$10,000 he contributed to the capital of the partnership and was entitled to withdraw, made the amount apparently due him upon the settlement of \$13,199.80; and upon this basis appellant settled with appellee, by paying \$1,199.80 in money and executing to him forty-eight notes, each for \$250, all bearing interest from August 1, 1902, the first payable September 1, 1902, and the last August 1, 1906; that the partners signed a written agreement, which sets forth the dissolution of the partnership, conveys to appellant all the interest of appellee in the partnership assets, and recites the consideration thereof. This writing was filed with and made a part of the petition, and, though signed by the parties July 31st, it was dated July 1, 1902; but all the calculations and estimates of appellee constituting the basis of the settlement and dissolution of the partnership, as well as appellant's purchase of appellee's interest in the partnership ⁷⁵⁵ property and assets, were brought down to and valued as of August 1, 1902. The petition also particularly sets forth a great many specific errors committed by appellee in making the inventory, valuation and statement of account intrusted to him, such as inventorying thirty-five, instead of thirty, barrels of whisky, underestimating the storage and insurance charges on whisky in bond, the amount due from the firm to the city creditors, and the amount of expenses incurred, but not due, which appellant was to assume and pay. All the errors complained of are fully set forth in a written statement exhibited with, and made a part of, the petition. According to this statement, and the averment of the petition, the errors in question amount in the aggregate to \$2,223.60, and by reason thereof appellant, upon the dissolution of the partnership, settled with appellee for \$555.90 more than he was entitled to receive under the agreement between them. The petition contains in substance the further averments that appellee was permitted by appellant to make out the statement constituting the basis of the dissolution of the partnership and the latter's purchase of his interest in the property and assets thereof because of his belief that he was a reliable bookkeeper and honest man;

that he accepted appellee's work, relying upon his honesty, good faith and accuracy; that the wrongful entries, misstatements and misrepresentations of appellee in the estimates, calculations and statement of account furnished by him as a basis for the settlement of the partnership were made either by mistake or with the fraudulent intention of deceiving appellant and making him settle with appellee for a larger amount than was justly due him; and that one or the other of these facts is true, but appellant does not know ⁷⁵⁶ which of them is true. The prayer of the petition asks that the settlement of the partnership be corrected, and appellee be ordered to surrender enough of the settlement notes to equal the errors in the settlement, or that one of them be surrendered and another credited with the remainder, and, if appellee has sold the notes, then for personal judgment against him for \$555.90, and for all general and proper relief. It also appears from the allegations of the petition that appellee, after receiving of appellant the several notes executed in settlement of his (appellee's) interest in the partnership property and assets, assigned them to his father, Philip Stitzel, who was joined as a defendant in the action; but, the latter having died after the institution of the action, the same was revived against his widow as administratrix of his estate.

It is contended for appellee that the petition is bad on demurrer, because (1) it seeks by parol evidence to show that the settlement and dissolution of the partnership between appellant and appellee, as well as the purchase by the former of the latter's interest in the partnership property, occurred July 31st, instead of July 1, 1902, as shown by the date of the writing signed by the parties; (2) that it seeks to recover \$555.90 on account of errors in the partnership settlement, whereas the written agreement shows a contract of sale of all appellee's interest in the partnership assets of \$13,199.80; (3) that the petition is fatally defective, in that it does not allege that appellant had exercised a due surveillance over appellee in his work of making the inventory and statement for the partnership settlement.

As to the first contention, it is sufficient to say that ordinarily the true date of every paper is the time ⁷⁵⁷ of its delivery, and this may, even as between the parties themselves, be shown by parol evidence, although a different date be upon the paper. Indeed, this is the rule, unless there are

in the document itself provisions that refer to its date as material and show it to be essential to the rights of the parties. The writing in this case at bar contains no provision that refers to its date as material, or makes it so. On the contrary, it indicates August 1, 1902, as a more important date than July 1, 1902, for by its terms the notes executed by appellant to appellee are to bear interest from August 1, 1902, instead of from July 1, 1902, the date of the writing. But, as only one transaction is involved, it is for the purpose of the action immaterial when that transaction occurred. The view of the law above expressed is supported by the following authorities: Taylor on Evidence, sec. 1150; Perrin v. Broadwell, 3 Dana, 596; Miller v. Hampton, 37 Ala. 342; Aldridge v. Bank of Decatur, 17 Ala. 45; Burns & Co. v. Moore, 76 Ala. 339, 52 Am. Rep. 332; Battles v. Fobes, 21 Pick. 239; Shaughnessey v. Lewis, 130 Mass. 355; Russell v. Carr & Co., 38 Ga. 459.

The second contention of counsel for appellee is bottomed upon the theory that the transaction between appellant and appellee was a purchase by the former of the latter's interest in the partnership property and effects. Therefore there can be no surcharging of the settlement made between them as in a case of mere accounting, but appellant's remedy is by an action for damages. We are, however, unable to adopt this view of the matter. While the instrument of writing between the parties expresses a sale, as well as conveyance of appellee's interest in the property and business of the firm, it is not a naked ⁷⁵⁸ sale, such as would have resulted if one partner, acting upon his own judgment and from his personal knowledge of the property and business of the firm, had paid the other a round sum for his interest. In such a sale each partner would simply have had an eye to his own advantage in the legal and commercial sense in which sales are usually made, when men deal with each other at arm's-length, with no other advantage than that which results from superiority of judgment and skill in trading. But the transaction between appellant and appellee was not in this class or of this kind. According to the averments of the petition, appellant was not familiar with the business in which he and appellee were engaged, but appellee was. Appellant, desiring to become the exclusive owner of the business in which he and appellee were partners, was willing to pay for the latter's interest therein, but unwilling to risk

his own judgment by paying a round sum therefor. So, having full confidence in appellee's knowledge of the business, his skill as a bookkeeper, and integrity as a man, and desiring to pay him all that his interest in the partnership business would amount to, it was agreed by him that appellee should accurately value the property of the partnership, and estimate its liabilities and profits, in order to arrive at the value of his interest therein. This work appellee undertook to do, and professed to have done. The dissolution of the partnership and sale of his interest to appellant resulted from the accounting thus made, and the consideration therefor was the actual balance reported by appellee to be due him upon such accounting and settlement, and it is in respect to this balance appellant charges fraud or mistake. That the value of appellee's interest in the partnership was thus ascertained is ⁷⁵⁹ shown by the fact that the amount found to be due him was not expressed in a round sum, as would have been the case if the sale had been made in the usual way.

The case of *Kraushaar v. Brant*, 22 Mo. App. 162, in point of fact is strikingly like the one at bar. The entire capital stock of a business corporation was owned by two persons. One agreed to purchase of the other his shares of the stock at their par value, and to pay therefor such a sum as should be found due the seller upon an accounting. The purchaser by fraud or mistake, by presenting to the seller a false statement of account, induced him to sell for a less amount than was due him. The itemized account constituting the basis of settlement contained at its close these words: "By amount due C. F. Kraushaar in full settlement of his account and purchase of his entire one-half interest in said Western Bath Tub Manufacturing Company, \$1,730.87." Suit was brought in equity by the defrauded party for an accounting and cancellation of certain notes executed in the transaction complained of. The defense interposed was that there was only a contract of sale of shares of stock in the corporation, which might be rescinded on account of fraud or mistake in arriving at the consideration, but that the settlement manifesting the amount of the consideration could not be surcharged. In the opinion (delivered by Seymour D. Thompson, Judge), it is said: "If the plaintiff were asking merely for a rescission of the contract, he would be bound to tender back what he had received under the contract.

But a court of equity may vary its relief to suit the exigencies of each particular case. It is very plain here that what the parties intended to do was to settle the matters of account between ⁷⁶⁰ them, in respect of this corporation upon the basis of the defendant getting credit for the advances which he had made on account of the plaintiff and taking the plaintiff's shares of stock in the concern at its par value. That, we have no doubt, is what the defendant led the plaintiff to believe that he was giving him, and what the plaintiff supposed he was getting. The defendant strenuously denies this, and claims that nothing was said about the value at which the plaintiff should transfer his shares to the defendant, but that he simply offered to buy out the defendant for the named sum, which he paid. In this testimony he is supported by Mr. Mueller as to what took place at the interview. But, unfortunately for his contention, courts of equity are in the habit of giving more effect to the contemporaneous acts and declarations of the parties than to the subsequent testimony of interested witnesses; and this story is utterly incompatible with the story told by the account called 'Exhibit B.' The sum of \$1,730.87 is not a round sum by any means. If the defendant had simply made the plaintiff an offer to take his interest at a round sum, it is inconceivable that he would have added eighty-seven cents to the round sum. Nor does he (the defendant) explain how it is that this round sum happens exactly to balance the account, called 'Exhibit B,' which he exhibited to the plaintiff, and on the faith of which he obtained the plaintiff's consent to the settlement on the terms named. As the plaintiff did not get what he should have got, equity will compel the defendant to carry out the settlement according to the understanding of the parties, by paying plaintiff enough to make up what he would have received if the account between them had been properly stated and settled."

⁷⁶¹ Other cases on this question, cited by counsel, are *Herty v. Clark*, 46 Ga. 649; *Trump v. Baltzell*, 3 Md. 295; *Heath v. Waters*, 40 Mich. 457. And an examination of them will show that they are in accord with the doctrine expressed in *Kraushaar v. Brant*, 22 Mo. App. 162. From the foregoing cases we reach the conclusion that where there is a sale to one partner of a retiring partner's interest in the firm's property and business, made in the course of a settlement after a full accounting, the consideration for such sale, being the

balance resulting from the accounting, may be surcharged to the extent that there were errors committed in arriving at the amount of the consideration, whether as the result of fraud or mistake.

We are not without authority in our own state with respect to surcharging a balance erroneously accepted by partners in a settlement, preparatory to or in pursuance of partnership dissolution; the error being due to mutual mistake of the parties, or to a mistake of the party wronged by the act of the other. In *Lee's Admrs. v. Reed*, 4 Dana, 109, it is said: "A settlement concluded between parties, each of whom may be presumed to be acquainted with the transactions involved, is entitled to great consideration, as furnishing high evidence of the correctness of its results. But it loses much of its authority when it appears that the matters brought into account rest exclusively, or principally, within the knowledge of one of the parties, and are received and admitted by the other upon his representations. In the first case, however, the settlement is not deemed so conclusive but that it may be impeached on the ground of fraud or mistake; and in the other it is still held to be sufficient evidence of the truth and fairness of its results until fraud or mistake is established. But as fraud ⁷⁶² may be more easily practiced, or mistakes more easily occur, in the latter than in the former case, reason as well as authority indicates that slighter evidence of fraud or mistake will induce the chancellor to open the settlement and look into the accounts in the one case than in the other": *Wickliffe v. Mosely*, 4 J. J. Marsh. 172; *Barnett's Admr. v. Barnett*, 6 J. J. Marsh. 499; *Waggoner v. Minter*, 7 J. J. Marsh. 173.

Appellant's last contention is, we think, untenable, because it disregards that fundamental principle in the law of partnership which requires good faith and mutual trust between the individual members of a partnership. This rule is aptly expressed in *Story on Partnership*, third edition, section 169, as follows: "We come in the next place to the consideration of the rights, duties, and obligations of partners between themselves. And here it may be stated that, as the contract itself has its solid foundation in the mutual respect, confidence, and belief in the entire integrity of each partner, and his sincere devotion to the business and true interests of the partnership, good faith and reasonable skill and diligence and the exercise of sound judgment and discretion are natu-

rally, if not necessarily, implied from the very nature and character of the relation of partnership." The same thing is equally well expressed in Lindley on Partnership, page 303: "The utmost good faith is due from every member of a partnership toward every other member; and if any dispute arises between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show, not only that he has law on his side, but that his conduct will bear to be tried by the highest standard of honor. Thus, ⁷⁶³ if one partner knows more about the state of the partnership than another, and, concealing what he knows, enters into an agreement with that other relative to some matters as to which a knowledge of the state of accounts is material, such agreement will not be allowed to stand. This obligation to perfect fairness and good faith is, moreover, not confined to persons who actually are partners. It extends to persons negotiating for a partnership, but between whom no partnership as yet exists, and also to persons who have dissolved partnership, but who have not completely wound up and settled the partnership affairs; and most especially is good faith required to be observed where one partner is endeavoring to get rid of another, or to buy him out." The necessity for good faith applies in the case of a sale by one partner to another of his partnership interest, and such sale will be sustained only when it is made for a fair consideration and upon full disclosure of all important information as to value. The rule applies, even after dissolution, where partnership affairs have not been completely wound up and settled: 22 Am. & Eng. Ency. of Law, 2d ed., p. 105. The same general doctrine is announced in Pomeroy's Equity Jurisprudence, sections 848, 852, 856, 1088.

In transactions between partners, concealment becomes fraudulent when it is the duty of the party having knowledge of the facts to disclose them to the other, and obviously an intentional misrepresentation of the facts by one partner to the other would be a greater fraud than mere concealment: Pomeroy's Equity Jurisprudence, secs. 891, 902. In *Lee's Admrs. v. Reed*, 4 Dana, 109, this court announces the readiness of a court of equity to afford relief to the injured party against fraud or mistake in a settlement practiced by one in whom the other justifiably ⁷⁶⁴ reposed confidence: "Whether Murrell, who must have known all the facts, had forgotten them, or whether his omission to mention them re-

sulted from a desire to evade his liabilities altogether, or from an anxiety, increased, doubtless, by that of his co-obligors and sureties, to obtain as large a credit as possible upon the note, leaving other matters to be settled as they might be, in future, it is not necessary to inquire. If he had forgotten them, their omission from the settlement was the consequence of mutual ignorance and mistake. If he failed to mention them designedly, either for the purpose above supposed, or because he thought it belonged to the other side to know and bring them forward, their omission is attributable to ignorance on the one side, or to an improper, if not an inexcusable, suppression of the truth on the other; and in either case the party thus injured by mistake or fraud is entitled to relief in equity, by introducing the omitted items, with the same effect as if they had not been omitted."

The facts set forth in the petition, and admitted by the demurrer, manifest specific errors in an accounting, made by the fraud or mistake of a retiring partner, in whose integrity as a man, superior knowledge of the partnership business, and skill as a bookkeeper appellant reposed implicit confidence, and that the errors committed were to the advantage of the retiring partner and the serious loss and injury of appellant. There is, in our opinion, therefore, no reason for denying the latter the relief asked, if the facts alleged be sustained by sufficient proof. It follows, therefore, that the chancellor erred in sustaining the demurrer.

Wherefore, the judgment is reversed and cause remanded for further proceedings consistent with the opinion.

A Partnership is essentially a relation of trust and confidence: *Breaux v. Le Blanc*, 50 La. Ann. 228, 69 Am. St. Rep. 403; *Goldsmith v. Eichold*, 94 Ala. 116, 33 Am. St. Rep. 97. And when the partners deal with each other in relation to partnership matters, they are required to make full disclosure of all material facts within their knowledge in any way relating to the firm affairs. The duty of each to the other is analogous to that of a trustee. Community interest exists between partners, producing a community of duty: *Caldwell v. Davis*, 10 Colo. 481, 3 Am. St. Rep. 599; *Raymond v. Vaughn*, 128 Ill. 256, 15 Am. St. Rep. 112.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

BROWN v. FLETCHER'S ESTATE.

[146 Mich. 401, 109 N. W. 686.]

ABATEMENT.—At the Common Law the death of a party to an action terminated it, but a different rule was adopted by the courts of equity. (p. 238.)

ABATEMENT AND REVIVOR—Effect of a Decree on the Revivor of a Suit After the Death of the Defendant.—Though a suit was brought and jurisdiction of the defendant obtained in his lifetime, yet if he dies and the suit is revived against his ancillary administrator with the will annexed, the decedent having been a non-resident, any decree which may be entered against such administrator acts upon him only, and not upon the estate, and is satisfied when, giving it due credit and effect, he distributes the estate of the decedent according to the law of the forum. (p. 240.)

JUDGMENT AND DECREE—Privity Between an Administrator of a Decedent in One State and His Executors in Another.—There is no privity between an administrator with the will annexed appointed in a state of which the decedent was not a resident at the time of his death and his executors appointed in the state of his residence. Hence a decree against the former is not evidence to establish a claim against the latter, though such decree was entered upon the revivor of a suit in equity in which the decedent had appeared in his lifetime and wherein the court had acquired jurisdiction over him. (pp. 242, 244.)

DECREE, Extraterritorial Effect, Whether Enhanced by the Fact that It was Founded upon an Award and a Stipulation Agreeing to Perform It.—The fact that the suit is submitted to arbitration, and the parties, in making the submission, agree to perform the award and pay any sum found due, and purport to bind their heirs, executors and administrators, does not enhance the effect of any decree which may subsequently be rendered on the revivor of the suit against an ancillary administrator with the will annexed of the estate of the decedent. (p. 249.)

Proceedings for the allowance of a claim against the estate of George N. Fletcher, deceased, based on a decree of the supreme judicial court of Massachusetts, entered April 14,

1903, in a suit which had been begun against the decedent in his lifetime, to wit, in April, 1874. Process was served on the defendant within the state of Massachusetts. During the pendency of the suit, it was referred to a master, who made certain reports, and in April, 1892, and before any exceptions to those reports had been heard, an agreement was entered into between the decedent and the other parties to the suit submitting it and other claims and demands between the parties to arbitration, the decedent and the other parties covenanting for themselves, their heirs, executors and administrators to abide by the conditions of any award that should be made, and that decedent, his heirs, executors or administrators would perform and pay the award to the plaintiff or his successor; that when the award should be made, either party might apply to the court for a decree to enforce the same, or it might be enforced by a decree or judgment of any other court having jurisdiction of the parties, and the submission was made under a rule of court and was not to operate as a discontinuance of the suit. In April, 1894, the arbitrators made a preliminary award directing an accounting by the decedent, and though the decedent appeared in the proceeding for such accounting, he died before the accounting was completed. His death was then suggested of record to the court of Massachusetts, and the suit was revived in that state against the administrator with the will annexed, who had been appointed by its courts upon a petition of the complainant. The Michigan executors were requested to come in and defend the suit, but refused to do so. The complainant then filed a petition in the Massachusetts court setting up the proceedings in the suit there and the stipulation for arbitration and the proceedings in the estate of the decedent in Michigan and also in Massachusetts, and prayed that the court proceed to make its decree in the cause, and stated that before doing so, it was necessary, in order to bind the heirs of the decedent, to make his executors and heirs parties, and prayed that they be summoned to defend the suit. The court made an order as requested and fixing a time within which the executors and heirs must appear, and copies of these orders were served upon them in Michigan and their default was afterward entered, because they did not appear, and after other proceedings the arbitrator made his final award, and a decree was entered thereon. The claim based on such decree was disallowed by the commissioners

in Michigan, and the claimants appealed to the circuit court, which directed a verdict, in favor of the defendants, and the claimants brought error.

John Miner and Geer, Williams, Martin & Butler, for the appellant.

Russell & Campbell and Ashley Pond, for the appellee.

⁴¹⁴ OSTRANDER, J. The question presented is whether the records and judgment put in evidence by the claimant establish his demand upon the defendant estate, and this is answered by determining the effect which shall be given here to the proceedings and the decree of the Massachusetts court.

“By the constitution of the United States it is declared that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And Congress, in pursuance of the power given them by the constitution in a succeeding clause, have declared that the judgments of state courts shall have the same faith and credit in other states as they have in the state where they are rendered. They are therefore put upon the same footing as domestic judgments. But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was rendered to pronounce the judgment, nor an inquiry into the right of the state to exercise authority over the parties or the subject matter, nor an inquiry whether the judgment is founded in and impeachable for a manifest fraud. The constitution did not mean to confer any new power upon the states, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other states domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other states. And they enjoy, not the right of priority or privilege, or lien which they have in the state where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments.”: Story on Conflict of Laws, 8th ed., sec. 609.

⁴¹⁵ Counsel for appellant, as we understand the briefs make certain concessions with respect to propositions advanced and discussed at length in the briefs for the ap-

pellees, the effect of which concessions is to relieve this court from discussion and application of those propositions. It is to be added that, whether intended as concessions or as statements *arguendo* of concessions which might be safely made, an examination of them and of the authorities discloses no reason for disagreeing with any of them. Thus, for the purposes of this opinion, it is assumed:

1. That the powers of an executor or administrator do not extend beyond the territorial jurisdiction in which he may have qualified.

2. That such executor or administrator cannot sue or be sued in his representative capacity in any other state than that in which he may qualify.

3. That a pending suit may not be revived against a foreign executor who has failed to qualify in the jurisdiction in which the suit is pending.

4. That as between representatives of a decedent's estate appointed in different states, no privity is, in general recognized in law as existing.

5. That no state has authority to invade the jurisdiction of another, and, by service of its process, compel parties resident there to submit their controversies to the determination of its courts.

6. That parties cannot confer jurisdiction over a subject matter by their consent upon courts from which the law has withheld it.

Counsel for both parties are agreed that the Massachusetts court acquired jurisdiction of the subject matter and of the original parties to the suit; that after the death of Mr. Fletcher the suit was properly revived and properly proceeded to a final decree which had some force and effect.

It is also agreed that the submission of issues to arbitration was a step merely in the proceedings depending in court; that the decree, and not the award, constituted the final adjudication. This is in accord with the settled law of the state of Massachusetts: *Woodbury v. Proctor*, 9 Gray (Mass.), 18; *Seavey v. Beckler*, 132 Mass. 203; ⁴¹⁶ *Haske!! v. Whitney*, 12 Mass. 47; *Willey v. Durgin*, 118 Mass. 64.

In behalf of appellant, the grounds relied upon are somewhat broadly stated in the briefs in the following words:

"The appellant rests his contention in support of the decree in this case upon the plenary jurisdiction possessed

by the supreme judicial court in equity over both the subject matter of the suit and the person of the defendant, George N. Fletcher, prior to the death of said Fletcher, and which jurisdiction was not lost by reason of his death, but remained wholly vested in that court for the purposes of entering the final decree in the cause, notwithstanding the death of said Fletcher. That the jurisdiction over the cause and the parties remained in the Massachusetts court notwithstanding the death of the defendant, George N. Fletcher, because of the stipulation of the parties entered in the cause, and the inherent power of the court. That the jurisdiction attached to the executors of the deceased, Fletcher, as his personal representatives, and that the service upon them at any place either within or without the territorial jurisdiction of the Massachusetts court of notice of a step in the proceedings in the cause was within the lawful power of that court to order for the purpose of making its jurisdiction effective and final.

"It is our contention that, even if counsel for the defendant estate are right in their claim that the court had no power to revive the suit against the executors in Michigan, and that the service of the notice upon them in Michigan did not give the court jurisdiction to make a valid decree against them, still, the suit having been commenced in the lifetime of Fletcher, and process having been served upon him within the jurisdiction of the court, and he having appeared in the cause and litigated the matters involved as above set forth; in other words, that the court having acquired jurisdiction of the subject matter and of the parties in the lifetime of Fletcher, it had the power to revive the suit against the administrator with the will annexed, and make a decree that would be valid as a claim against his estate in Michigan.

"If the decree is valid against the estate in Massachusetts—and we shall show that it is—then it is our contention that under article 4, section 1 of the constitution of the United States, and section 905 of the Revised Statutes of the United States, the decree is valid as a claim against the estate of Fletcher in Michigan."

⁴¹⁷ Two principal propositions are asserted: One, that the lawful course and practice of the Massachusetts court and the relation of the administrator with the will annexed to

the court (as a party to the suit properly brought on the record), and to the estate of the decedent (by reason of his privity with the domiciliary executors and the estate), have the effect to make the judgment pronounced by that court conclusive and binding upon the estate of Mr. Fletcher wherever found and upon the domiciliary representatives. The other position is that the Massachusetts tribunal acquired, by virtue of the stipulation of the parties, jurisdiction to pronounce, after the death of Mr. Fletcher, a judgment giving effect to the provisions of the stipulation; at least, the court had jurisdiction to declare what the force and effect of the stipulation should be, and, having given its judgment accordingly, viz., to the effect that the estate and the local and domiciliary representatives were alike bound, such judgment, given full faith and credit, must be received here as conclusive upon the estate and its representatives.

1. At the common law, the death of a party to a suit terminated the suit. A different rule was adopted by courts of equity.

“An abatement, in the sense of the common law, is an entire overthrow or destruction of the suit, so that it is quashed and ended. But in the sense of courts of equity, an abatement signifies only a present suspension of all proceedings in the suit, from the want of proper parties capable of proceeding therein. At the common law, a suit, when abated, is absolutely dead. But in equity a suit when abated is (if such an expression be allowable) merely in a state of suspended animation, and it may be revived”: Story on Equity Pleadings, 10th ed., sec. 354. See, also, *Clarke v. Mathewson*, 12 Pet. (U. S.) 164, 9 L. ed. 1041; *Mellus v. Thompson*, 1 Cliff. (U. S.) 125, Fed. Cas. No. 9405; *Hoxie v. Carr*, 1 Sum. (U. S.) 173, Fed. Cas. No. 6802; *Sanford v. Sanford*, 28 Conn. 6. This rule of the equity courts has been made, in most of the states, the rule of the law courts, by the ⁴¹⁸ adoption of statutes which prescribe the practice which shall be followed, in the event of the death of a party to the suit, for the purpose of continuing the suit. Commonly, these statutes apply alike to proceedings at law and in equity. By section 17, chapter 171, 2 Massachusetts Revised Laws, 1902, it is provided: “If a party to a suit in equity dies and the cause by the rules of equity may be revived against or in favor of an executor, administrator,

heir or devisee, or other person, such representative may, in lieu of proceedings to revive the same appear or be summoned to prosecute or defend in like manner as in an action at law."

Other relevant sections of the statute are sections 5, 6, and 7:

"If the sole plaintiff or defendant in a personal action, the cause of which survives, dies before the entry thereof or of an appeal from a judgment rendered therein, the action or appeal may be entered and his death suggested upon the record. After the entry of such action or appeal and of the suggestion of his death as aforesaid, his executor or administrator may, within such times as the court or trial justice allows, appear and prosecute or defend in the same manner as if the action had been commenced by or against him. If he does not voluntarily appear the court or trial justice before whom the action is pending shall, upon motion of the surviving party, cite him to appear and prosecute or defend it.

"Such citation shall be returnable at such time as the court or trial justice may order and shall be served fourteen days at least before the return day; but it shall not issue after the expiration of two years from the time such executor or administrator has given bond, if he has given the notice of his appointment as required by law.

"If the executor or administrator does not appear on the return of the citation or within such further time as the court or trial justice allows, he shall be nonsuited or defaulted and judgment rendered against him in like manner as if the action had been commenced by or against him in his said capacity, except that he shall not be personally liable for costs; but the estate of the deceased in his hands shall be liable for the costs, as well as for the debt or damages recovered."

⁴¹⁹ The statute procedure which resulted in the allowance of the will in Massachusetts and in the appointment there of an administrator was essentially a proceeding in rem. It was the exercise of the sovereign authority of the state over things within the state. The person appointed administrator was brought upon the record of the equity court as a party to the proceeding there depending, and was personally before the court. This in no way enlarged his pow-

ers or the duties of his office. They were defined and limited by the law of the forum of his appointment, and by the estate of the decedent coming to his possession or under his control. The ancillary character of his administration was disclosed by the record. The equity court did not, and did not assume to, act upon the estate, but upon the administrator. As to him, its decree was satisfied when, giving it due credit and effect, he had distributed the estate according to the law of the forum. That estate has been administered and the decree of the equity court satisfied, so far as it is possible to satisfy it by any person upon whom, personally, the court had, in conformity with jurisdiction acquired through its process or by voluntary appearance, authority to impose its judgment. It is said that: "While a court ought to cease the exercise of its jurisdiction over a party on his death, its failure to do so can only be corrected in a direct proceeding. The court having possessed jurisdiction in the lifetime of the party, and having retained such jurisdiction until the final determination of the suit, its exercise of that jurisdiction, even after the death of a party, is not subject to collateral attack."

The record answers the argument. The suit abated, was revived, and proceeded thereafter against the legal representative of the deceased. The decree is not in form against the deceased; it is in form against his representatives. So, too, the argument that the final decree might have been entered nunc pro tunc a day prior to the death of Mr. Fletcher, and being so entered could not be collaterally⁴²⁰ attacked, is in the same way answered. It is not intended, however, to admit that in the case supposed the question mooted could not be raised and determined.

But it is said the executors in Michigan and the administrator in Massachusetts are in privity, and, therefore, the decree established a valid claim enforceable in this jurisdiction.

"It is our contention," counsel say, "that the administrator with the will annexed had the same powers and duties regarding the administration of Fletcher's estate in Massachusetts as the executors would have had if they had qualified as such in that state; that if a decree could have been made against them, if they had qualified in that state, which would have been valid as a claim against Fletcher's estate in Michi-

gan, then that the decree against the administrator with the will annexed is valid as a claim against that estate in Michigan."

This rests upon the idea that the judgment pronounced, the administrator being properly in court, is a judgment in effect against the estate wherever it may be situated. It rests, also, further, upon the fact that the court had acquired jurisdiction to render a personal judgment against Mr. Fletcher had he survived the litigation; that the suit in which the judgment was pronounced was pending when Mr. Fletcher died.

If Mr. Fletcher had had no estate in Massachusetts, no judgment could have been pronounced there which would bind the executors or the estate, 'unless the executors had applied and had been admitted to conduct the case. Because, whatever the rule as to survival of equity causes, such causes cannot in fact survive the death of a party so far as the rights of that party are concerned, except by the action of some one with the legal authority to represent him. If Mr. Fletcher had left no estate in Massachusetts, there would have been no person and no thing connected with his estate within the jurisdiction of the court. And, as it was, the Massachusetts administrator derived none of his interest or powers from Mr. Fletcher. To Mr. Fletcher and his testamentary disposition of property ⁴²¹ he was a stranger. The notion of the unity or identity of the res and the one of the privity of the representatives of the estate, which are essential to the theory of claimant, are not available here. The fact that the administrator in Massachusetts took the title of administrator with the will annexed did not have the effect to create privity with the domiciliary executors. It was the act of a person with interests adverse to those of the estate, permitted by the law of the forum in the interest of creditors of the decedent. In this view, *Latine v. Clements*, 3 Ga. 426, *Garland's Admr. v. Garland's Admr.*, 84 Va. 181, 4 S. E. 344, and other cases in accord with these are not authority here. Whatever may be the relations of two or more coexecutors, residing in different states, in each of which states the testator left property, and whatever the liability of a sole executor, who, for the purpose of administering the estate, secures his own appointment in a state other than

that having primary probate jurisdiction, to admit in every jurisdiction the force and validity of a judgment properly pronounced against him in any jurisdiction, it is clear that the domiciliary executor and the estate in the state of decedent's domicile cannot be affected by the acts of a foreign administrator, or by any judgment or decree rendered against such foreign administrator in the state of his appointment. And the case is not changed because the suit in which the judgment is rendered against the foreign administrator was pending in the foreign jurisdiction at the time of the death of the testator.

In *Creighton v. Murphy*, 8 Neb. 394, 1 N. W. 138, it appeared that in an action begun against Creighton, in Iowa, he appeared and filed an answer to the petition. He was a resident of Nebraska, and before trial died in that state. The administrator of his estate, appointed in Nebraska, applied to be and was appointed administrator in Iowa upon his petition, which alleged as ground for such appointment the pendency of said action. He filed an answer, denying the facts set out in the petition and the jurisdiction of the court. Judgment went against him, and he ⁴²² was directed to pay it out of assets of the estate. A transcript of the judgment having been brought into Nebraska, it was there allowed as a claim against the estate in Nebraska. It does not seem to have been claimed by the answer filed in Nebraska that the allowance of the claim in Iowa was not binding upon the Nebraska estate, and the case was heard on demurrer to the answer. In the supreme court, the question is, however, considered, and the opinion, recognizing the rule that where administration is granted to different persons in different states they are so far independent of each other that a judgment against one will furnish no right of action against the other, says that as to coexecutors the rule is different because they derive the same privities from the same estate from the same will; citing *Goodall v. Tucker*, 13 How. (U. S.) 469, 14 L. ed. 227. It is said: "Whatever the rule may be as to judgments recovered against ancillary administrators upon claims filed after the death of the intestate, it cannot affect this case. . . . The court had acquired jurisdiction, and the death of the defendant did not oust it of that jurisdiction. The court therefore had authority to revive the action against the administrator, and to hear and

determine the rights of the parties, and such judgment is conclusive as to the matters in issue."

See, also, *Mellus v. Thompson*, 1 Cliff. (U. S.) 125, Fed. Cas. No. 9405; *Judy v. Kelley*, 11 Ill. 211, 50 Am. Dec. 455; *Greer v. Ferguson*, 56 Ark. 324, 19 S. W. 966. As to claims presented after death of the testator in different jurisdictions, the rule of the federal courts, as stated by Chief Justice Fuller in *Carpenter v. Strange*, 141 U. S. 87, 11 Sup. Ct. Rep. 960, 35 L. ed. 640, is: "That as the interest of an executor in the testator's estate is what the testator gives him, while that of an administrator is only that which the law of his appointment enjoins, executors in different states are, as regards the creditors of the testator, executors in privity, bearing to the creditors the same responsibility as if there was only one executor. And that although a judgment obtained against one executor in one state is not conclusive upon an executor in another, yet it is admissible in evidence to ⁴²³ show that a demand has been carried into judgment, and the other executors are precluded by it from pleading prescription or the statute of limitations upon the original cause of action": Citing *Hill v. Tucker*, 13 How. (U. S.) 458, 14 L. ed. 223.

In *Johnson v. Powers*, 139 U. S. 156, 11 Sup. Ct. Rep. 525, 35 L. ed. 112, language from the opinion in *Stacy v. Thrasher*, 6 How. (U. S.) 44, 12 L. ed. 337, is cited with approval: "In answering the objection that to apply these principles to a judgment obtained in another state of the Union would be to deny it the faith and credit and the effect, to which it was entitled by the constitution and laws of the United States, he observed that it was evidence, and conclusive by way of estoppel, only between the same parties or their privies, or on the same subject matter when the proceeding was in rem; and that the parties to the judgments in question were not the same; neither were they privies in blood, in law, or by estate, and proceeded as follows:

"An administrator under grant of administration in one state stands in none of these relations to an administrator in another. Each is privy to the testator, and would be estopped by a judgment against him; but they have no privity with each other, in law or in estate. They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the other. Each is accountable to the ordinary from whom he receives his author-

ity. Nor does the one come by succession to the other into the trust of the same property, encumbered by the same debts.

“ ‘It is for those who assert this privity to show wherein it lies, and the argument for it seems to be this: That the judgment against the administrator is against the estate of the intestate, and that his estate, wheresoever situate, is liable to pay his debts; therefore the plaintiff, having once established his claim against the estate by the judgment of a court, should not be called on to make proof of it again. This argument assumes that the judgment is in rem, and not in personam, or that the estate has a sort of corporate entity and unity. But this is not true, either in fact or in legal construction. The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another state, liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands ⁴²⁴ cannot be affected by a judgment to which he is personally a stranger.

“ ‘The laws and courts of a state can only affect persons and things within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another state is *res inter alios acta*. It cannot be even *prima facie* evidence of a debt; for if it have any effect at all, it must be as a judgment, and operate by way of estoppel.’ ”

To the same effect are *Low v. Bartlett*, 8 Allen (Mass.), 259; *Ela v. Edwards*, 13 Allen (Mass.), 48, 90 Am. Dec. 174; *Clark v. Blackington*, 110 Mass. 369. In that state, too, it is held that there is no privity between the executor and an administrator *de bonis non cum testamento annexo*: *Grout v. Chamberlin*, 4 Mass. 611. In that case the executor, after judgment had been rendered against him, died. The administrator sued out a writ of error to reverse the judgment. The writ was quashed for the reason stated. Later, a statute was passed to cover the subject.

The Massachusetts administrator and the Michigan executors are not in privity, and, considered apart from the effect to be given to the stipulation of the parties, the decree of the Massachusetts court had no force or effect to

bind anyone except the administrator appointed in that jurisdiction.

2. As to the force and effect to be given to the stipulation signed by Mr. Fletcher. Certain of the counsel for appellant assert that the instrument is a contract, and that, the awards having been made by the arbitrator and confirmed by the decree of the court, in strict compliance with the contract, the decree is a valid claim against the estate in Michigan by virtue of the provisions of the contract. Of submission to arbitration, generally, it has been said:

“A submission is a contract; consequently, the parties must have a general, legal capacity to contract. . . .

“Submission is the technical designation of that contract by which parties agree to refer matters which are in dispute, difference, or doubt between them, to be finally ⁴²⁵ decided by the award of judges named by the parties, and called ‘arbitrators’”: *Morse on Arbitration and Award*, 1, 36.

Other counsel for appellant assert that the stipulation of the parties lacked the essential elements of a contract; that—

“The stipulation had no force or efficacy whatever from the mere will and consent of the parties. It had no vitality or legal effectiveness until it was accepted and approved by the court. The mere consent of the parties might discontinue the cause, and withdraw the issues from the court, but without the rule of the court, which was a judicial act, the case could not be referred. The stipulation, indeed, evidenced the terms upon which the parties had agreed to make the reference, but no efficacy attached to that agreement until after the court had approved it by the entry of its rule of reference.

“After the court had entered its rule referring the case, it was beyond the power of the parties to modify or revoke. The rule was the act of the court, and it belonged exclusively to the power of the court to modify or set aside its own rule: *Haskell v. Whitney*, 12 Mass. 47; *Willey v. Durgin*, 118 Mass. 64.

“The proceedings in the suit belonged to the exclusive power of the court in which the suit was pending to control. Hence, no right of action could arise out of the stipulation except as the court, from its own view of the justice of the

case, might allow: *District of Columbia v. Bailey*, 171 U. S. 161, 18 Sup. Ct. Rep. 868, 43 L. ed. 118."

The same counsel contends that the court had exclusive control for the purpose of construing and determining the meaning of the stipulation, and giving to it the effect contemplated by the parties, such jurisdiction necessarily appertaining to its jurisdiction over the pending suit; that the Massachusetts court has construed the stipulation, has found it to be proper if not necessary (the death of Fletcher having occurred) to give notice to the persons upon whom as a class the stipulation was made binding, viz., the legal representatives of Fletcher, of its construction of the stipulation, summoning, and inviting them to come into court and take part in such proceedings as succeeded ⁴²⁶ the death of Fletcher, and that the stipulation by its terms, as construed by that court, warranted the entry under the circumstances of a judgment against all of the legal representatives of Fletcher, which judgment and decree is, for the same reasons, binding upon the estate of Fletcher wherever situated.

The forum of the arbitration was not one chosen by the parties to the stipulation, and what is asserted here is not the award, but is the judgment of a court which had jurisdiction, with or without the stipulation, to determine the issues. This is not an action to enforce, or a suit for damages occasioned by a breach of, the stipulation.

It was not an uncommon practice, at a time when actions at law, and especially actions ex delicto, were wholly abated by the death of one of the parties, for orders to be entered by the court, either upon the stipulation of the parties or as a condition precedent to the granting of some favor by the court to one or other of the parties, that the death of neither party should abate the action, and that it should proceed after such death, if it occurred, precisely as though all parties to the suit had survived the entry of final judgment.

In *Ames v. Webbers*, 10 Wend. (N. Y.) 575, an action for a tort, defendant asked to put off the trial of a cause for the want of a witness. It being made to appear to the satisfaction of the court that there was reason to apprehend that the defendant might die previous to the next term of court, it was imposed as a condition for putting off the trial that the defendant stipulate that his death should not abate the suit. The defendant afterward died. A motion was made to

be relieved from the stipulation entered into in compliance with the condition imposed by the judge. It was held that the stipulation was correctly imposed, and the motion was denied: See, also, *Cox v. New York etc. R. R. Co.*, 63 N. Y. 414.

In *Tyler v. Jones*, 3 Barn. & C. 144, it appeared that by an order of reference the award was to be delivered to the parties, or, if they or either of them were dead before ⁴²⁷ the making of the award, to their respective personal representatives on or before a given day, with liberty to the arbitrator to enlarge the time for making his award. The plaintiff died before the award was made, and after his death the arbitrator enlarged the time for making the award. It was held that the award made within the enlarged time was good. The rule of the English courts seems to have been that, while the death of a party, generally speaking, operated as a revocation of an arbitrator's authority, if the rule provided in express terms for such an event, and an award was made under such a rule after the death of a party, it would be valid. To the argument made in the case last cited, that the award could not be enforced against the executors of the plaintiff, and consequently it ought not to be enforced against the defendant, it was said that it was true that it could not be enforced against the executors by attachment, but that an action would lie against the executors upon the undertaking of their testator to perform the award.

In *Clarke v. Crofts*, 4 Bing. 143, *Dowse v. Coxe*, 3 Bing. 20, and *Lewin v. Holbrook*, 11 Mees. & W. 110, the same rule was recognized and enforced: It was said in *Dowse v. Coxe*, 3 Bing. 20, by Best, C. J.: "The engagement is, not that the party will not revoke, but that death shall not abate the arbitration. It has been asked whether an agreement that a suit shall not abate by death would enable a court to proceed with the cause. It is not necessary to decide that; for, though an agreement of the parties may not give a court jurisdiction, that doctrine does not apply to a domestic forum erected by the parties themselves."

And by Burrough, J., in the same case: "The law touching revocation does not apply to this case, which is not the case of a simple authority, but one in which the party expressly binds his effects to the result of the award, and the

action is brought against the defendants only in their representative capacity.”

In that case the arbitrator awarded that the executor of ⁴²⁸ the deceased defendant should pay plaintiff two hundred and twenty-five pounds sterling out of the assets of said deceased defendant, and the action in which the opinion referred to was rendered was a suit brought as upon the promise and undertaking of the executors to perform the award.

The original cause in which the arbitration was had was one depending in chancery, and it was ordered, with the consent of the parties, that the matters in question and all disputes between the parties should be referred to a person named to make awards, and in case either of the parties should die, the death was not to abate that reference. On demurrer to the declaration against the executor of the deceased party, it was held that the promise appeared to have been made by the defendant in his representative capacity, and that there was a sufficient award to enable plaintiff to sue.

We are not required to construe or to declare the force and effect of the stipulation. We are asked to rule that the construction and determination of the Massachusetts court bound certain persons not in fact within the jurisdiction of that court, and not in fact possessing in that state the official character required to admit them to either prosecute or defend suits therein. In none of these cases, or our own decision in *Weaver v. Richards*, 144 Mich. 395, 108 N. W. 382, 6 L. R. A., N. S., 855, is such a question involved. The subject matter of the Massachusetts suit was the differences of the parties to that suit submitted for judicial determination in accordance with the rules and practice of the court. It was not changed by the stipulation. It did not change with the death of Mr. Fletcher. Jurisdiction of the person of Mr. Fletcher was lost when he died. There was then no judgment, and, as has been already said, there was no person within the territorial jurisdiction of the court upon whom the determination of the court could be made binding. There was no person, either, in that jurisdiction, whose action or whose office made a revival of the suit possible. There was, however, the stipulation of the parties.

Counsel do not go so far, but the argument made to support the minor proposition is ineffective unless it supports

⁴²⁹ also the major proposition, which is that the court, by virtue of the stipulation alone, had the power—the jurisdiction—to proceed to a final determination of the issues, and to enter a judgment binding either upon the res or upon the representatives of Mr. Fletcher as a class. Jurisdiction to bind the res was not asserted. Jurisdiction to bind the representatives was asserted. The argument that from and after the confirmation of the agreement of the parties by the rule of court the legal representatives of Mr. Fletcher, as a class, were potentially before the court, and that when the identity of the individuals of the class was established those individuals were subject to the future orders of the court in the pending suit, is unsound. Jurisdiction to construe and declare the meaning and effect of the stipulation, if it existed, is not jurisdiction to impose the construction and declaration made upon persons not before the court, nor could the court, by declaring the meaning and effect of the instrument, bring before it, and clothe with the necessary official character, individuals who were in fact beyond its jurisdiction. These conclusions appear to me to be legally axiomatic.

It must be held that the proceeding in the Massachusetts court abated with the death of Mr. Fletcher; that its revival was possible only because there was brought into existence, by the exercise of the sovereign power of the state, a representative of the decedent, clothed with certain powers with respect to the estate of decedent within the state; and that the decree thereafter rendered in the suit so revived is without effect save upon the administrator of the estate, who was, in accordance with the law of the place, brought upon the record.

It follows that the judgment should be, and it is, affirmed.

Carpenter, C. J., and McAlvay, Blair, and Moore, JJ., concurred.

The Case was Taken to the Supreme Court of the United States, where it was affirmed. The opinion accompanying the judgment in affirmance, delivered by Mr. Justice Brewer, is as follows:

“The federal question presented is whether the Michigan courts gave force and effect to the first section of article 4 of the federal constitution, which provides that ‘full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.’ That this is a federal question is not open to

doubt: *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. Rep. 224, 36 L. ed. 1123, and cases cited.

“The constitutional provision does not preclude the courts of a state in which the judgment of a sister state is presented from inquiry as to the jurisdiction of the court by which the judgment was rendered: See the elaborate opinion by Mr. Justice Bradley, speaking for the court, in *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897. That opinion has been followed in many cases, among which may be named *Simmons v. Saul*, 138 U. S. 439, 11 Sup. Ct. Rep. 369, 34 L. ed. 1054; *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. Rep. 773, 35 L. ed. 464; *Thormann v. Frame*, 176 U. S. 350, 20 Sup. Ct. Rep. 446, 44 L. ed. 500; Even record recitals of jurisdictional facts do not preclude oral testimony as to the existence of those facts: *Knowles v. Logansport Gaslight & Coke Co.*, 19 Wall. 58, 22 L. ed. 70; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Cooper v. Newell*, 173 U. S. 555, 19 Sup. Ct. Rep. 506, 43 L. ed. 808.

“Every state has exclusive jurisdiction over the property within its borders: *Overby v. Gordon*, 177 U. S. 214, 20 Sup. Ct. Rep. 603, 44 L. ed. 741. We make this extract from the opinion of Mr. Justice White in that case, p. 222:

“ ‘To quote the language of Mr. Chief Justice Marshall, in *Rose v. Himely*, 4 Cranch, 241, 2 L. ed. 608: ‘It is repugnant to every idea of a proceeding in rem to act against a thing which is not in the power of the sovereign under whose authority the court proceeds; and no nation will admit that its property should be absolutely changed, while remaining in its own possession, by a sentence which is entirely ex parte.’ ”

“ ‘As said also in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565: ‘Except as restrained and limited by the constitution, the several states of the Union possess and exercise the authority of independent states; and two well-established principles of public law respecting the jurisdiction of an independent state over persons and property are applicable to them. One of these principles is, that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . The other principle of public law referred to follows from the one mentioned; that is, that no state can exercise direct jurisdiction and authority over persons or property without its territory: *Story on Conflict of Laws*, c. 2; *Wheaton on International Law*, pt. 2, c. 2. The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists as an elementary principle that the laws of one state have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to submit either persons or property to its decisions. ‘Any exertion of authority of this sort beyond this limit,’ says *Story*, ‘is a mere nullity, and incapable of binding such persons

or property in any other tribunals': Story on Conflict of Laws, sec. 539.'''

"Fletcher, at the time of his decease, was the owner of property, some of it situated in Massachusetts and some in Michigan. Each state had jurisdiction over the property within its limits, and could, in its own courts, in conformity with its laws, provide for the disposition thereof. Massachusetts exercised its jurisdiction over the property within its limits and disposed of it by legal proceedings in its courts. The contention now is that the proceedings in the Massachusetts court can be made operative to control the disposition of the property in Michigan. In support of this contention, counsel for plaintiff in error state two propositions:

" 'The supreme judicial court in equity for Suffolk county, Massachusetts, having had jurisdiction in Fletcher's lifetime over the subject matter and the parties to the suit, and, on his death, the suit having been duly revived, the decree is conclusive evidence of debt in this proceeding.

" 'Fletcher's Michigan executors and the administrator with the will annexed of his estate in Massachusetts are in such privity that the decree is conclusive evidence of debt in this proceeding.'

"Considering first the latter proposition, we are of opinion that there is no such relation between the executor and an administrator with the will annexed, appointed in another state, as will make a decree against the latter binding upon the former, or the estate in his possession. While a judgment against a party may be conclusive, not merely against him, but also against those in privity with him, there is no privity between two administrators appointed in different states: *Vaughan v. Northrup*, 15 Pet. 1, 10 L. ed. 639; *Aspden v. Nixon*, 4 How. 467, 11 L. ed. 1059; *Stacy v. Thrasher*, 6 How. 44, 12 L. ed. 337. In this latter case, on page 58, it was said:

" 'Where administrations are granted to different persons in different states, they are so far deemed independent of each other that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration; for, in contemplation of law, there is no privity between him and the other administrator: See Story on Conflict of Laws, sec. 522; *Brodie v. Bickley*, 2 Rawle, 431.'

"See, also, *McLean v. Meek*, 18 How. 16, 15 L. ed. 277, *Johnson v. Powers*, 139 U. S. 156, 11 Sup. Ct. Rep. 525, 35 L. ed. 112, in which the question is discussed at some length by Mr. Justice Gray. This doctrine was enforced in Massachusetts (*Low v. Bartlett*, 8 Allen, 259), where a judgment had been recovered in Vermont against an ancillary administrator appointed in that state, whose appointment had been made at the request of the executor under the will probated in Massachusetts, and it was held that the administrator was not in privity with the executor, because the two were administering two separate and distinct estates; the court saying (p. 262):

“ ‘If we look at the question of privity between the executor here and the ancillary administrator in Vermont, it is difficult to find any valid ground on which such privity can rest. The executor derives his authority from the letters testamentary issued by the probate court here; he gives bond to the court; is accountable to it for all his proceedings; makes his final settlement in it, and is discharged by it, in conformity with the statutes of this commonwealth. The administrator derives his authority from the probate court in Vermont, and is accountable to it in the same manner in which the executor is accountable to our court. The authority of the executor does not extend to the property there, nor to the doings of the administrator. Nor does the authority of the administrator extend to the property here, or to the doings of the executor. Where the plaintiff commenced his suit against the administrator, the executor had no right to go there and defend it. If he had been found in Vermont, he could not have been sued there. The judgment rendered in the suit was not against him, or against the testator's goods in his hands; but was simply against the administrator and the testator's goods in his hands. The courts of Vermont had no jurisdiction of the executor or of the goods in his hands, any more than our courts would have over the administrator and the goods in his hands. It is this limitation of state jurisdiction that creates a necessity for an administration in every state where a deceased person leaves property; and each state regulates for itself exclusively the manner in which the estate found within its limits shall be settled.’

“ ‘The Massachusetts statutes proceed along this line. Sections 10, 11, and 12, chapter 136, Massachusetts Revised Laws 1902, provide for the probate of foreign wills in Massachusetts. Section 12 reads:

“ ‘After allowing a will under the provisions of the two preceding sections, the probate court shall grant letters testamentary on such will, or letters of administration with the will annexed, and shall proceed in the settlement of the estate which may be found in this commonwealth in the manner provided in chapter 143, relative to such estates.’

“ ‘With reference to the first contention of counsel, we remark that, while the original suit against Fletcher in the Massachusetts court was revived after his death, yet the revivor was operative only against the administrator with the will annexed. Neither the executors nor the residuary legatees were made parties, for it is elementary that service of process outside of the limits of the state is not operative to bring the party served within the jurisdiction of the court ordering the process. Such also is the statutory provision in Massachusetts. Section 1, chapter 170, Massachusetts Revised Laws 1902, reads:

“ ‘A personal action shall not be maintained against a person who is not an inhabitant of this commonwealth unless he has been served with process within this commonwealth, or unless an effectual attach-

ment of his property within this commonwealth has been made upon the original writ; and, in case of such attachment without such service, the judgment shall be valid to secure the application of the property so attached to the satisfaction of the judgment, and not otherwise.'

"The Massachusetts court, therefore, proceeded without any personal jurisdiction over the executors and legatees, who were all domiciled in Michigan, did not appear, and were not validly served with process.

"The argument of plaintiff in error is that, by personal appearance during his lifetime, the Massachusetts court acquired jurisdiction of the suit in equity against Fletcher; that his death prior to a decree did not abate the suit, but only temporarily suspended it until his representative should be made a party; that, if a decree had been rendered against him in his lifetime, it would have established, both against himself, and, after his death, against his estate, whatever of liability was decreed; that, while the suit was pending, the parties entered into a stipulation for an arbitration; that that arbitration did not abate, nor was it outside the suit, but, in terms, made under rule of court, and not to operate as a discontinuance of the suit. Provision was also made in the stipulation for the 'contingency of death, its terms being 'that the decease of any party shall not revoke said submission, but that said arbitration shall continue, and that the legal representatives of said Brown and said Fletcher shall be bound by the final award therein'; so that there is not merely the equity rule that a suit in equity does not abate by the death of the defendant, and that the jurisdiction of the court is only suspended until such time as the proper representatives of the deceased are made parties defendant, but also a special agreement in the submission to arbitration that it shall be made under a rule of court, and that the death of either party shall not terminate the arbitration proceedings, but that they shall continue until the final award. It is urged that, on the death, a revivor was ordered; that the representative of the decedent's estate in Massachusetts, to wit, the administrator, was made a party defendant and appeared to the suit, and notice was given by personal service upon the executors and legatees in Michigan of the fact of the revivor, and that they were called upon to appear and defend.

"But it must be borne in mind that this arbitration was made under a rule of court. Not only that, but special provision was made for the action of the court in deciding questions of law arising upon the report of the arbitrator, so that the arbitration was not an outside and independent proceeding, but simply one had in court, for the purpose of facilitating the disposition of the case. And we may remark in passing that we do not have before us the case of a simple arbitration, executed independently of judicial proceedings, and express no opinion as to the rights and remedies of one party thereto

in case of the death of the other. The validity of the decree must depend upon the proceedings subsequent to the death of Fletcher. On his death the jurisdiction of the Massachusetts court was not wholly destroyed, but suspended until the proper representative of Fletcher was made a party. The Massachusetts administrator was made a party and did appear, and the decree rendered unquestionably bound him; but the executors, the domiciliary representatives of the decedent's estate, did not appear, and were not brought into court. The Massachusetts administrator was not a general representative of the estate, and could not bind it by any appearance or action other than in respect to the property in his custody. If the home estate was to be reached, it had to be reached by proceedings to which the home representatives were parties. The agreement of the parties that the arbitration should continue in case of the death of either, and that the legal representatives of the party should be bound by the final award, was an agreement made in the course of judicial proceedings of the suit in the Massachusetts court. It did not operate to make the home representatives of the decedent parties to the suit on the death of Fletcher. It did not bring his general estate into court. We concur in the views expressed by the supreme court of Michigan in the close of its opinion that—

“ ‘It must be held that the proceeding in the Massachusetts court abated with the death of Mr. Fletcher, that its revival was possible only because there was brought into existence, by the exercise of the sovereign power of the state, a representative of the decedent, clothed with certain powers with respect to the estate of decedent within the state, and that the decree thereafter rendered in the suit so revived is without effect save upon the administrator of the estate, who was, in accordance with the law of the place, brought upon the record.’

“ ‘We are of the opinion that the supreme court of Michigan did not fail to give ‘full faith and credit’ to the decree of the Massachusetts supreme court, and therefore the judgment is affirmed’”: *Brown v. Fletcher*, 210 U. S. 82, 28 Sup. Ct. Rep. 702, 52 L. ed.

A Judgment Against an Administrator in one state is no evidence of debt in a subsequent action by the same person in another state against an administrator, whether the same or a different person, appointed there, or against any other person having assets of the deceased: *Braithwaite v. Harvey*, 14 Mont. 208, 43 Am. St. Rep. 625; *Price v. Ward*, 25 Nev. 203, 58 Pac. 849.

ALEXIER v. MATZKE.

[151 Mich. 36, 115 N. W. 251.]

CONTRACTS, Capacity to Make.—A Deaf Mute is not incapable of entering into contracts if shown to have sufficient mental capacity. (p. 257.)

CONTRACTS, Capacity to Make, When Established on the Part of a Deaf Mute.—If the evidence is undisputed and conclusive that a deaf mute understood the contract when he signed it, the jury should be instructed that the contract is binding on him, when it was entered into understandingly by him, with the consent of his father, and was to serve his brother in law for the remainder of their lives in consideration of support and care. (p. 258.)

Assumpsit for work and labor. Judgment for the plaintiff.

Charles R. Henry, for the appellant.

Joseph Cavanagh, for the appellee.

³⁶ McALVAY, J. The plaintiff is a deaf mute. He brought suit against defendant, who is his brother in law, for work and labor. Plaintiff lost his speech and hearing when about three years old as a result of sickness. He can write his name, and read a little in German. He has never been instructed by the usual methods used by deaf mutes to communicate with others. He communicates with some of his family by the use of motions and a ³⁷ limited number of signs, and watching the movements of the lips.

These parties are all German and speak the German language. In August, 1884, plaintiff, then nineteen years of age, under an agreement agreeable to all concerned and consented to by his father, went to live on defendant's farm where his parents lived, and to which farm defendant afterward moved. Plaintiff remained there until August 10, 1892, when the following agreement was made and signed by the parties to this suit and plaintiff's father:

"This agreement, made this 10th day of August, 1892, between William Matzke of Maple Ridge township, Alpena county, Michigan, of the first part, and August Alexier, Sr., and his son August Alexier, Jr., of the same place, of the second part, witnesseth:

"Whereas, the said August Alexier, J., being twenty-seven years of age, and deaf and dumb, and unable to earn inde-

pendently enough to make his living, has agreed, with the consent of his father, the above-named August Alexier, Sr., some seven years ago, to live and stay with the said William Matzke during their natural lives, and serve the said William Matzke with manual labor, and will faithfully obey all the reasonable wishes and commands of the said William Matzke, and protect and preserve the goods and property of the said Matzke; and the said William Matzke agrees and promises for the above consideration being faithfully and honestly fulfilled by the said August Alexier, Jr., he will board, lodge, wash, clothe him, and in case of sickness furnish him with medical attendance, care and medicine; but only as long as the said Alexier, Jr., shall remain and stay with the said Matzke.

“If the said August Alexier, Jr., should ever elect or choose to leave and part () with the said Matzke, then this agreement shall be null and void, and the said William Matzke shall be under no obligation to the said August Alexier, Jr., whatsoever, for any services the said August Alexier, Jr., has rendered during his stay with the said Matzke, and the said August Alexier, Jr., agrees and promises that he will not demand any pay or other compensation for his services for the past years, nor for the future, except the above-named, during his stay, or while staying with the said William Matzke, but ³⁸ will be satisfied with any compensation the said William Matzke should elect to give him out of his free will to the above-named compensation.

“Given in Maple Ridge, the day and year first above named.

“WILLIAM MATZKE. (L. S.)

“AUGUST ALEXIER, Sr. (L. S.)

“AUGUST ALEXIER, Jr. (L. S.)

“Signed in presence of

“FRED W. WENDT.

“AUGUSTA SCHENK.”

This contract was prepared by Rev. F. W. Wendt, the pastor of the church these people attended, and a friend of the family. It was written first in German and by signs explained to plaintiff, and then written out in English and signed by the parties in the presence of witnesses.

It is urged upon the trial on behalf of plaintiff that he did not understand and appreciate the terms of this instrument when he signed it. The case was tried and submitted to

the jury, and a verdict for plaintiff for five hundred and fifteen dollars was rendered and a judgment entered against defendant, who asks this court to set aside this judgment on account of errors assigned. At the conclusion of the testimony defendant asked the court to direct a verdict in his behalf, for the reason that by the undisputed evidence in the case it appeared that plaintiff signed the contract with defendant understandingly and therefore cannot recover in this action. This motion was denied by the court, and the only important question in the case is whether the court erred in so doing. Defendant admits that the court upon the trial was correct in holding that the plaintiff in the case appearing to be a deaf mute, the burden of proof was on the defendant to show that plaintiff executed the contract understandingly.

The old doctrine that a deaf mute was presumed to be an idiot (i. e., *non compos mentis*) no longer prevails: 8 Am. & Eng. Ency. of Law, 2d ed., p. 842, and notes. The courts now hold that a deaf mute is not incapable of entering into contracts if shown to have sufficient mental capacity: 22 Cyc. 1208, citing *Brown v. Brown*, 3 Conn. 299, 8 Am. Dec. 187; *Collins v. Trotter*, 81 Mo. 275.

³⁹ The record, taken as a whole, shows that plaintiff does not lack ordinary intelligence. The question is not whether he was mentally competent to enter into this agreement with defendant, but whether he understood it at the time. The evidence upon this proposition was all furnished by witnesses for defendant. They are the father, mother and sister of plaintiff, the family minister, the defendant and his wife, who is also plaintiff's sister. The testimony of these witnesses is unimpeached and uncontradicted. The acts of the parties to this suit strongly support the testimony in the case. The first arrangement was made with the consent of the father about eight years before the written agreement was executed. No dispute appears to have been raised under it. For twelve years after this final agreement the parties acted under it without question. There is nothing in the case that casts the slightest suspicion upon the testimony of any of these witnesses. It is plain that, considering the weight of this evidence, in an ordinary case the court would have held it conclusive and directed a verdict for defendant. Will a dif-

ferent rule be applied in this case because plaintiff is a deaf mute? We see no reason why it should be made an exception. The mental competency of plaintiff having been established without question, the case is in the same condition as any case, leaving the transaction in dispute to be established by evidence. If the evidence was undisputed and conclusive that plaintiff understood the contract at the time he signed it—and we think it was—a verdict should have been instructed for defendant: *Druse v. Wheeler*, 26 Mich. 189; *Lange v. Perley*, 47 Mich. 352, 11 N. W. 193; *Byles v. Township of Golden*, 52 Mich. 612, 18 N. W. 383; *Fourth Nat. Bank of Grand Rapids v. Olney*, 63 Mich. 58, 29 N. W. 513; *Corbett v. Spencer*, 63 Mich. 731, 30 N. W. 385; *Hunt v. Order of Chosen Friends*, 64 Mich. 671, 8 Am. St. Rep. 855, 31 N. W. 576; *Gillett v. Knowles*, 97 Mich. 77, 56 N. W. 218; *Jakoboski v. Grand Rapids etc. R. R. Co.*, 106 Mich. 440, 64 N. W. 461.

The three cases relied upon by plaintiff, viz., *Molitor v. Robinson*, 40 Mich. 200, *Woodin v. Durfee*, 46 ⁴⁰ Mich. 424, 90 N. W. 457, and *Wilson v. Royal Neighbors of America*, 139 Mich. 423, 102 N. W. 957, are distinguished from the case at bar in that the evidence relied upon was not undisputed, as an examination of those cases clearly discloses.

For the reasons herein stated, the judgment is reversed and no new trial will be ordered.

Grant, C. J., and Blair, Moore, and Carpenter, JJ., concurred.

A Person Deaf and Dumb from his nativity, having in fact sufficient capacity, is not legally incapable of making a deed: *Brown v. Brown*, 3 Conn. 299, 8 Am. Dec. 187. And a deaf and dumb person is not incompetent as a witness at a trial: *State v. DeWolf*, 8 Conn. 93, 20 Am. Dec. 90. The will of a speechless paralytic is upheld in *Rothrock v. Rothrock*, 22 Or. 551, 30 Pac. 453. See, too, *Estate of Latour*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441.

KAUFMAN v. STATE SAVINGS BANK.

[151 Mich. 65, 114 N. W. 863.]

HUSBAND AND WIFE—Presumption of Her Assent to an Assignment to Her.—If a policy of insurance is assigned to a wife for her benefit, her consent to and acceptance of the assignment will be presumed. (p. 260.)

HUSBAND AND WIFE—Her Right to Affirm an Act of His for Her Benefit.—If a draft which ought to have been made in favor of a wife is by the direction of her husband, made to him and her, she has the right to avail herself of the draft by affirming her husband's receipt of it. (p. 260.)

HUSBAND AND WIFE—His Indorsement of Commercial Paper Payable to Both on Its Face, but in Fact Belonging to Her.—If checks or drafts purporting to be payable to a husband and wife in fact belong wholly to her and are sold by him, he forging her name to the indorsement, this is a conversion by him and also by the person to whom they are indorsed and who subsequently receives the money thereon, making him liable to her for the amount so received. (p. 261.)

TENANTS IN COMMON of Commercial Paper, Implied Authority of One to Indorse for the Other.—Where negotiable paper is payable to two or more persons, there is no presumption that one indorses and transfers it for the others, and if the title is to be transferred, it must be by the indorsement of all. (p. 261.)

Action on the case against the defendant savings bank for negligently cashing a check or draft. The court directed a verdict in favor of the plaintiff, and such verdict having been returned, judgment was entered thereon, and defendant appealed.

Walker & Spalding, for the appellant.

Oscar M. Springer and Fred H. Warren, for the appellee.

66 MONTGOMERY, J. This action is brought for the wrongful taking possession and conversion of a check and draft, each being made payable to the order of the plaintiff and Bernard S. Kaufman, her husband. The transactions which resulted in the giving of each of these items of commercial paper were in all substantial respects identical. The plaintiff was the owner of some furniture in the Sibley apartments, so called, in the city of Detroit, which was covered by two policies of insurance, one in the Aachen and Munich Fire Insurance Company, and the other in the American Insurance Company of Boston. For some reason, which does not clearly appear, the policies were made payable to Bernard S. Kaufman notwithstanding the ownership of the

goods in the plaintiff. A fire having occurred, Bernard S. Kaufman assigned the policies to plaintiff and deposited the policies with the respective companies. The agent of the first-named company made a draft on the general manager for the amount of the insurance, payable to the order of Bernard S. Kaufman and Adelaide Kaufman. The second named company, through its agent, made a check payable in the same manner to the order of Bernard S. Kaufman and Adelaide Kaufman. These two pieces of paper were indorsed to defendant by Bernard S. Kaufman in his own name and also in the name of plaintiff. The latter indorsement was wholly without authority, the draft issued by the first company being purchased outright on these indorsements, the check from the second company being received for collection on the like forged indorsement. Defendant, on receiving the fund, turned it over to Bernard S. Kaufman. The circuit judge directed a verdict for plaintiff, and defendant brings error.

It is claimed that no title to the paper ever vested in the plaintiff, for the reason that there was no delivery of the same to her. The assignment of the insurance to her was for her benefit and interest, and her assent to the assignment and acceptance of it would be presumed: *Thatcher v. St. Andrew's Church*, 37 Mich. 264; *Bangs v. ⁶⁷ Browne*, 149 Mich. 478, 112 N. W. 1107. The fact that this check and draft were made payable to the two rendered it, if plaintiff's contention be correct, as secure as it would have been had it been payable to the plaintiff alone, and we see no reason why plaintiff is not in a position to avail herself of the draft and check if she sees fit by affirming her husband's receipt of the same to do so.

The meritorious question in the case is whether the defendant, having purchased this draft on the indorsement of one of two joint payees, and having assumed to collect the check on an indorsement which turns out to have been a forged indorsement of plaintiff's name, is in position to assert title as against the true owner, or whether, on the other hand, having received the money upon the check and draft, the defendant is accountable to the true owner for the amount of money received. The defendant relies upon the case of *Harding v. Parshall*, 56 Ill. 219, and other cases, to establish the rule that a debt to two jointly may be paid to either, and this being so, it is urged that the owner of commercial

paper is entitled to demand and receive payment even in the absence of any indorsement at all, and it is sought to reason from this that the indorsement by Bernard S. Kaufman of plaintiff's name had no other effect than to enable Kaufman himself to receive payment through the instrumentality of the defendant.

It is a sufficient answer to this view to say that such was not the transaction. What did happen was that Bernard S. Kaufman, having in possession these two pieces of commercial paper, each of which represented money due to plaintiff individually, sold one piece of paper to the defendant, and put it in the power of defendant to recover from the payor the pay on the other piece on a forged indorsement. This as between plaintiff and Bernard S. Kaufman was a conversion of the property, and unless he was authorized to pass title to the defendant or vest it with an agency to receive the money on her paper, it was likewise as between the defendant and the plaintiff a conversion of the property.

⁶⁸ In the same jurisdiction in which *Harding v. Parshall*, 56 Ill. 219, was decided, it was held by Mr. Justice Scofield, in *Ryhiner v. Feickert*, 92 Ill. 305, 34 Am. Rep. 130, following and citing with approval 1 *Daniel on Negotiable Instruments*, section 684, that if several persons not partners are payees or indorsees of a bill or note it must be indorsed by all of them; either one of the joint payees may authorize the other to indorse for him, and an assignment of his interest in the paper from one to the other carries with it such authority, but there is no presumption of law that one may indorse for the other. The same rule was laid down in *Wood v. Wood*, 16 N. J. L. 428, and we have been unable to find any case which makes for the contrary rule. This is not the case of receiving payment from the maker by one of two joint payees; it is an attempt to transfer title in one case and create an agency in the other, and, as we have seen, this cannot be done except by indorsement of all to whose order the instrument is made payable. It will, of course, be understood that this is subject to the rule that under the implied authority of one partner he may indorse for his copartner. But that is not the case here.

The judgment will be affirmed.

Ostrander, Hooker, Carpenter, and McAlvay, JJ., concurred.

The Question Whether One of Two Joint Payees has authority to indorse the name of his copayee is discussed in Ryhiner v. Freickert, 92 Ill. 305, 34 Am. Rep. 130; Herring v. Woodhull, 29 Ill. 92, 81 Am. Dec. 296; Bennett v. McCaughy, 3 How. 192, 34 Am. Dec. 77.

GARTH LUMBER AND SHINGLE COMPANY v. JOHNSON.

[151 Mich. 205, 115 N. W. 52.]

CONSTITUTIONAL LAW—Statute Assuming to Confer the Right to Use Dams and Assort Logs on the Lands of Another.—A statute purporting to make it lawful for any person having logs, timber, ties, posts or poles in any stream navigable therefor to temporarily assort such logs, timber, ties, posts or logs in such stream and along the shore and at the mouth thereof is unconstitutional as against owners of lands through which such streams pass, because it in effect gives the right to enter on such lands without compensation. (p. 264.)

INJUNCTION, Issuing of to Prevent Trespass Though the Injury Being Done is Slight.—An injunction will not issue to prevent the defendants from resisting the complainants in entering upon waters and lands of the former for the purpose of assorting and booming logs in the streams thereon, though the damage which will be done by the complainants if an injunction issues is slight and capable of being compensated by damages. (p. 265.)

Suit to restrain the defendants Johnson and others from interfering with the assorting of logs in a stream on the lands of such defendants. An order was made granting a temporary injunction, and the defendants appealed.

F. D. Mead, for the complainants.

A. H. Ryall, for the defendants.

²⁰⁵ OSTRANDER, J. Defendants appealed from an order granting an injunction: 150 Mich. 73. They were restrained "From in any manner interfering with or preventing the booming, sorting and removal of the logs, ties, poles, posts and other forest products belonging to the said complainants ²⁰⁶ now lying at or near the mouth of White Fish river, in Delta county, Michigan, and from in any manner interfering with any booms temporarily attached to the shore of any of the parcels of land belonging to said defendants, and from interfering with the men in the employ of the said complainants, or any of them, in walking along the shores of said White

Fish river while necessarily engaged in the work of booming, sorting and removing said logs, ties, poles, posts and other forest products, as above described, until the further order of this court."

We shall treat the bill as admitting that complainants were making such use of the stream, and of the banks thereof, as the injunction, in terms, protects. That is, they were booming and sorting forest products in the stream upon the defendants' lands, had and maintained booms in the stream which were attached to defendants' lands, and their men went upon and walked along the shores of the river, on the lands of defendants, in the work of sorting logs and in removing such as were lodged or stranded. We assume, also, that the White Fish river is, where it flows over defendants' lands, in sections 21 and 28, town 41 north, of range 21 west, navigable only for floating forest products. The right asserted by complainants, the exercise of which they contend should be protected by injunction (the bill asks for no other relief), is bottomed, in the argument, upon three distinct grounds.

First, upon the statute, Act No. 189, Public Acts of 1905, entitled: "An act to regulate and define the rights of persons in running, rafting and booming of logs, timber, ties, posts or poles in the streams and rivers of the Upper Peninsula, in the state of Michigan."

This act has two sections which read:

"Section 1. It shall be lawful for any person or persons having logs, timber, ties, posts or poles in any stream in the Upper Peninsula navigable for such logs, timber, ties, posts or poles, to temporarily boom and assort such ²⁰⁷ logs, timber, ties, posts or poles in said stream, and along the shores, and at the mouth thereof, and to secure the booms by means of piles driven in the stream, or by chains, ropes, timbers or traverse poles made fast at points along the shore: Provided, That the driving and maintaining of said piles or holding of said logs, timber, ties, posts or poles aforesaid shall not interfere with the use of said stream by others for the purpose of floating similar products.

"Sec. 2. Provided, That this act shall not apply to any rivers or waters now having organized boom companies doing business under charter or to Anna river in Alger county."

It is charged in the bill that there is no organized boom company doing business under charter on the White Fish river.

Second, upon a prescriptive right to do the work they were doing in the manner in which they were doing it. It is charged in the bill that the stream has been used for floating logs for fifty years, that two of complainants have had in said river, for ten years, forest products to be floated down it, sorted at its mouth and towed to the mills, that the other complainant has for two years been engaged in the same business, having purchased from another mills, lands, booms and sorting works which had been established at the mouth of the stream and used for sorting logs which came down the stream, for thirty years or more. That in March, 1907, complainants entered into an agreement by which, "After the logs had been driven to a solid jam down the said White Fish river at or near the State Road bridge, which crosses the said White Fish river about one mile from its mouth, they should sort said logs, use the booms which had been placed in said river and which had been used for many years in sorting logs and other forest products, now owned by the Garth Lumber and Shingle Company, and also adding such additional booms as might be necessary for said purpose, and under this arrangement the parties contributed to the cost of this sorting proportionately to the amount of timber each had in said river."

Third, upon the common law—that what they are protected ²⁰⁸ by the injunction in doing is incident merely to the navigation of the stream.

1. Assuming that the statute which is relied upon attempts to confer a right not otherwise existing, it is plainly invalid. It does not, as its title would indicate, merely regulate and define the rights of persons in running and booming logs. It in terms makes it lawful for individuals charged with no public or quasi public duties in the premises to temporarily boom and assort logs along the shores, and for that purpose to secure booms at points along the shore. As applied to this case, it gives a right of entry upon the land of others, the effect of which is dispossession of the owners and interference with their dominion over property; this without any provision for compensation. The principle involved is not different from that employed in *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *White River Log & Booming Co. v. Nelson*, 45 Mich. 578, 8 N. W. 587, 909. See, also, *Ball v. Herbert*, 3 Term Rep. 253; *Cohn v. Wausan Boom Co.*, 47 Wis. 314, 2 N. W. 546;

Perry v. Wilson, 7 Mass. 393. It is true that in his brief counsel for appellants states that, "in so far as they had attached booms to the shore and were in possession of them, and in so far as the injunction restrained defendants from interfering with them while in complainants' possession, no appeal has been made"; but counsel does, necessarily, because of the apparent claims of counsel for complainants, contend that no right to possess or interfere with the defendants' lands is supported by this statute. In this, we agree with counsel for appellants.

2. The bill does not charge a prescriptive right—an easement—in the lands of defendants. Whether the condition of things described in the bill ever before existed does not appear.

3. The question of the right of owners of logs floated at high water to reclaim and set afloat such of them as are left by the subsidence of the water, or such as are forced, in prudently conducting the drive, upon the banks ²⁰⁰ of a river, is not presented by this record: See 2 Comp. Laws, sec. 5098; Gratwick etc. Lumber Co. v. Lewis, 66 Mich. 533, 33 N. W. 415; Bradley v. Tittabawassee Boom Co., 82 Mich. 9, 46 N. W. 9; Bauman v. Pere Marquette Boom Co., 66 Mich. 544, 33 N. W. 538. And, upon the subject, see, generally, Hooper v. Hobson, 57 Me. 273, 99 Am. Dec. 769; Carter v. Thurston, 58 N. H. 104, 42 Am. Rep. 584; Watkins v. Dorris, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199. What complainants are doing is not a necessary incident to such navigation as this stream affords. It is, apparently, a calculated invasion of private property. The bill charges that "said defendants threaten to interfere with the sorting of said logs by your orators, and threaten to use force to prevent your orators from walking along said shores, as above set forth, or from booming said logs along said shore and assorting them temporarily," offers to pay any damages accruing to defendants "from such use of said shores in the assorting of said logs," which complainants are legally liable to pay. No previous offer to compensate defendants is alleged, no attempt to agree with them for compensation. The statute right to use defendants' lands being denied, the position of complainants is, in effect, that defendants are not, in fact, damaged by what complainants have done and are doing; if they are, they must submit to such use of their property as serves the necessities or convenience of complainants' operations and prove their damages after such use has ceased. It is urged

that the value of the forest products in the stream is one hundred thousand dollars, that one-fifth is stranded upon the shores and that the value of the land desired to be used is small, the land uncultivated, and the resulting injury to defendants inconsequential. The court has upon occasion refused the writ of injunction to restrain a threatened trespass where the remedy at law was adequate, the opposed interests to be affected by the injunction of large, proportional, consequence, and other and independent circumstances considered negatived the right of complainant to equitable relief: *Howard v. Bellows*, 148 Mich. 410, 111 N. W. 1047. So the writ ²¹⁰ might have been refused to the defendants in the case here presented. It does not follow that the writ will issue to protect a confessed trespasser in his occupancy and use of his neighbor's premises upon the ground that his interests and operations are large and the land owner's damages small. Purely legal rights are involved in the present controversy.

Because no ground for equitable interference is stated in the bill of complaint, it will be dismissed, with costs of both courts, without prejudice to the rights of any of the parties to institute suits at law.

Montgomery, Hooker, Carpenter, and McAlvay, JJ., concurred.

The Right to Use a Stream for Navigation in Floating Timber extends only to the bed thereof, and not to a use or an appropriation of the banks: *Smith v. Atkins*, 110 Ky. 119, 96 Am. St. Rep. 424; *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 102 Am. St. Rep. 905.

On Injunctions Against Trespasses upon real property, see the note to *Moore v. Halliday*, 99 Am. St. Rep. 731.

DAVIDSON v. HINE.

[151 Mich. 294, 115 N. W. 246.]

CONSTITUTIONAL LAW—Statute Unconstitutional in Part, When must be Declared Wholly Unconstitutional.—A statute purporting to create a board of public safety to be appointed by the governor and to have control of the police and fire departments of a municipality, being unconstitutional as to the latter department, the whole act must fall. (pp. 267, 268.)

MUNICIPAL CORPORATION, Right of to Self-Government.—Municipalities have the constitutional right to self-government, and it is an invasion of that right by the state for it to make the appointment of officers to perform the functions of a local governmental nature. (pp. 268, 269.)

CONSTITUTIONAL LAW—Municipal Corporations, Authority of Over Fire Department not Subject to Legislative Control.—A statute undertaking to create a board of public safety to be appointed by the governor and to give it control of the fire department of a city is unconstitutional, because the authority of the municipality over such department cannot be taken away by the legislature. (p. 272.)

U. R. Loranger, Fred W. Defoe and James E. Duffy, for the relators.

S. G. Houghton, for the respondents.

²⁹⁵ CARPENTER, J. Relators claim to be a bureau of public safety for the city of Bay City. Their title to their office is derived from an appointment made by the governor of the state acting pursuant to Act No. 750 of the Local Acts of 1907. They brought this mandamus proceeding in the circuit court for the county of Bay to compel said respondents to surrender to them the custody of the public records, papers and offices pertaining to the police and fire departments of said city. The case was heard in the lower court on petition and answer, and a mandamus ordered in accordance with the prayer of relators. The proceedings are brought to this court for review by writ of certiorari.

The only question in the case arises from the contention of respondents that the act under which relators are appointed is unconstitutional. That act provides for the appointment by the governor of a bureau of public safety consisting of five members whose term of office shall be respectively one, two, three, four and five years. It confides to the bureau so appointed "full power and control and the management of the police department, and the fire department, the organization and government and discipline of such department

and the custody and control of all public property, books, records and equipments thereto belonging to such department." If this act had been confined to the police department it would have been constitutional under the decision of *People v. Mahaney*, 13 Mich. 481. But it is not so confined. It ²⁹⁶ gives to the bureau appointed by the governor full power and control over the fire department of said city, and it is clear that this feature is an essential part of the act, and, if unconstitutional, the entire act must fall.

Has the legislature the constitutional right to vest the management of the fire department of a municipality in a board appointed by the governor? This court has consistently held, commencing at a very early day (see *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103) that municipalities have a constitutional right of self-government, and that it is an invasion of that right for the state to make appointment of officers to perform functions of a local governmental character. It was determined in *People v. Hurlbut*, 24 Mich. 44, that officers having charge of the streets of a municipality, officers having charge of the water supply of a municipality, and officers having charge of the sewers of a municipality, each perform functions of a local governmental character; that the constitution gives to the municipality, and denies to the state, authority to appoint such officers. I quote from the opinion of Justice Cooley in that case:

"In the case before us, the officers in question involve the custody, care, management and control of the pavements, sewers, waterworks and public buildings of the city, and the duties are purely local. The state at large may have an indirect interest in an intelligent, honest, upright and prompt discharge of them; but this is on commercial and neighborhood grounds rather than political, and is not much greater or more direct than if the state line excluded the city. . . . These [municipal] corporations are of a twofold character; the one public as regards the state at large, in so far as they are its agents in government; the other private, in so far as they are to provide the local necessities and conveniences for their own citizens. . . . The question recurs whether our state constitution can be so construed as to confer upon the legislature the power to appoint for the municipalities, the officers who are to manage the property, interests, and rights in which their own people alone are concerned. If it can be, it involves these consequences: As there is no provision re-

quiring the legislative interference ²⁹⁷ to be upon any general system, it can and may be partial and purely arbitrary. As there is nothing requiring the persons appointed to be citizens of the locality, they can and may be sent in from abroad, and it is not a remote possibility that self-government of towns may make way for a government by such influences as can force themselves upon the legislative notice at Lansing. As the municipal corporation will have no control, except such as the state may voluntarily give it, as regards the taxes to be levied, the buildings to be constructed, the pavements to be laid, and the conveniences to be supplied, it is inevitable that parties, from mere personal considerations, shall seek the offices, and endeavor to secure from the appointing body, whose members in general are not to feel the burden, a compensation such as would not be awarded by the people, who must bear it, though the chief tie binding them to the interests of the people governed might be the salaries paid on the one side and drawn on the other. As the legislature could not be compelled to regard the local political sentiment in their choice, and would, in fact, be most likely to interfere when that sentiment was adverse to their own, the government of cities might be taken to itself by the party for the time being in power, and municipal governments might easily and naturally become the spoils of party. All these things are not only possible, but entirely within the range of probability. It may be said that these would be mere abuses of power, such as may creep in under any system of constitutional freedom? Has the administration of equal laws by magistrates freely chosen no necessary place in it? Constitutional freedom certainly does not consist in exemption from governmental interference in the citizen's private affairs; in his being unmolested in his family, suffered to buy, sell and enjoy property, and generally to seek happiness in his own way. All this might be permitted by the most arbitrary ruler, even though he allowed his subjects no degree of political liberty. The government of an oligarchy may be as just, as regardful of private rights, and as little burdensome as any other; but if it were sought to establish such a government over our cities by law, it would hardly do to call upon a protesting people to show where in the constitution the power to establish it was prohibited; it would be necessary, on the other hand, to point out to ²⁹⁸ them where and by what unguarded words the power had

been conferred. . . . The state may mold local institutions according to its views of policy or expediency; but local government is matter of absolute right; and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the state not only shaped its government, but at discretion sent in its own agents to administer it; or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all. . . . I think . . . there is an express recognition of the right of local authority by the constitution. That instrument provides (article 15, section 14) that 'judicial officers of cities and villages shall be elected; and all other officers shall be elected or appointed at such time and in such manner as the legislature may direct.' It is conceded that all elections must, under this section, be by the electors of the municipality. But it is to be observed that there is no express declaration to that effect to be found in the constitution; and it may well be asked what there is to localize the elections any more than the appointments. The answer must be, that in examining the whole instrument a general intent is found pervading it, which clearly indicates that these elections are to be by the local voters, and not by the legislature, or by the people of a larger territory than that immediately concerned. I think, also, that when the constitution is examined in the light of previous and contemporaneous history, the like general intent requires, in language equally clear and imperative, that the choice of the other corporate officers shall be made in some form, either directly or indirectly, by the corporators themselves. . . . When, therefore, we seek to gather the meaning of the constitution from 'the four corners of the instrument,' it is impossible to conclude that the appointments here prescribed, in immediate connection with elections by the local voters, and by a convention intent on localizing and popularizing authority, were meant to be made at the discretion of the central authority."

This court has never cast doubt upon these principles, but has often recognized and applied them. It applied them in *People v. Detroit Common Council*, 28 Mich. 228, 15 Am. Rep. 202, and there denied ²⁹⁹ the authority of the legislature to compel the city of Detroit to establish a park. It again applied them in *Blades v. Board of Water Commrs. of Detroit*, 122 Mich. 366, 81 N. W. 271, in a case where the

legislature undertook to turn over to a board of its own selection authority to determine the taxes to be raised for the maintenance of the waterworks of Detroit, and the act was held unconstitutional upon the ground that "the furnishing of water to the city and its inhabitants is purely a local matter." Still later it applied them in *Moreland v. Millen*, 126 Mich. 381, 85 N. W. 882, and again the authority of the state to appoint officers having charge of the streets of a municipality was denied. These authorities are, in my judgment, decisive of the case under consideration.

The right of the state to appoint officers to manage the fire department of a city cannot, in my judgment, be maintained by a single sound argument which would not also authorize it to appoint officers having the management of municipal streets or of municipal waterworks. It is said that a municipality derives no private corporate benefits from, and as such has no particular interest in, a municipal fire department. This points to no essential distinction between a municipal fire department and the departments managing municipal streets and municipal waterworks. It is only by considering a municipal corporation as an entity, distinct and separate from its inhabitants and their interests, that it can be said that it has no "particular interest in its fire department." So considered, it may just as truly be said that it has no particular interest in the department managing its streets or waterworks, and it may also be said that it is no part—at least, no essential part—of the plan of managing municipal streets or of municipal waterworks that private corporate benefits should be derived therefrom. All these departments are, however, alike in this—and this is the important circumstance—each is an agency of local government maintained for the benefit of the local community. I can conceive of no legitimate process of reasoning ³⁰⁰ by which it can be urged that the state has the right to manage a municipality's fire department, and has no authority over the control of water by which the fire is to be extinguished. I submit, therefore, that within the principle of the foregoing decisions of this court, the act in question is unconstitutional.

It is true that our decisions have recognized the right of the state to make provisional appointments of officers who perform duties of a local governmental character, but it is conceded, as I understand the briefs of counsel, at least, it is clear that the appointments under consideration cannot be

sustained as provisional appointments. We cannot then sustain the constitutionality of the act under consideration without overruling the foregoing decisions of this court. The suggestion that we should overrule them and thereby deny—or cast doubt upon—the proposition that our constitution recognizes the right of local self-government cannot for one moment be entertained.

This court has decided in *Davock v. Moore*, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783, that the state has a right to appoint a municipal board of health, and it is argued that there is no distinction between the function of such a board and that of a board controlling a municipal fire department. The decision of *Davock v. Moore* proceeds upon the ground that a municipal board of health is a state agency and not a municipal agency. It clearly recognizes the authority of *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, and it proceeds upon the ground that those municipal officers, and those only who are acting as agents of the state, can be appointed by the state. To claim that a municipal fire department—whose duty it is to extinguish fires within the limits of a municipality—is as much an agent of the state as is a municipal board of health, is to cast doubt upon the validity of the decision of *Davock v. Moore*, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783. For, in my judgment, as already shown, a municipal fire department is indistinguishable from a system of municipal waterworks which is authoritatively³⁰¹ determined to be an agency of municipal government. We cannot, I insist, hold that a municipal fire department is an agency of the state government and that the authorities managing it can be appointed by state authority, without overruling *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, and other cases decided by this court. But I do not think it necessary to cast any doubt upon the correctness of the decision of *Davock v. Moore*, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783; for there is a distinction between the function of a municipal board of health and that of a municipal fire department. The municipal board of health has in charge the health of the public. If it neglects its duties, an epidemic is likely—indeed almost certain—to arise which will endanger the health not only of those within the municipality, but of other residents of the state who never visit it. This is not true of a municipal fire department. The duty of that department is confined to the suppression of fires arising within

municipal limits. Those living outside the municipality are not affected by the performance of this duty, unless they visit the municipality or have property within its limits. The possibility of that occurrence does not make the department a state agency. If it does, all our decisions upon this subject are erroneous.

Relators insist that *Brink v. City of Grand Rapids*, 144 Mich. 472, 108 N. W. 430, is an authority supporting their contention that the state has a right to appoint the officers having charge of a municipal fire department. In that case it was determined that a municipality was not responsible for the negligence of the employés of a fire department. This decision does not rest upon the proposition that a municipal fire department is a state agency. It rests upon this proposition—a proposition conceded by relators' counsel—that “a municipality is not responsible for negligent injuries to persons or property committed by members of a fire department when engaged in work pertaining exclusively to the extinguishment of fires.” Does it follow that the state has authority to appoint the officers who manage the fire department of a municipality? Unless ³⁰² it does, there is no ground for saying that *Brink v. City of Grand Rapids*, 114 Mich. 472, 108 N. W. 430, supports relator's contention. It cannot be said that a municipality is responsible for all the negligence of its officers when they are engaged in performing a local governmental duty, and, therefore, it is not true that exemption from such responsibility proves that they are not performing a local governmental duty. This is settled by our own decisions. The authorities heretofore cited in this opinion prove that officers having charge of the streets of a municipality are performing local governmental duties, and that the state has no right to appoint such officers. And it is also settled that in the absence of a statute establishing a contrary rule, a municipality is not liable for the negligence of such officials: See *City of Detroit v. Blackeby*, 21 Mich. 84, 4 Am. Rep. 450; *Alberts v. City of Muskegon*, 146 Mich. 210, 117 Am. St. Rep. 633, 109 N. W. 262, 6 L. R. A., N. S., 1094. *Brink v. City of Grand Rapids*, 114 Mich. 472, 108 N. W. 430, is not, therefore, opposed to the reasoning of this opinion. In this connection I quote from the opinion of Justice Cooley in *People v. Detroit Common Council*, 28 Mich. 228, 15 Am. Rep. 202: “Indeed, it is a matter of gen-

eral observation that the state does not force upon the local community these larger powers [powers to provide for its citizens such matters of necessity or convenience as their health, protection, comfort or enjoyment as a political community may demand], but waits to be solicited to confer them when the people interested shall deem them for their advantage. This is so well understood that in many of the states it has been decided that a municipal corporation may justly be held, when receiving its charter, to contract in consideration of the powers conferred, that its authority shall perform toward all parties concerned, the several duties imposed upon the corporation, and may be held liable in damages for their failure to perform them. And although we have not followed those decisions in this state, the twofold character of these corporations, as organizations on the one hand for state purposes, and on the other for the benefit of the individual corporators, has invariably ³⁰⁸ been recognized by this court wherever there has been occasion to refer to it."

Justice Cooley thus clearly recognizes that in Michigan the doctrine that a municipality is responsible for the negligence of its officers when engaged in performing a local governmental duty does not obtain.

It is undoubtedly true that relators' contention is sustained by decisions of the courts of some of our sister states. It is sufficient to say that those decisions are opposed to our own and to our peculiar doctrine of constitutional local self-government.

In my judgment, the statute under consideration is unconstitutional, and the order granting a *mándamus* should be vacated.

Grant, C. J., and Blair, Montgomery, Ostrander, Moora, and McAlvay, JJ., concurred with Carpenter, J.

Judge Hooker Dissented on the ground that functions of the members of the fire department were governmental and did not relate to the private interests of a city, relying on *People v. Mahaney*, 13 Mich. 481, sustaining a statute taking from a municipality the control of the police department; *People v. Reilly*, 53 Mich. 260, 18 N. W. 849, authorizing the appointment by the governor of jury commissioners; *Davock v. Moore*, 105 Mich. 120, 63 N. W. 424, 28 L. E. A. 783; *Board of State Tax Commissioners v. Board of Assessors*, 124 Mich. 491, 83 N. W. 209, involving the right of the state to pre-

vide for the appointment of tax commissioners. He also relied upon *Brink v. City of Grand Rapids*, 144 Mich. 472, 108 N. W. 430; 2 *Dillon on Municipal Corporations*, sec. 976; *Terrell v. Water Co. (Ky.)*, 105 S. W. 100; *Redell v. Moores*, 63 Neb. 219, 93 Am. St. Rep. 431, 88 N. W. 243, 55 L. R. A. 740; *Mayor of Americus v. Perry*, 114 Ga. 871, 40 South. 1004, 57 L. R. A. 230; *City of Newport v. Horton*, 22 R. I. 196, 47 Atl. 312, 50 L. R. A. 330; *Fox v. McDonald*, 101 Ala. 51, 46 Am. St. Rep. 98, 13 South. 146, 21 L. R. A. 529; and *State v. Freeman*, 61 Kan. 90, 58 Pac. 959, 47 L. R. A. 67.

A Statute Authorizing the Governor to Appoint the members of the board of fire and police commissioners in the city of Omaha has been held constitutional: State v. Broatch, 68 Neb. 687, 110 Am. St. Rep. 477, and see the cases cited in the cross-reference note thereto on the right of the state government to interfere with local affairs.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

WALKER v. SANDERS.

[103 Minn. 124, 114 N. W. 649.]

INTERVENTION, Construction of Statute Allowing.—Statutes permitting an intervention by an outsider are liberally construed. (p. 277.)

INTERVENTION, Cumulative Remedy.—The right to intervene will be sustained though the intervener may have another remedy. (p. 278.)

INTERVENTION by a Transferee Pendente Lite.—If, during the pendency of a suit to set aside a conveyance of real property because procured by fraud, the complainant conveys the property, his grantee is entitled to intervene and thereby join in contesting the validity of a deed. (p. 278.)

INTERVENTION, When the Proper Remedy Rather than Substitution.—If, during the pendency of an action to set aside a conveyance of real property, the complainant transfers such property, the remedy of the grantee is by intervention and not by substitution, if the complainant still retains such a right or interest that he can be benefited by the final judgment, as where the conveyance contains covenants for title upon which, if it is permitted to stand, he may be held personally liable. (p. 279.)

J. T. Van Metre, for the appellant.

J. E. Beum, for the respondent.

125 BROWN, J. The facts in this case are as follows: The action was brought by plaintiff, Sophia Walker, an Indian woman of the Chippewa tribe, to cancel and set aside a deed theretofore executed by her to defendant, conveying to him certain real property which she had acquired from the general government by reason of her relationship with said tribe of Indians. The complaint alleges that she duly acquired title to the land, and that in the month of September, 1906, defendant procured the deed, which the action was

brought to set aside, by fraud and fraudulent representations, and that plaintiff received no consideration whatever therefor. The deed was thereafter caused to be recorded by defendant in the office of the register of deeds. Defendant answered, admitting that plaintiff was a member of the Chippewa tribe of Indians and that she acquired title to the land in question from the general government, admitting also that she conveyed the same to defendant, but denying that the deed was obtained by fraud or ¹²⁸ fraudulent representations or that it was without consideration. The action was commenced in October, 1906, a month after the execution of the deed. Thereafter, in April, 1907, the plaintiff, her husband joining, conveyed the land by warranty deed to Ingval H. Aamoth. Whereupon Aamoth made application to the court to intervene and become a party to the action, to the end that he might join plaintiff in contesting the validity of the deed to defendant. The application was granted, and the intervener filed a complaint in intervention in due form, setting up, among other things, the conveyance of the land to him, and demanding judgment that the deed to defendant be canceled and set aside, and that the intervener be declared the owner in fee of the land. Defendant then moved the court to dismiss the intervener's complaint, and also demurred thereto on the ground that the complaint failed to state facts sufficient to constitute a cause of action. The court denied the motion to dismiss and overruled the demurrer, whereupon defendant appealed from both orders.

In view of the conclusion we have reached, namely, that Aamoth had the right to intervene in the action, joining plaintiff in contesting the validity of defendant's deed, it becomes unnecessary to consider whether the question was properly raised by defendant's demurrer, or his motion to dismiss the complaint in intervention. Conceding that the question was properly raised, we consider only the merits of the case.

Our statutes on the subject of intervention (Rev. Laws 1905, sec. 4140) provide that any person having such an interest in the matter in litigation between others that he may either gain or lose by the judgment therein may, at any time before trial, become a party to the action by filing a complaint setting forth his interest and demanding appropriate relief against either or both the principal parties. Statutes of this kind permitting intervention by interested outsiders

are liberally construed by the courts, resulting in substantial benefit to litigants, inasmuch as it secures the settlement of controversies between several persons concerning particular property rights in a single action and prevents unnecessary litigation: 11 Ency. of Pl. & Pr. 496-500. The right is quite generally accorded to any person having a beneficial ¹²⁷ interest in the matter in suit, and is sustained, even though the intervener may have another remedy: Coffey v. Greenfield, 55 Cal. 382; Spalding v. Murphy, 63 Neb. 401, 88 N. W. 489; Corwin v. Bensley, 43 Cal. 253; Taylor v. Bank of Volga, 9 S. D. 572, 70 N. W. 834; Bennett v. Whitcomb, 25 Minn. 148; Schuler v. McCord, 79 Minn. 39, 81 N. W. 547; McAllen v. Hodge, 92 Minn. 68, 99 N. W. 424.

Our statutes permit an intervention when the person seeking to intervene shows an interest in the litigation and the fact that he will either gain or lose by the judgment between the original parties. That the intervener in this case brings himself within the statute we are quite clear. He has succeeded to the plaintiff's title to the property in controversy, and if the judgment be in plaintiff's favor he will gain directly thereby; for it will clear the title of defendant's claim and obviate another suit to determine the same questions. He probably would not lose any of his rights by a judgment for defendant; for it is doubtful, not being a party to the suit, whether he would be bound thereby. But that he would gain, should plaintiff prevail, is beyond question.

This is not seriously controverted by defendant; his principal contention being that, as plaintiff's interest in the property passed by the warranty deed to intervener, substitution, and not intervention, was the proper remedy. However forceful this contention may seem at first thought, it is not sound. The right of substitution, and the consequent complete elimination of a party to the action, arises only in those cases where the whole beneficial interest in the cause of action is assigned or transferred pendente lite. If by the terms of an assignment of a cause of action plaintiff retains any interest therein, or may become liable to the assignee if the action fails, he remains an interested party, and may insist on his right to contest the action jointly with his assignee. While in the case at bar plaintiff conveyed the land in controversy to intervener after the commencement of the action, her whole interest in the subject matter of the action was not thereby

transferred. We assume, from the fact alleged in the intervener's complaint, that the conveyance by which plaintiff parted with her title to the property was in the form of a warranty deed, and that she therein covenanted that she was the owner of the property, with ¹²⁸ good right to sell and convey the same, and that she would warrant and defend the title. In this situation it is clear that she still has an interest in the outcome of the litigation and the right to remain a party to the action, to the end that she may protect herself from liability on these covenants. She, therefore, could not be completely ignored by the substitution of her grantee as party plaintiff.

The case of *Bank of Commerce v. Timbrell*, 113 Iowa, 713, 84 N. W. 519, cited by appellant, is not in point. In that case, after the commencement of the action plaintiff made an assignment of the cause of action to the intervener, retaining no right therein and assuming no obligations naturally to follow an adverse result of the action. Neither is the case of *Smith v. Gale*, 144 U. S. 509, 12 Sup. Ct. Rep. 674, 36 L. ed. 521, in point. There a person who had conveyed real property sought to intervene and become a party to the suit between her grantee and a third person for the protection of her rights and possible liability under her covenants of warranty. But the court refused to permit the intervention. In this action the intervener is the holder of the legal title, which he seeks to protect by intervening in the action. If he had been the grantor in the deed of the property, and sought to intervene in the action for the purpose of litigating the questions in issue to protect him from the consequences of a breach of covenants or failure of title, the case would be like the *Gale* case, just referred to. It is not fatal to the right of intervention that the intervener's title to the property was acquired after the commencement of the action. It is immaterial when he acquired the right he makes the basis of his claim to be heard, whether before or after the suit was commenced. The statutes permit an intervention at any time before the trial of the principal action commences, and do not limit the right to those who acquired an interest in the subject matter of the litigation before the action was brought.

Order affirmed.

INTERVENTION.

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I. Definition.

Intervention is a proceeding by which one not originally made a party to an action or suit is permitted, on his own application, to appear therein and join one of the original parties in maintaining his cause of action or defense, or to assert some cause of action in favor of

the intervener against some or all of the parties to the proceeding as originally instituted. It differs from interpleader with which it is sometimes confused, even in the statutes: See N. C. Code, Revisal of 1908, sec. 414. The one is the coming between parties in a litigation already pending for the purpose of assisting the one or the other, or acting in hostility to both. The other is the institution of a suit against parties not before in court for the purpose of compelling them to litigate between themselves the right to property or to the performance of an obligation, and he who compels them to interplead does not assist either, nor can he claim in hostility to either.

II. Origin and Purpose of.

a. **Independently of Statutes.**—Intervention was borrowed from the civil law, and while employed in the English ecclesiastical courts to some extent, it was unknown to the common law and also to the practice in equity: *Hyman v. Cameron*, 46 Miss. 725; and where permitted, it is controlled by statute and not to be allowed in cases other than those therein prescribed: *Ex parte Branch*, 53 Ala. 140; *Ex parte Proskauer*, 59 Ala. 194; *Fischer v. Hanna*, 8 Colo. App. 471, 47 Pac. 303; *Carter v. Smith*, 35 Fla. 169, 17 South. 411; *Doke v. Williams*, 45 Fla. 248, 34 South. 569; *Wightman v. Evanston Y. Co.*, 217 Ill. 371, 108 Am. St. Rep. 258, 75 N. E. 502; *Union T. Co. v. Detroit etc. Ry. Co.*, 127 Mich. 252, 86 N. W. 788; *Whitney v. Hanover Nat. Bank*, 71 Miss. 1009, 15 South. 33, 23 L. R. A. 531; *Parsons v. Eureka Powder Works*, 48 N. H. 66; *Chapman v. Forbes*, 123 N. Y. 532, 26 N. E. 3; *Merchants' Nat. Bank v. Hagemeyer*, 4 App. Div. 52, 38 N. Y. 626; *Stretch v. Stretch*, 2 Tenn. Ch. 140; *Comfort v. McTeer*, 7 Lea, 652; *Gall v. Gall*, 50 W. Va. 523, 40 S. E. 380; though there are instances in which it appears to have been permitted in the courts of bankruptcy without any statute being cited in support of the proceeding, or of the power of the court to authorize it being seriously or at all considered: *In re Etheridge F. Co.*, 92 Fed. 329; *Goldman v. Smith*, 93 Fed. 182. Nothing appears clearer than that, in the absence of some statute authorizing it, there can, strictly speaking, be no intervention in a suit in equity: *Drake v. Goodrich*, 6 Blatchf. 151; Fed. Cas. No. 4062; *Anderson v. Jacksonville R. R. Co.*, 2 Woods, 628, Fed. Cas. No. 358; *Shields v. Barrow*, 15 How. 130, 15 L. ed. 158; notwithstanding general declarations that intervention in equity is controlled by equitable principles or even indicating that it sometimes takes place in courts of chancery. In *Marsh v. Green*, 79 Ill. 385, the court said: "As we understand the modern practice, any person feeling that he has an interest in the litigation may apply to the court and be permitted to intervene and become a party and have his rights passed upon on the hearing, and the court will

permit him to become such party on a proper showing." This decision was cited with apparent approval in *Wightman v. Evanston Y. Co.*, 217 Ill. 371, 108 Am. St. Rep. 258, 75 N. E. 502, wherein the court, after referring to *Shannahan v. Stevens*, 139 Ill. 428, 28 N. E. 804, said: "From the foregoing text and decisions we understand the rule to be nothing more nor less than that parties having an interest in the subject matter of the suit in equity and who are either necessary or proper parties to such suit, if not made so by the plaintiff, may come in by way of application to intervene and be made parties complainant or defendant, to the end that their interests may be adjudicated and protected." But in this case, it was determined that the party seeking the intervention was not entitled thereto, while in *Shannahan v. Stevens*, 139 Ill. 428, 28 N. E. 804, the application was not for intervention, strictly speaking, but one who ought to have been joined as complainant appeared with the heirs at law of the original complainant, and he and they asked that he might join with them as co-complainants in the bill. It must, however, be admitted that courts of equity, when property is in their custody, and perhaps in other instances where their action might prove prejudicial to a party not before them, will permit him to appear and make known his interests and take measures which will prevent any abuse of their process and powers; that this action is sometimes brought about by a bill filed in his behalf and sometimes by motion only; and that this proceeding is even spoken of as intervention: *Wightman v. Evanston Y. Co.*, 217 Ill. 371, 108 Am. St. Rep. 258, 75 N. E. 502; *Zumbro v. Parnin*, 141 Ind. 430, 40 N. E. 1085; *Cambria I. Co. v. Union Trust Co.*, 154 Ind. 291, 55 N. E. 745, 56 N. E. 665, 48 L. R. A. 41; *French v. Gapen*, 105 U. S. 509, 26 L. ed. 951; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. Rep. 27, 28 L. ed. 145; *Williams v. Morgan*, 111 U. S. 684, 4 Sup. Ct. Rep. 638, 28 L. ed. 559. But even where statutes have been enacted purporting to provide for intervention and to specify the conditions under which the privilege may be exercised, some courts have, though we think mistakenly, believed themselves to be possessed with general authority to grant the right in cases not provided for in the statute. Thus, in *Gibson v. Ferrell (Kan.)*, 94 Pac. 783, the court said: "The application to intervene falls within no provision of the Code of Civil Procedure, but, notwithstanding this fact, the district court, acting upon principles of manifest justice, may, in cases not covered by the code, permit one not a party to the suit to intervene, either before or after judgment, for the protection or advancement of some right with reference to the subject matter of litigation which he holds."

The more usual mode in which the rights of a third person when disclosed to the court are protected is not by permitting him to file any pleading analogous to a complaint of intervention, but by re-

fusing to proceed, unless the plaintiff will so amend his bill as to bring such third person before the court: *Smith v. Evans*, 3 A. K. Marsh. 217; *Morriss v. Barclay*, 2 J. J. Marsh. 374; *Gall v. Gall*, 50 W. Va. 523, 40 S. E. 380. As we shall hereafter show, statutes exist in some of the states which, without expressly conferring the right to intervene, indicate a purpose to authorize and require the court to bring before it all persons necessary to a complete determination of the matters involved and to the granting all the relief appropriate to such determination, and these statutes have been so liberally construed as to cause the courts to permit proceedings which, while not strictly speaking, intervention, accomplish substantially the same result.

b. *As Declared by Statute.*—The decisions rendered under the statutes of the various states having enactments upon the subject are such as to indicate that those enactments have a common purpose and authorize proceedings substantially identical. An examination of these enactments will, however, show that they differ widely in form. The following represent substantially those falling within our observation:

Arizona.—“Any person who has an interest in the subject matter of the suit which can be affected by the judgment may, on leave of the court or judge, intervene in such suit or proceeding at any time before trial”: *Ariz. Rev. Stats.*, ed. 1901, sec. 1278.

California.—“Any person may, before the trial, intervene in an action or proceeding who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint setting forth the grounds upon which the intervention rests, filed by leave of the court and served upon the parties to the action or proceeding who have not appeared and upon the attorneys of the parties who have appeared, who may answer and demur as if it were an original complaint”: *Cal. Code Civ. Proc.*, sec. 387.

Colorado.—Substantially the same as California: See sec. 22, p. 40, *Mills' Ann. Code Colo.*, ed. 1905.

Georgia.—In Georgia there are provisions for the intervention of persons claiming money in the hands of an officer or in custody of the court: *Ga. Code*, ed. 1895, secs. 4776, 4845; or property in the hands of a receiver: *Ga. Code*, ed. 1895, sec. 4904; or having liens on such property: *Ga. Code*, ed. 1895, sec. 4911.

Idaho.—Section 4111, Revised Codes of Idaho, corresponds to California.

Indiana.—See Burns' Rev. Stat., ed. 1894, sec. 273, hereinafter set out on pages 285, 286; *Zumbro v. Parnin*, 141 Ind. 430, 40 N. E. 1085.

Iowa.—"Any person who has any interest in the matter in litigation, in the success of either of the parties to the action, or against both, may become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the cause, and before the trial commences": Iowa Code, sec. 3594. Section 2928 of the same code provides specially for intervention in attachment, by any person other than the defendant, claiming the attached property or its proceeds, and section 4166 authorizes a claim by a third person in actions of replevin.

Louisiana.—"An intervention or interpleader is a demand by which a third person requires to be permitted to become a party in a suit between other persons; by joining the plaintiff in claiming the same thing, or something connected with it, or by uniting with the defendant in resisting the claims of plaintiff, or, where his interest requires it, by opposing both. In order to be entitled to intervene it is enough to have an interest in the success of either of the parties to the suit, or an interest opposed to both": Garland's La. Rev. Code, secs. 389, 390.

Nevada.—Code Civ. Proc., sec. 599, same as California, section 387.

New York.—"Where a person, not a party to the action, has an interest in the subject thereof, or in real property, the title to which may in any manner be affected by the judgment, or in real property for injury to which the complaint demands relief, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment": N. Y. Code Civ. Proc., sec. 452.

North Carolina.—In the Code of Civil Procedure of North Carolina under the heading of "Interpleader" may be found a provision that "When in an action for the recovery of personal or real property, a person not a party to the action, but having an interest in the subject matter thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment": Revisal of 1905 of N. C., sec. 414. Section 76 permits, when land is sought to be sold by an administrator, any other person who claims the same land to be heard. Intervention, though still called interpleader, is also authorized in favor of third persons claiming attached property: N. C. Revisal of 1905, sec. 789; or claiming property taken

by the sheriff in proceedings of claim and delivery or replevin: N. C. Revisal of 1905, sec. 800.

North Dakota.—Code of Civil Procedure, section 6825, and South Dakota, section 96, conform to the provisions of the Code of Civil Procedure of California.

Tennessee.—In actions for the recovery of property, any person not a party thereto, or showing himself interested in the subject matter of the suit, may be allowed to appear and defend therein: Shannon's Tenn. Code, ed. 1896, sec. 4496.

Texas.—The pleadings of an intervener shall conform to the requirements of pleadings on the part of the plaintiff and defendant, respectively, so far as they may be applicable: Sayles' Tex. Civ. Stats., ed. 1897, sec. 1184. In this state the courts seem to have followed the Louisiana rules as to intervention without any statutory adoption of the code or statute of that state or any other on this subject: *Whitman v. Willis*, 51 Tex. 421.

Utah.—Same substantially as California: Rev. Stats. 1898, sec. 2925.

Washington.—Same substantially as California: Pierce's Wash. Code, sec. 273.

In addition to the statutes expressly authorizing intervention, others have been held to do so impliedly by indicating the legislative purpose to have determined in a single proceeding all questions whose determination is necessary to completely dispose of the controversy. Thus, the supreme court of Indiana said: "While the code does not, in terms, recognize an intervener as a party litigant, yet this court has many times recognized in a party the attributes of an intervener in equity: *Barner v. Bayless*, 134 Ind. 600, 33 N. E. 907; 34 N. E. 502, and cases cited; *State v. Union Nat. Bank*, 145 Ind. 537, 57 Am. St. Rep. 209, 44 N. E. 585. It is the spirit of our code to settle in a single action the rights and equities of all persons interested in the subject matter, and to simplify the rules of practice and pleading as far as the same may be done with due regard to the just determination of the controversy. To accomplish this end, therefore, one not a party and having an interest in the subject matter of a pending action that may be adversely affected by the suit, will be permitted by the court, upon a proper showing, under section 273 of 1 Burns' Revised Statutes of 1894, to come into the case for the protection of whatever right or interest he may have in the subject matter": *Cambria I. Co. v. Union Trust Co.*, 154 Ind. 291, 55 N. E. 745, 56 N. E. 665, 48 L. R. A. 41. The section thus referred to, so far as material, is as follows: "The court may determine any controversy between the parties before it when it can be done without prejudice to the right of others or by saving their rights, but, when a complete determination of the controversy cannot be made

without the presence of other parties, the court must cause them to be joined as proper parties. And, when in an action for the recovery of real or personal property, a person not a party to the action, but having interest in the subject matter thereof, makes application to the court to be made a party, it may order him to be made a party by the proper amendment." This section was held not restricted to controversies respecting real or personal property, but to be "broad enough to include and admit all parties to any controversy in the nature of a civil action": *Zumbro v. Parnin*, 141 Ind. 430, 40 N. E. 1085.

III. Leave of the Court.

Most of the statutes provide that the applicant for intervention must obtain leave or permission of the court to intervene or to file his complaint therefor. Hence, he cannot be considered, strictly speaking, an intervener until he has procured such leave: *Ex parte Gray* (Ala.), 47 South. 286; *Gale v. Frazier*, 4 Dak. 196, 30 N. W. 138; *Bradley v. Trousdale*, 15 La. Ann. 206; *McLaughlin v. McLaughlin's Admr.*, 16 Mo. 242; *Dietrich v. Steam D. & A.*, 14 Mont. 261, 36 Pac. 81; *State v. Barnes*, 5 N. D. 350, 65 N. W. 688; *Doyle v. New York & N. E. R. Co.*, 14 R. I. 55; *Fowler v. Lewis' Admr.*, 36 W. Va. 112, 14 S. E. 447; but under a statute providing that "any person who has or claims an interest in the matter in litigation may become a party thereto or have his rights determined," leave of the court is not necessary, and the "court has no authority to exclude from the case an intervener whose pleading discloses a direct interest in the matter litigated. It must give judgment on the merits. It must decide in his favor or against him, and if against, it must grant him the rights which belong to any other unsuccessful suitor": *State v. Holmes*, 60 Neb. 39, 82 N. W. 109; *Spalding v. Murphy*, 63 Neb. 401, 8 N. W. 489. Leave of the court may be given on an ex parte application: *Kimball v. Kimball-Richardson Co.*, 111 Cal. 386, 43 Pac. 111; and will be presumed where nothing to the contrary appears: *Grove v. Foutch*, 6 Colo. App. 357, 40 Pac. 852. It may be granted nunc pro tunc after the filing of his complaint, and, if so, is as effective as if granted before: *Stone v. Ingham Circuit Judge*, 105 Mich. 234, 63 N. W. 79; and the overruling of a motion to strike out a petition in intervention is equivalent to granting leave to file it: *Ringen S. Co. v. Bowers*, 109 Iowa, 175, 80 N. W. 318.

IV. Application for.

The mode of applying for leave to intervene may be, and often is, to a great extent fixed by statute. In the absence of statutory di-

rection, doubtless the application should be by motion to the court for leave to intervene, supported by some showing tending to disclose the interest of the applicant and the reasons why he should be permitted to become a party to the proceeding. This showing may, of course, consist of the proposed complaint of intervention, especially if verified. Speaking in a state whose courts appear to have adopted the idea that the right of intervention exists as a general equitable right not requiring any statutory support, the court said: "It seems that the regular and orderly course of procedure is first to file an application for leave to file a petition of intervention, of which the parties to the suit should have notice. This is determined from the face of the application. If the allegations of the application show a case in which intervention should be allowed, the leave is granted. The petition for intervention is then filed, on which the court examines the petition and answer, and such testimony by affidavit or otherwise as may be produced and determines the question as to whether the petitioner shall be allowed to intervene and become a party to the suit": *Ex parte Gray* (Ala.), 47 South. 286. Of course, the application is necessarily made to the court in which the original action or suit is pending: *Succession of Hoover v. York*, 30 La. Ann. 752; and is by some writing filed in the case which binds the intervener to the allegations and responsibilities of a litigant: *Laughlin v. Leigh*, 107 Ill. App. 476.

V. Discretion of the Court.

Several decisions speak of the court having a discretion to grant or refuse the application to intervene as though the right of the intervener to be heard was not an absolute one, but, on the other hand, was one for the refusal of which he had no remedy: *Gunderson v. Illinois T. & S. Bank*, 100 Ill. App. 461, 199 Ill. 422, 65 N. E. 326; *Wills v. Babb*, 131 Ill. App. 511; *Scheidt v. Sturgis*, 23 N. Y. Super. Ct. 606; *Hart v. Kohn*, 12 Misc. Rep. 648, 33 N. Y. Supp. 272; *Childress v. State Trust Co.* (Tex. Civ. App.), 32 S. W. 330; *Ex parte Cutting*, 94 U. S. 14, 24 L. ed. 49; *Land Title & T. Co. v. Tatnall*, 132 Fed. 305, 65 C. C. A. 671. Possibly this may be true in those courts which are not acting by virtue of statutory authority, but merely adopt the practice which they suppose to be sanctioned by the rules peculiar to equity jurisdiction, but where the right is granted by statute, its exercise is not dependent on the discretion of the court to which application is made. It should grant the application if the matters alleged entitle the applicant to intervene and if it refuses to do so, he may with success seek his remedy by appeal: *Stich v. Dickinson*, 38 Cal. 608; *Henry v. Travelers' Ins. Co.*, 16 Colo. 179, 26 Pac. 318; *Bowman v. McElroy*, 15

La. Ann. 663; Welborn v. Eskey, 25 Neb. 195, 40 N. W. 960; Earle v. Hart, 20 Hun, 75; Draper v. Pratt, 43 Misc. Rep. 406, 89 N. Y. Supp. 356; Carney v. Gleissner, 62 Wis. 493, 22 N. W. 735. Circumstances are easily conceivable wherein it would be proper for the court to impose conditions: **Uhlfelder v. Tansen, 18 Misc. Rep. 173, 41 N. Y. Supp. 438; Allen v. Coe, 109 Wis. 635, 85 N. Y. 492;** but where the intervener is guilty of no laches, such imposition cannot be sustained: **Wood v. Swift, 81 N. Y. 81; Lawton v. Lawton, 54 Hun, 455, 7 N. Y. Supp. 556.**

Perhaps it is proper in this connection to refer to the question whether the necessity of the intervention, or rather the absence of necessity, may warrant the exercise of a discretion to deny the leave. Doubtless there are many general expressions indicating that a court may exercise a discretion against granting leave to intervene because there is no necessity for the applicant to resort to that remedy: **Clarke v. Wheatley, 113 Ga. 1074, 39 S. E. 437.** And some of the expressions are to the effect that leave may be denied because the intervener is seeking, or may seek, the same remedy by some other legal proceeding: **Scheidt v. Sturgis, 23 N. Y. Super. Ct. 506; Dent v. Ross, 35 Pa. 337.** In the few cases in which intervention may be permitted after final judgment, such interventions "are never granted as a matter of course, and, owing to the tendency of such applications to occasion delay and prolong the existing litigation, they ought not to be granted unless it is necessary to do so to preserve some right which cannot otherwise be protected, or to avoid some complication that is liable to arise": **United States v. Northern Securities Co., 128 Fed. 808.**

We apprehend that intervention may always be denied on the ground that it is not necessary, if by these terms is meant that it is not necessary that the applicant have the relief sought by him to be acquired through the aid of his intervention; but the fact that he might seek and secure such relief by some other action or proceeding does not show that it is unnecessary. To deny intervention because of the existence of some cumulative or concurrent remedy would be nearly equivalent to denying it in all cases. Where intervention is controlled by statute, the applicant is entitled to intervene whenever he brings himself within the terms of the statute, and his application ought not to be denied on the ground that he might procure adequate redress in some other way: **Coffey v. Greenfield, 55 Cal. 382; Central R. & B. Co. v. Farmers' L. & T. Co., 116 Fed. 700.** In truth, intervention and some other remedy are usually concurrent, but where such is the case, the person entitled to intervene cannot be compelled to resort to the one remedy rather than to the other. He is entitled to make the election, and in doing so, is not subject either to the control either of his adversary or of the court acting at the suggestion of the adversary: **Corwin v. Bensley, 43 Cal. 253; Coffey v. Greenfield, 55 Cal. 382; Shuler v. McCord, 79**

Minn. 39, 81 N. W. 547; Walker v. Sanders, 103 Minn. 124, ante, p. 276, 114 N. W. 649; Spalding v. Murphy, 63 Neb. 401, 88 N. W. 489; Taylor v. Bank of Volga, 9 S. D. 572, 70 N. W. 834. If the election is to pursue some separate action or proceeding, the right to do so is not to be denied because the same relief might have been sought by intervention: Hopkins v. Roseclare L. Co., 72 Ill. 373; Hazard v. Agricultural Bank, 11 Rob. 326; Le Blanc v. Dashiell, 14 La. Ann. 274; Lannes v. Courege, 31 La. Ann. 74.

VL The Complaint or Petition.

The complaint or petition in intervention must state such facts as, if conceded to be true, will entitle the applicant to some relief, or, in other words, will sustain his right to intermeddle in the proceeding and support a decree or judgment in his favor or in favor of the party whom he undertakes to assist. To consider fully what are the essential elements of the complaint or petition would involve the consideration of what are sufficient complaints or answers in all the various cases which may possibly be presented by interveners. Probably no more need to be said for present purposes than to affirm that the complaint or answer must be in such form as would be sufficient if the party seeking the intervention presented the same pleading as an original party making a complaint against his adversary where affirmative relief is sought, or urging the same matters as defenses where the purpose of the intervener is to sustain the defense: Bechtol v. Bechtol, 2 Alaska, 397; Shepard v. County of Murray, 33 Minn. 519, 24 N. W. 291; Smith v. Gale, 144 U. S. 509, 12 Sup. Ct. Rep. 674, 36 L. ed. 521. The petition must not be merely in an argumentative form presenting what must apparently be regarded as conclusions of law, rather than statements of issuable facts: Bouden v. Long A. S. B. Co., 92 App. Div. 325, 86 N. Y. Supp. 1080. Though the intervener may join in or aid the defense, his pleading cannot consist of mere matters of negation. He must show some interest in the subject matter of the litigation and not content himself merely with denying the facts essential to the plaintiff's recovery: Coffey v. Greenfield, 62 Cal. 602; Ward v. Healy, 114 Cal. 191, 45 Pac. 1065; Clapp v. Phelps, 19 La. Ann. 461, 92 Am. Dec. 545; Shepard v. County of Murray, 33 Minn. 519, 24 N. W. 291; Welborn v. Eskey, 25 Neb. 193, 195, 40 N. W. 959, 960; Moline M. & S. Co. v. Hamilton, 56 Neb. 132, 76 N. W. 455; Davis v. Sullivan, 33 N. J. Eq. 569; Smith v. Allen, 28 Tex. 497; Ransom v. Winn, 18 How. 295, 15 L. ed. 388; Empire Distilling Co. v. McNulta, 77 Fed. 700, 23 C. C. A. 415.

Some doubt exists, under the decisions, whether the intervener must allege matters already stated in the pleadings of the other parties, or, in other words, tender or join in the issues already tendered or made. The question has been but little considered, and when

considered, has not always been necessarily involved. On the one hand it is suggested that the intervenor's pleading should be sufficient in itself and cannot be aided by reference therein to another pleading on file: *Blackwell v. Hatch*, 13 Okl. 169, 73 Pac. 933; and on the other hand, that where the intervenor and the original plaintiff rely upon the same facts as grounds of recovery, the former may adopt the allegations of the original complaint and make this the basis of his recovery: *Hamilton v. Lamphear*, 54 Conn. 237, 7 Atl. 19. We judge the latter to be the better view, and that the complaint in intervention may be aided by the other pleadings on file not merely with respect to the allegations, but also as to the designation of the parties, and that it need not contain any formal prayer for process: *American etc. Co. v. German*, 126 Ala. 194, 85 Am. St. Rep. 21, 28 South. 603. It should be verified: *Parsons v. Little*, 28 App. D. C. 218; and signed; and in one case a signing by the agent of the intervenor was held insufficient: *Rosenbaum v. Adams*, 61 Iowa, 382, 16 N. W. 290, the complaint may be amended to the same extent as other complaints are amendable, restricted, however, by the rule that the principal suit should not be retarded: *Gillis v. Carter*, 9 La. Ann. 698.

The rules as to joinder are apparently the same as in original actions. The applicant cannot by one petition or complaint intervene in several distinct and unconsolidated actions: *Rosenbaum v. Adams*, 61 Iowa, 382, 16 N. W. 290; nor can several persons claiming liens arising out of distinct contracts join as intervenors to enforce such liens: *Gravenberg v. Laws*, 100 Fed. 1, 40 C. C. A. 240.

VII. Notice or Process.

Though leave to intervene may doubtless be granted *ex parte*, yet, as the matters alleged may be the ground of affirmative relief against the parties or some of them, it is clear that there should be some step which answers the purpose of service of process, or, in other words, some measure should be taken which will result in informing the parties interested of the assault made on their interests by the complaint in intervention, and that they must be prepared to answer, and if necessary, to disprove its allegations. Where the original parties have been brought within the jurisdiction of the court or have voluntarily submitted thereto, subsequent proceedings in intervention cannot properly be regarded as *coram non judice*, whether formal notice of them is given or not: *Ah Goon v. Superior Court*, 61 Cal. 555; but the statutes usually provided for the services on the original parties of the petition or complaint in intervention, and such statutes should be obeyed, and the failure to make such service renders the subsequent proceedings under the intervention irregular and erroneous: *Fischer v. Hanna*, 8 Colo. App. 471, 47 Pac. 303; *Bradley v. Trousdale*, 15 La. Ann. 206; *Johnson v. City of New Orleans*, 105 La. 149, 29 South. 355; *Perrine v. Perrine*, 63 N. J. Eq. 483, 52 Atl.

627; *Bryan v. Lund*, 25 Tex. 98; *Fowler v. Lewis' Admr.*, 36 W. Va. 112, 14 S. E. 447. As the original parties are, however, all within the jurisdiction of the court, and hence bound to take notice of all proceedings in the action, the failure to serve them with the complaint of intervention and the proceeding to judgment without such service can rarely be regarded as so prejudicial as to require a reversal of the judgment or the disregarding it as void. The better view we think is, that the parties previously in court must take notice of any complaint in intervention, and, if it is not served on them as prescribed by statutes, must object to proceeding in the absence of such service, and failing to so object, must be deemed to have waived the irregularity: *Ah Goon v. Superior Court*, 61 Cal. 555; *Fischer v. Hanna*, 8 Colo. App. 471, 47 Pac. 303; *Bradley v. Trousdale*, 15 La. Ann. 206; *Johnson v. City of New Orleans*, 105 La. 149, 29 South. 355; *Perrine v. Perrine*, 63 N. J. Eq. 483, 52 Atl. 627; *Bryan v. Lund*, 25 Tex. 98; *Fleming v. Seeligson*, 57 Tex. 524; *Deering v. Hurt* (Tex.), 2 S. W. 42; *Brown v. Hudson* (Tex. Civ. App.), 38 S. W. 653; *American S. Co. v. San Antonio L. & T. Co.* (Tex. Civ. App.), 98 S. W. 387; *Fowler v. Lewis' Admr.*, 36 W. Va. 112, 14 S. E. 447; *McLeod v. New Albany*, 66 Fed. 378, 13 C. C. A. 525. If any of the original parties against whom relief is sought is beyond the jurisdiction of the court, it may authorize service upon his attorney, and thereupon proceed to exercise jurisdiction over him with respect to the matters properly brought before the court by the petition or complaint of intervention: *Fidelity T. & S. V. Co. v. Mobile St. Ry. Co.*, 53 Fed. 850.

VIII. The Pleadings and Proceedings in Response to the Complaint of Intervention.

The sufficiency of the complaint of intervention may be tested to the same extent and in the same manner as other pleadings. Motions may be made to strike out the whole of the complaint on the ground that it was filed without leave or does not present matters available to an intervener, or to strike out specified parts because they do not assert any fact constituting either a defense or cause of action, or, though undertaking to assert a defense or a cause of action, do not disclose one available in intervention proceedings: *Ragland v. Wisrock*, 61 Tex. 391; as where it relates to property other than that involved in the action: *Tuttle v. Moore*, 3 Ind. Ter. 712, 64 S. W. 585. The petition or complaint may also be assailed by demurrer on the same grounds as any other pleading, and the further ground that the matters alleged do not warrant an intervention: *Chielovich v. Kraus* (Cal.), 11 Pac. 781; *Gale v. Frazier*, 4 Dak. 196, 30 N. W. 138; *May v. Disconto Gesellschaft*, 113 Ill. App. 415, affirmed 211 Ill. 310, 71 N. E. 1001; *Phares v. Buser* (Iowa), 79 N. W. 120; *Kansas City v. Schroeder*, 196 Mo. 281, 93 S. W. 405; and, finally, it, like other complaints, may be so insufficient that neither a motion

to strike out nor a demurrer is required, and such insufficiency may be available at any stage of the proceeding by directing the attention of the court thereto: *Harlan v. Eureka M. Co.*, 10 Nev. 92; and doubtless may be suggested and acted upon by the court itself, whether it is exercising original or appellate jurisdiction. In such case no answer need be filed: *Guarantee etc. Co. v. Edwards* (Ind. Ter.), 104 S. W. 624. In Kentucky, under a statute authorizing any person, where an attachment has been levied, to present his petition disputing the validity of the attachment or stating a claim to the property or an interest in it or a lien, if setting forth the facts on which such claim is founded, no answer need be filed to such petition, and it is deemed traversed: *Taylor v. Taylor*, 3 Bush, 118. Generally, however, any of the parties wishing to controvert any of the allegations of the complaint of intervention must do so by an answer, and failing in this, the allegation not denied must be taken as admitted, but the intervener need not answer any averment contained in the answer to his complaint of intervention: *Pearson v. Creed*, 78 Cal. 144, 20 Pac. 302. So, if the intervener is permitted to intervene upon the claim that he has an interest in the success of the defendant as against the plaintiff, and, in addition to his denial of the allegations of the complaint, his pleading contains new matter in defense of the defendant's right which need not have been denied by the plaintiff had it been set out in the defendant's answer, then such new matter must be taken as controverted by the plaintiff, though the complaint of intervention is not answered with respect thereto: *People v. Perris Irr. Dist.*, 132 Cal. 289, 64 Pac. 399, 773.

IX. Questions Which the Intervener may Raise.

It is sometimes said that an intervener must take the case as he finds it, and by this is generally meant that he cannot avail himself of or urge mere irregularities in the proceeding which the original parties have expressly or impliedly waived, nor of defenses which are personal to them: *Standard I. Co. v. Lansing Wagon Works*, 58 Kan. 125, 48 Pac. 638; *Cahn v. Ford*, 42 La. Ann. 965, 8 South. 477; *Honegger v. Wettstein*, 94 N. Y. 252; *Whitman v. Hogan*, 15 Hun, 197; *Kincaid v. Neal*, 3 McCord, 201; *McBride v. Floyd*, 2 Bail. 209; *Fletcher v. Bennett*, 36 Vt. 659. Thus, if the proceeding is in attachment, and he comes in as a claimant of the property or for some other sufficient cause, he cannot ordinarily defeat the attachment by urging mere irregularities therein: *Sannoner v. Jacobsen*, 47 Ark. 31, 14 S. W. 458; *Davis v. H. B. Claffin Co.*, 63 Ark. 157, 58 Am. St. Rep. 102, 38 S. W. 662, 1117, 41 S. W. 996, 35 L. R. A. 776; *May v. Disconto Gesellschaft*, 113 Ill. App. 415, 211 Ill. 310, 71 N. E. 1001; *Wichita National Bank v. Wichita P. Co.*, 8 Kan. App. 10, 54 Pac. 11; *Goodman v. Allen*, 11 La. Ann. 246; *Hawkins & Co. v. McAllister*, 86 Miss. 84, 38 South. 225; *Blair v. Puryear*, 87 N. C. 101; *Saunders v. Ireland* (Tex. Civ. App.), 27 S. W. 880; *Rice v. Adler-Goldman*

C. Co., 71 Fed. 151, 18 C. C. A. 15. So, generally, an intervener is not allowed to object to pleadings or process which the defendant or other party against whom it is employed has submitted to without objection: *Charleston & W. C. R. Co. v. Pope*, 122 Ga. 577, 50 S. E. 374; *Seaboard Air Line Co. v. Knickerbocker T. Co.*, 125 Ga. 463, 54 S. E. 138; nor to charge laches on the part of the plaintiff in bringing the suit: *Hunt v. O'Leary*, 84 Minn. 200, 87 N. W. 611; nor to assail the jurisdiction of the court: *Jack v. Des Moines etc. R. Co.*, 49 Iowa, 627; nor plead an adjudication or discharge in bankruptcy as in bar of the plaintiff's right to recover when the bankrupt does not choose to assert it: *Serra é Hijo v. Hoffman*, 29 La. Ann. 17; nor move to dismiss the suit or object to its trial: *Hunt v. O'Leary*, 84 Minn. 200, 87 N. W. 611; nor to object in a mortgage foreclosure that no action at law has been taken to enforce the debt: *Pratt v. Gallaway (Neb.)*, 95 N. W. 329. Limitations upon this rule rest upon the obvious ground that the parties to the original suit have no power to waive or otherwise annul the substantial rights of the intervener. Thus, if an action is brought and an attachment issued before the debt is due, the failure to defend on this ground does not prevent the intervener from attacking the attachment because the action has commenced prematurely: *Davis v. H. B. Claflin Co.*, 63 Ark. 157, 58 Am. St. Rep. 102, 38 S. W. 662, 1117, 41 S. W. 996, 35 L. R. A. 776; nor is an intervener estopped from urging fraud or collusion between the parties: *Mussina v. Goldthwaite*, 34 Tex. 125, 7 Am. Rep. 281. Any judgment or other determination made before he became a party has not the effect of *res judicata* against him. He may, therefore, urge that there is a defect of parties because of which the court ought not to proceed, though before he became a party the same suggestion had been made to the court and by it overruled: *Castle v. City of Madison*, 113 Wis. 346, 89 N. W. 156. He may plead inconsistent defenses, provided they are pertinent: *Smith v. Sublett*, 28 Tex. 163. He cannot, however, obtain an order changing the place of trial to the county of his residence, where the action was properly brought in the county in which the original defendant resided: *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa, 530, 63 Am. St. Rep. 399, 70 N. W. 769. The application of this rule to the removal of causes from the state to the national courts is not well settled. Perhaps it may be affirmed, with an appearance of confidence warranted by the decisions, that if there is a real and substantial controversy between the parties to the original suit which they, as between themselves, had the right to submit to and try in the state courts, then they cannot be deprived of this right because some one intervenes: *Baltimore & O. Tel. Co. v. Morgan's L. & T. etc. Co.*, 37 La. Ann. 883; *Olds Wagon Works v. Benedict*, 67 Fed. 1, 14 C. C. A. 285; *Ex parte Girard*, 3 Wall., Jr., 263, Fed. Cas. No. 5457; *Ex parte Turner*, 3 Wall. Jr. 258, Fed. Cas. No. 14,245; but if the intervener is the

real party in interest and the controversy is between him and the plaintiff or defendant, and might be determined without the presence of any party, but such plaintiff or defendant and the intervener, then he is entitled to remove the cause, and is not to be deprived of this right because it was commenced without naming him a party: *Burdick v. Peterson*, 2 McCrary, 135, 6 Fed. 840; *Snow v. Texas Trunk R. R.*, 4 Woods, 394, 16 Fed. 1; *Chase v. Beech Creek R. Co.*, 144 Fed. 571; *Cable v. Ellis*, 110 U. S. 389, 4 Sup. Ct. Rep. 85, 28 L. ed. 186; *Houston & Tex. C. R. R. Co. v. Shirley*, 111 U. S. 358, 4 Sup. Ct. Rep. 472, 28 L. ed. 455.

X. Time Within Which the Application may be Made.

In several of the states, as we have hereinbefore shown, the right to intervene is limited to those who appear before the trial: Ante, II, b. It has been said that "the inaction of the defendants in permitting their default does not preclude the intervener from his relief": *Townsend v. Driver*, 5 Cal. App. 581, 90 Pac. 1071; but this language was applied to the action of the court in entering a default and judgment against certain defendants after the intervener had appeared and by permission filed his complaint. Had the default been entered before such appearance, then the decision must have been otherwise, for the entry of the default seems to be equivalent to the calling of the case for trial, in its effect upon the termination of the right to intervene. "The default by which all the issues tendered by the complaint was admitted in favor of the plaintiff is equivalent to a trial wherein the case is litigated": *Hibernia S. & L. Soc. v. Churchill*, 128 Cal. 633, 79 Am. St. Rep. 73, 61 Pac. 278; *Safely v. Caldwell*, 17 Mont. 184, 52 Am. St. Rep. 693, 42 Pac. 766; *McCallon v. Waterman*, 1 Flipp. 651, Fed. Cas. No. 8675; and so would an agreement between the original parties for the entry of judgment, though such entry had not been made by the clerk: *Henry v. Cass County M. & E. Co.*, 42 Iowa, 33; *Lambie v. Wibert* (Tex. Civ. App.), 31 S. W. 225. In *Thompson v. Huron L. Co.*, 4 Wash. 600, 30 Pac. 741, it was held, though apparently without much consideration of the question, that the failure to present a complaint of intervention until after a motion for default had been made was not fatal to the intervener. If a defendant corporation suffers a default, its receiver, on subsequently intervening, has been held to be bound by the admission of the facts alleged in the bill: *Perry v. Godbe*, 82 Fed. 141.

Where the statute does not expressly limit the time within which the application may be made, it is doubtless within the discretion of the court to permit an intervention, though the defendant is in default: *Floyd v. Sellers*, 7 Colo. App. 491, 44 Pac. 371. Practically all the statutes upon the subject and all rulings of the court where not controlled by statute are to the effect that the intervener must be diligent and not guilty of any unreasonable laches after knowledge

of the suit, that he has no right to delay the original parties nor retard their trial, nor render nugatory any trial which has already begun, though it has not resulted in a judgment or other decision; and finally, that the application to intervene may be denied because of the appellant's laches or because it may retard the original parties or change their position for the worse: *Hibernia S. & L. Soc. v. Churchill*, 128 Cal. 633, 79 Am. St. Rep. 73, 61 Pac. 278; *Gale v. Frazier*, 4 Dak. 196, 30 N. W. 138; *Teachout v. Des Moines B. St. Ry. Co.*, 75 Iowa, 722, 28 N. W. 145; *Kassing v. Walter* (Iowa), 65 N. W. 832; *Gibson v. Ferrell* (Kan.), 94 Pac. 783; *Walker v. Dunbar*, 7 Mart., N. S., 586, 18 Am. Dec. 248; *New York Bank Note Co. v. Kidder P. Mfg. Co.*, 192 Mass. 391, 78 N. E. 463; *Continental Trust Co. v. Toledo etc. R. Co.*, 82 Fed. 642. Though no statute is in force requiring the application to be made before the trial, yet it may be denied because of laches, if the trial has been begun or the cause has been submitted or is ready for decision: *Lincoln v. Ball's Exrs.*, 6 La. Ann. 113; *Wenar v. Schwartz*, 120 La. 1, 44 South. 902; *Flint v. Chaloupka* (Neb.), 115 N. W. 535; *Wilson v. Bank of Lexington*, 77 N. C. 47; *Pinkard v. Willis*, 24 Tex. Civ. App. 69, 57 S. W. 891; *Van Bibber v. Geer*, 12 Tex. 15; *Smith v. Allen*, 28 Tex. 497; *Seligman v. City of Santa Rosa*, 81 Fed. 524; or even where the trial has not commenced, if the allowance of the intervention must delay the trial and the applicant might, with reasonable diligence, have intervened at an earlier date: *Smith v. Gale*, 144 U. S. 509, 12 Sup. Ct. Rep. 684, 36 L. ed. 521.

In the absence of statutes to the contrary, it has been said that an intervention may be permitted at any stage of the proceedings: *Robertson v. Baker*, 11 Fla. 192; and where the discretion of the court is not limited by statute, it is difficult to establish that this may not be so, but the tendency of the courts is to exercise their discretion in favor of the diligent only. The question sometimes arises whether an intervention may be after final judgment. If it does not relate to the merits of the question, as where it is a proceeding to determine the validity of an attachment or whether specified property is subject thereto, the intervention need not delay the main action nor necessarily unsettle any judgment entered therein. Hence, in such case there is no reason why an intervention may not be after, as well as before, final judgment: *Simmons C. Co. v. Davis*, 3 Ind. Ter. 379, 58 S. W. 655; *Parham & Co. v. Potts-Thompson L. Co.*, 127 Ga. 303, 56 S. E. 460. Even in other cases, unless restrained by some statute, the court may authorize an intervention after final judgment, wherein, notwithstanding such judgment, some relief may still be granted in furtherance of justice without violating the rules of *res judicata*: *Petty v. Hayden*, 115 Iowa, 212, 88 N. W. 339; *In re Ayrault's Will*, 81 Hun, 107, 31 N. Y. Supp. 654; *McNair v. Pope*, 104 N. C. 350, 10 S. E. 252; but generally the discretion of the court will be exercised against granting so tardy an application, and if

so exercised, will not be reviewed by the appellate court: *Witherspoon v. Swift*, 112 Ga. 689, 37 S. E. 976; *McAllaster v. Edgerton*, 3 Ind. Ter. 704, 64 S. W. 583; *Hunt v. McDonald*, 124 Wis. 82, 102 N. W. 318.

The dismissal of the action is a final judgment, and hence intervention may be denied because of such dismissal: *Whalen v. McMahon*, 16 Colo. 373, 26 Pac. 583; though the intervener claims it was fraudulent as to him: *Keehn v. Keehn*, 115 Iowa, 467, 88 N. W. 957. Sustaining a demurrer to a complaint or bill is not a final judgment if leave to demur is granted or exists, and hence is not an obstacle to a subsequent application for leave to intervene: *Wright v. Neathery*, 14 Tex. 211.

If there is no statutory prohibition, an application for permission to file a bill or complaint in intervention may be granted at any time which will not delay the trial of the cause, whether before or after an issue has been presented by the original parties: *Boyd v. Heine*, 41 La. Ann. 393, 6 South. 714; *McConniff v. Van Duzen*, 57 Neb. 49, 77 N. W. 348.

XI. Actions and Proceedings in Which Available.

We have hitherto shown that intervention, so far as the right thereto is conceded, existed by the civil law, but was a stranger to the common law and apparently also to the practice in equity, and where it exists at all to-day, its existence is due either to statutes expressly or impliedly creating it or to the attempts of equity, resulting, as they often do, in a usurpation finally acquiesced in, and under which those courts adopted such measures as to them seemed proper, for the purpose of avoiding the abuse of their process and orders, by first bringing before them all the parties in interest, instead of proceeding in their absence, when, to do so, might affect the rights of one not brought within their jurisdiction by making him a party to the suit. Unless some statute has authorized it, there can be no intervention in an action at law: *Springfield F. & M. Ins. Co. v. Richmond & D. R. Co.*, 48 Fed. 360; even though the intervener undertakes to set up equitable rights, where the court does not possess equity jurisdiction: *Clarke v. Eureka County Bank*, 116 Fed. 534. Under the statutes creating the right to intervene no distinction is usually made between actions at law and suits in equity, and hence intervention may be allowed in such suits if the purpose for which it is sought falls within the protection of the statute: *Graves E. Co. v. Masonic T. Assn.*, 85 Hun, 496, 33 N. Y. Supp. 362; *Montague v. Jewelers T. Co.*, 44 App. Div. 224, 60 N. Y. Supp. 680. The provisions of these statutes, so far as we have observed, do not include criminal prosecutions: *People v. Green*, 1 Idaho, 235; nor proceedings in probate: *State v. District Court*, 25 Mont. 355, 65 Pac. 120; *Estate of Tilden*, 2 Dem. 489, 5 Civ. Pro. R. 449; *In re Hoyt's Will*, 55 Misc. Rep. 159, 106 N. Y. Supp. 359. Indeed, in the

latter proceeding no intervention can ordinarily be necessary, for the parties in interest are generally allowed to appear and represent such interests, and, in contemplation of law, occupy the attitude of parties to the proceeding, at least in all cases where they are cited to appear, or where it is their duty to appear without citation, or else be bound by the action of the court: N. Y. Code Civ. Proc., sec. 2617; *In re Wohlgemuth*, 184 N. Y. 578, 77 N. E. 1198. The majority of these statutes have been construed not to extend to special proceedings: *Steingoetter v. Board of Canvassers*, 18 N. Y. St. 797, 2 N. Y. Supp. 561; *State v. Rost*, 49 La. Ann. 1451, 22 South. 421; though the courts of Nebraska and Nevada decided that a third person was entitled to intervene in opposition to an application for a writ of mandate: *First Nat. Bank v. Lancaster*, 54 Neb. 467, 74 N. W. 858; *State v. Mack*, 26 Nev. 430, 69 Pac. 862. The question is not very material where the proceeding is by mandate or certiorari, or a proceeding of like character, in which the real parties in interest are not often made formal parties, for in such cases the court will permit them to protect their interests, even if to do so it must hear them as *amicus curiae*: *State v. Rost*, 49 La. Ann. 1451, 22 South. 421. In chancery proceedings in the national courts it has been held that if creditors petition to have the debtor declared a bankrupt, other creditors may, by intervention, join in the proceedings: *In re John A. Etheridge F. Co.*, 92 Fed. 329; *Goldman v. Smith*, 93 Fed. 182; but they cannot thus appear, where the proceeding is voluntary, for the purpose of denying that the petitioner is insolvent: *In re Carleton*, 115 Fed. 246.

Even if there is a statute expressly authorizing intervention, it may limit the right to a special class of actions, and where such is the case, an action of any class not included in the specification is expressly excluded, and intervention therein cannot be sustained: *Ex parte Proskauer*, 59 Ala. 194; *Judd v. Young*, 7 How. Pr. 79; *Cohen v. Lane*, 21 N. Y. St. 273, 4 N. Y. Supp. 228; *Hornby v. Gordon*, 22 N. Y. Super. Ct. 656.

XII. What Parties and Interests Support an Intervention.

a. **The General Rule.**—As the statutes controlling the question are by no means identical, it is difficult to formulate any rule for the purpose of designating the interests or persons on account of which or for whose benefit intervention must be allowed on due and timely application. Perhaps all the statutes, as well as courts proceeding without any express statutory authority, concede that if the interest involved and the person appearing in its behalf are such that the court cannot proceed to final judgment without in some manner affecting such interest or person, so that, on a suggestion, the court must delay the proceeding for want of necessary parties to render its action effective, then it will either require the complainant or plaintiff to amend his bill or complaint so as to make such person

a party defendant, or will grant him leave to intervene: *Hailey v. Boyd's Admr.*, 64 Ala. 399. Frequently the courts have said that the interest which entitles a person to intervene in a suit between other parties must be in the matter in litigation and of such direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment: *Wood v. Denver City Waterworks Co.*, 20 Colo. 253, 46 Am. St. Rep. 288, 38 Pac. 239; *Cache La Poudre D. Co. v. Hawley* (Colo.), 95 Pac. 317; *Day v. Bullen*, 127 Ill. App. 155; *Wightman v. Evanston Y. Co.*, 118 Ill. App. 379, 217 Ill. 371, 108 Am. St. Rep. 258, 75 N. E. 502; *Dennis v. Spencer*, 51 Minn. 259, 38 Am. St. Rep. 499, 53 N. W. 631; *Walker v. Sanders*, 103 Minn. 124, ante, p. 276, 114 N. W. 649; *Maddox v. Rader*, 9 Mont. 126, 22 Pac. 386; *Harlan v. Eureka M. Co.*, 10 Nev. 92; *Dickson v. Dows*, 11 N. D. 407, 92 N. W. 798. Any loss or gain by the direct legal effect and operation of a judgment, it is true, will generally, if not universally, justify the granting of an application for leave to intervene, but that this is essential in all cases to sustain an intervention, even though it is so declared by statute, is confidently denied. No one so loses or gains in the strict sense of the term unless he is a party or in privity with a party to the proceeding. No intervention can be ordered in favor of a party, for the reason that he is already such and has an adequate remedy within the original proceeding: *Wynn v. Irvine's Georgia M. H.*, 109 Ga. 287, 34 S. E. 582. Privies may, as we shall hereafter show, intervene, because, as such, they are bound by, and may have the benefit of, the judgment, but they by no means constitute the only class of persons entitled to this remedy, and this may be affirmed, almost without taking into consideration the peculiar language of any statute, for whether judges or legislators have employed the terms referred to, they did so carelessly and inadvertently, and have meant no more than that a person is entitled to intervene if the direct operation of the judgment, if enforceable against him, must be to benefit or prejudice him. Hence, in most of the cases cited in which the general rule was quoted, intervention was sustained, though the party seeking that remedy was not in privity with any of the original parties, and the judgment in the original proceeding, had it been rendered in his absence, could not have operated directly, either for his loss or gain: *Wood v. Denver City Waterworks Co.*, 20 Colo. 253, 46 Am. St. Rep. 288, 38 Pac. 239; *Cache La Poudre D. Co. v. Hawley* (Colo.), 95 Pac. 317; *Walker v. Sanders*, 103 Minn. 124, ante, p. 276, 114 N. W. 649; *Maddox v. Rader*, 9 Mont. 126, 22 Pac. 386. On the other hand, though the enforcement of the judgment, when rendered, might benefit or prejudice the applicant for intervention, this does not entitle him to intervene if its effect is indirect, as where the party for or against whom the judgment may be, may, because of it, become more or less able to satisfy some obligation existing from him to the intervener: *Wightman v. Evanston Y. Co.*, 217 Ill. 371, 108 Am. St. Rep. 258, 75 N. E.

502; *Donohoo v. Howard*, 4 Ind. Ter. 433, 69 S. W. 927; *Union T. Co. v. Detroit etc. Ry. Co.*, 127 Mich. 252, 86 N. W. 788.

It may be accepted as a general rule that one who is a necessary party to a suit or action when it is commenced, so that the judgment or decree must be wholly or substantially inoperative unless he is made a party to it, is entitled to intervene: *Carter v. Mills*, 30 Mo. 432; but it cannot be affirmed, on the other hand, that because he was not a necessary party in this sense, he is not so entitled. Thus, if A sues B to recover property which in fact belongs to C, it cannot be said that the latter is a necessary party to the action, but, as he owns and is entitled to the possession of the subject matter, he is entitled to intervene: *Carter v. Mills*, 30 Mo. 432. Under most, if not all, the statutes, a person who is entitled to the subject matter of the action or some substantial interest therein may intervene in an action involving its title or the right to its possession: *Merchants' Nat. Bank v. Hagemeyer*, 4 App. Div. 52, 38 N. Y. Supp. 626; *McClurg v. State Bindery Co.*, 3 S. D. 362, 44 Am. St. Rep. 799, 53 N. W. 428; *Stretch v. Stretch*, 2 Tenn. Ch. 140; *Speak v. Ransom*, 2 Tenn. Ch. 210; *Legg v. McNeill*, 2 Tex. 428; *Graves v. Hall*, 27 Tex. 148; *Mussina v. Goldthwaite*, 34 Tex. 125, 7 Am. Rep. 281; *Hanna v. Drennan*, 2 Posey Unrep. Cas. 536; and having come into the cause because of his interest in the matter, the intervener is restricted to the issue as to title and cannot insist upon raising or trying other issues not involved in that of his title: *Dawson v. Thigpen*, 137 N. C. 462, 49 S. E. 959.

b. Persons in Privity with One of the Parties.

1. Purchasers Pendente Lite.—One who acquires an interest in property during the pendency of the litigation, and while it is within the operation of the law of *lis pendens*, is bound by, and entitled to the benefit of, any judgment which may be subsequently entered, and if he succeeds to the entire interest of his grantor or assignor, he is usually entitled to be substituted as a party in place of the one to whose interest he succeeds. It is not, therefore, absolutely necessary for such a successor to make himself a party by intervention, and if he wishes control of the suit, he may generally procure it by moving for substitution. Hence, there is some reason for insisting that a person is not entitled to intervene unless his intervention would have been proper when the action was commenced. For these reasons the right has been denied to persons acquiring it after the commencement of the action: *Bank of Commerce v. Timbrell*, 113 Iowa, 713, 84 N. W. 519; *Child v. Burton*, 6 Bush, 617; *Schaferman v. O'Brien*, 28 Md. 565, 92 Am. Dec. 708; *Hall v. Jack*, 32 Md. 253; *Beebe v. Richmond L. H. & P. Co.*, 6 App. Div. 187, 40 N. Y. Supp. 1013; *Coyne v. City of Yonkers*, 57 Misc. Rep. 366, 109 N. Y. Supp. 625. A slight preponderance of the authorities, however, is to the effect that a purchaser or other person acquiring an interest, *pendente lite* is entitled

to intervene: *Loughborough v. McNevin*, 74 Cal. 250, 5 Am. St. Rep. 435, 14 Pac. 369, 15 Pac. 773; *Eddleman v. Union County T. & P. Co.*, 217 Ill. 409, 75 N. E. 510; *Dyer v. Harris*, 22 Iowa, 268; *Marigney v. Nivet*, 2 La. 498; *Union Bank v. Bowman*, 15 La. Ann. 271; *Walker v. Sanders*, 103 Minn. 124, ante, p. 276, 114 N. W. 649; *Sheek v. Sykes*, 126 N. C. 210, 35 S. E. 425; *Jones v. Smith*, 55 Tex. 383; *Fleming v. Seeligson*, 57 Tex. 524; *Fifth Congregational Church v. Bright*, 28 App. D. C. 229. Some of the decisions make a distinction between those cases in which the transfer pendente lite deprives the original party of all further interest in the proceeding and entitles his successor to absolute substitution and those cases in which, though the successor acquires an interest, the original party is also entitled to remain in the action for some purpose and to still participate in its management, insisting that intervention may be denied in cases of the first class because unnecessary: *Bank of Commerce v. Timbrell*, 113 Iowa, 713, 84 N. W. 519; and must be granted in those of the second class, because, if denied, the successor might not be able to protect the title or interest transferred to him: *Walker v. Sanders*, 103 Minn. 124, ante, p. 276, 114 N. W. 649. Though this distinction seems entirely reasonable, it is not noticed in, and has not controlled, the majority of the decisions upon the subject.

2. Persons Bound by the Judgment or Otherwise Liable to Satisfy It.—There are many instances in which persons not made parties to the action or proceeding are nevertheless, bound by it or liable to reimburse one who is compelled to satisfy it. A familiar instance of this occurs when a surety sued upon an obligation has a right to recover of his principal if compelled to discharge it, or a principal is sued and the judgment against him must be evidence against his surety. In such cases, the one who is thus finally answerable, though he is not a necessary party, is entitled to intervene: *Nevins v. Fidelity & Casualty Co.*, 12 Misc. Rep. 77, 33 N. Y. Supp. 43; *Kinney v. Reid I. Co.*, 57 App. Div. 206, 68 N. Y. Supp. 325; *Feinburg v. American Surety Co.*, 33 Misc. Rep. 458, 67 N. Y. Supp. 868.

In Texas, however, where there is no statute expressly creating the right to intervention, the fact that a third person may become answerable to the defendant, in case judgment is entered against him does not entitle such third person to intervene unless there is privity between him and the plaintiff: *Burdett v. Glaiscock*, 25 N. Y. Supp. 45; *Wilson v. Tyler C. Co.*, 28 Tex. App. 172, 66 S. W. 865. This rule was applied though the applicant for intervention, being an indemnitor, might have appeared as such and defended the action: *McKee v. Coffin*, 66 Tex. 310, 1 S. W. 276.

c. Persons Owning the Subject Matter of the Suit or the Property Involved Therein.—Persons who claim to be the owners of or to have an interest in the property sued for or the cause of action sued upon are permitted to intervene, as where money taken from a prisoner is

the subject of an action and a person not a party claims to be entitled to it: *Gunnels v. Latta* (Ark.), 111 S. W. 273; or any other money or fund is before the court and is claimed by an outsider: *Denis v. Kolm*, 131 Cal. 91, 63 Pac. 141; or is subject to a trust, and a third party claims to be a beneficiary: *Doke v. Williams*, 45 Fla. 248, 34 South. 569; or is derived from a life insurance of which the claimant alleges he is a beneficiary: *Cambria I. Co. v. Union Trust Co.*, 154 Ind. 291, 55 N. E. 745, 56 N. E. 665, 48 L. R. A. 41; or results from a will under which the claimant insists he has a right to participate: *Dodge v. Hogan*, 19 R. I. 4, 31 Atl. 1059; or where the suit is on a certificate of deposit, draft, promissory note, or other obligation of which the intervener alleges he is the owner: *Stitch v. Dickinson*, 38 Cal. 608; *Rust v. Woolbright*, 54 Ga. 310; *Kastner v. Pibilinski*, 96 Ind. 229; *Taylor v. Adair*, 22 Ind. 279; *Jones v. Jenkins*, 9 Rob. 180; *Holland v. Commercial Bank*, 22 Neb. 585, 36 N. W. 112; *Dunn v. National Bank*, 11 S. D. 305, 77 N. W. 777; *Field v. Gantier*, 8 Tex. 74; *Bremond v. Manley*, 31 Tex. 6; *Converse v. Sorley*, 39 Tex. 515; *Jackson v. Fawlkcs* (Tex.), 20 S. W. 136. So, in an action for possession of real or personal property, an intervener may be admitted on the ground that he is an owner therein, either to assist in the defense, or to claim the property for himself, or to obtain some other relief germane to the action: *Gunning v. Sorg*, 214 Ill. 616, 73 N. E. 870; *McCullogh v. Connelly* (Iowa), 114 N. W. 301; *McLaughlin v. McLaughlin's Admr.*, 16 Mo. 242; *Hornby v. Gordon*, 22 N. Y. Super. Ct. 656; *Sprague v. Bond*, 113 N. C. 551, 18 S. E. 701; *Johnston v. O'Rourke* (Tex. Civ. App.), 85 S. W. 501. In a suit involving a water right, third persons who claim an undivided interest in the ditch and a common interest in the questions involved are entitled to intervene: *West Point I. Co. v. Moroni & M. P. I. D. Co.*, 14 Utah, 127, 46 Pac. 762. The right of one claiming to be a tenant in common with the plaintiff in the property sued for to intervene was denied in *McCracken v. Lewis* (Miss.), 42 South. 671; but in that case the court was not acting under any statute creating the right to intervene, and where there is no such statute, the right of an adverse claimant is generally, if not universally, denied: *Browning v. Randol*, 69 Mo. 594; *Britton v. Bohde*, 85 Hun, 449, 32 N. Y. Supp. 882; *Union T. Co. v. Boker*, 26 Misc. Rep. 85, 56 N. Y. Supp. 550; *Asheville Div. No. 15 v. Aston*, 92 N. C. 578; *Hillier v. Stewart*, 26 Ohio St. 652.

If, however, an attorney at law enters into a contract to prosecute an action for personal injuries and to receive as compensation one-half of the amount received, and the other party refuses to proceed pursuant to the contract, and under facts and the law of the state, the transaction can be deemed operative as an assignment of an interest in the claim, and the remedy of the attorney is only by an action of damages for the refusal to let him perform his contract, he cannot intervene: *Southern Pacific Co. v. Winton*, 27 Tex. Civ.

App. 503, 66 S. W. 477. A like conclusion was reached when a creditor agreed to pay an attorney thirty per cent of a claim for collecting it, the court holding this agreement merely fixed the amount of the compensation without assigning any interest in the claim: *Kelly-Maus & Co. v. Newman*, 79 Ill. App. 285; *Israel v. Metropolitan E. Ry. Co.*, 69 N. Y. Supp. 218, 88 App. Div. 266.

d. **Lien and Lienholders.**—Persons who have liens on the property affected by the suit or whose liens may be impaired by the judgment are entitled to intervene: *McCarthy v. Kirksley*, 70 Ark. 444, 69 S. W. 53; *Brugier v. Miller*, 114 La. 419, 38 South. 404; *Everett v. Edwards*, 149 Mass. 588, 14 Am. St. Rep. 462, 22 N. E. 52, 5 L. R. A. 110; *Maddox v. Rader*, 9 Mont. 126, 22 Pac. 386; *Maddox v. Teague*, 18 Mont. 593, 47 Pac. 209; *Ladd v. Stevenson*, 112 N. Y. 325, 8 Am. St. Rep. 748, 19 N. E. 842; *Murphy v. Nash* (Tex. Civ. App.), 45 S. W. 944; *Polk v. King*, 19 Tex. Civ. App. 666, 48 S. W. 601; *Douglas v. Robertson* (Tex. Civ. App.), 72 S. W. 868; *Rau v. Shaver*, 102 Va. 68, 45 S. E. 873; *Patrick v. Leach*, 3 McCrary, 555, 17 Fed. 476; *Knowles L. Works v. Ryle*, 81 Fed. 940; *Central T. Co. v. California & N. R. Co.*, 110 Fed. 70; but the application to intervene may be denied if it appears that the rendering of a judgment as sought by the plaintiff will not imperil the lien or render the property insufficient to satisfy it: *Wells v. Blackman*, 121 La. 394, 46 South. 437. We assume, though we have seen no decision considering the question, that if the suit is not one calling the lien in question or which can result in a judgment preventing its enforcement, that intervention is not a matter of right. Thus, if an action of ejectment is pending and either of the parties has executed a mortgage on the property or it is subject to some other lien, the lienholder is interested in the final judgment, not because it is binding on him as an estoppel, but because a decision in favor of the person against whom the lien exists will doubtless prevent the losing party from questioning the lien, while a decision against the person against whom the lien is claimed will bring the claimant into a controversy with the successful party. This, however, is an indirect rather than a direct effect of the judgment, and probably does not entitle the lienholder to intervene.

e. **Persons Entitled to Subrogation.**—Persons entitled to be subrogated to a right or cause of action should, at least in equity, be treated as owners thereof, and as such entitled to intervene for the purpose of assisting the persons to whose interests they are subrogated or of taking such other action as may be essential to protect their right: *Dobson v. Southern Ry. Co.*, 129 N. C. 289, 40 S. E. 42; *Mason v. Marine Ins. Co.*, 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700.

f. **Persons Who are Represented by Parties Already Before the Court.** In many instances, persons not made nominal parties to the action or proceeding are, nevertheless, represented by such parties, and therefore are, in the absence of collusion, bound by the judgment. There

is, however, no absolute right to intervene in such cases, and the right to do so may be denied by the court in the exercise of its discretion, and the discretion will usually be so exercised when there is no suggestion of fraud or collusion or that the representative will not act in good faith for the protection of all interests represented by him: *McLaughlin v. McLaughlin's Admr.*, 16 Mo. 242; *Brown v. Brink*, 57 Neb. 606, 78 N. W. 280; *Bowker v. Haight & Freese Co.*, 140 Fed. 794; *Fink v. Bay Shore T. Co.*, 144 Fed. 837; *Zell v. Judges of Circuit Court*, 203 U. S. 577, 27 Sup. Ct. Rep. 777, 51 L. ed. 325. The leave to intervene is sometimes granted: *Parsons v. Little*, 28 App. D. C. 218; and will not be denied if it appears probable that otherwise no defense will be made because of the collusion of the representative or because he is not in sympathy with the claims of the applicant for intervention and will hence not properly represent him: *Conlee v. Clay City*, 31 Ky. Law Rep. 533, 102 S. W. 862.

In proceedings involving the assessment of property or the collection of taxes, the real parties in interest are usually those who, or whose property, must contribute to the payment of the tax or those who on its collection are entitled to receive the proceeds in satisfaction of some obligation due to them. In either case such real parties are usually represented by some public officer, but this does not ordinarily result in the denial of their application to intervene: *Brown v. Bryan*, 31 Iowa, 556; *Miller v. City of Socorro*, 9 N. M. 416, 54 Pac. 756.

g. Receivers and Persons Interested in the Receivership.—The question of intervention may be presented in connection with receiverships (1) when the receiver seeks to intervene in an action or proceeding by or against the person or corporation of which he is the receiver, and (2) when the receiver, being already a party to a suit, a third person is so situated that the judgment, if for or against the receiver, will result in the gain or loss to such person. In cases of the first class there is no doubt of the right of the receiver to be heard, at least to the same extent as if he were a voluntary grantee or transferee of the person whom he represents: *Muhlenberg v. City of Tacoma*, 25 Wash. 36, 64 Pac. 925; *Bowen v. Needles Nat. Bank*, 76 Fed. 176. When the receiver is a party to the original action and is, in contemplation of law, the representative of the person asking leave to intervene, the court has a discretion to deny the leave on the ground that there is no necessity for any action on behalf of the applicant, for the reason that the receiver is faithfully and adequately representing him: *Alexander v. Maryland T. Co.*, 106 Md. 170, 66 Atl. 836; *Hosmer v. Standard S. M. Co.*, 39 Misc. Rep. 204, 79 N. Y. Supp. 393. The discretion, conceding one to exist, will, however, generally be exercised in favor of the proposed intervention: *Graves v. Hall*, 27 Tex. 148; *Mercantile T. Co. v. Pittsburgh & W. Ry. Co.*, 115 Fed. 475, 53 C. C. A. 207; *Pennsylvania S. Co. v. New York City Ry. Co.*, 157 Fed. 440; *In re Reisenberg*, 208 U. S. 90, 28 Sup. Ct. Rep. 219, 52 L. ed. 000. If the receiver makes application for leave to intervene

in a suit brought by or against another receiver, the latter may present the question that the suit in which he was appointed having been first brought, the court in which it was begun necessarily acquired exclusive jurisdiction of the matter, and hence that the receiver appointed in the subsequent proceeding had no right to be heard in intervention: *Southwell v. Church* (Tex. Civ. App.), 111 S. W. 969.

The position of a trustee or assignee in bankruptcy is similar to that of a receiver in being entitled to intervene in actions by or against the person whose estate or interest he has succeeded to or otherwise represents: *Griffin v. Mutual L. I. Co.*, 119 Ga. 664, 46 S. E. 870; *New Orleans A. & F. Co. v. Guillory & Co.*, 117 La. 821, 42 South. 329.

h. Executors and Administrators and Persons Interested in the Estate.—An executor or administrator or a special administrator is entitled to intervene for the benefit of the estate and interests which he represents: *Lambert v. Tucker*, 83 Ark. 416, 104 S. W. 131; *Hamilton v. Lamphear*, 54 Conn. 237, 7 Atl. 19; *Stafford v. Davidson*, 47 Ind. 319; *Boyd v. Heine*, 41 La. Ann. 396, 6 South. 714; *Underwood v. Boston Five Cents Sav. Bank*, 141 Mass. 305, 4 N. E. 822; *Uhlfelder v. Tansen*, 18 Misc. Rep. 173, 41 N. Y. Supp. 438; *Jefferson County Bank v. Robbins*, 67 Wis. 68, 28 N. W. 209, 893; *Monmouth I. Co. v. Means*, 151 Fed. 159, 80 C. C. A. 527. There are decisions asserting that one before the court in his individual capacity cannot intervene as an executor or administrator: *Jackson v. Jackson*, 91 Ala. 292, 10 South. 31; *First Nat. Bank v. Shuler*, 89 Hun, 303, 35 N. Y. Supp. 171; but an executor or administrator is, in contemplation of law, a different person from the one that he must be deemed to be in his official capacity, and we see no reason at all why if sued in one capacity, he may not intervene in another if the facts justify it to the same extent as if the office were held by a different person: *Stockton B. & L. Assn. v. Chalmers*, 75 Cal. 332, 7 Am. St. Rep. 173, 17 Pac. 229. If the interest of a legatee is likely to be diminished or destroyed by the proceeding against an administrator or executor, there is no reason why such legatee should not be permitted to intervene: *Gueli v. Lennihan*, 55 Hun, 608, 8 N. Y. Supp. 453; *Sherwood v. Harbeck*, 13 App. Div. 133, 42 N. Y. Supp. 1045.

1. Insurers.—We have already shown that the person entitled to subrogation may also be entitled to intervene (ante, XII, e), and the authorities there cited sustain an application for intervention in behalf of insurers where they are entitled to be subrogated to the claim of the plaintiff. In cases where an insurer is not entitled to subrogation, the rule may be different. Thus, where in a suit to set aside a sale, a title insurance company sought to intervene to aid the defendant on the ground that it had an interest arising from its having insured the property, the court denied the application for the reason that the subject of the action was real property in which the company had no interest and the consequential interest would not suffice: *Russ v. Stratton*, 8 Misc. Rep. 6, 28 N. Y. Supp. 392.

j. Stockholders and Corporations.—A judgment against a corporation may conclusively establish the liability of its stockholders or otherwise prejudicially affect them. They hence have such an interest as to be entitled to intervene in actions against the corporation: *Gunderson v. Illinois T. & S. Bank*, 110 Ill. App. 461, 199 Ill. 422, 65 N. E. 326. Leave to intervene is, nevertheless, often denied them on the ground that they are adequately represented before the court, there being no showing of any fraud or collusion on the part of the corporation, nor that it will not faithfully represent its stockholders and seek to secure them from liability: *Hosmer v. Standard S. M. Co.*, 39 Misc. Rep. 204, 79 N. Y. Supp. 390; *United States v. Northern Securities Co.*, 128 Fed. 808.

k. Husbands and Wives.—The right of a wife to intervene in an action against her husband has been denied where it seemed entirely proper, namely, in an action for cutting and carrying away timber, she claiming the land whence it was taken as her separate property: *Leach v. Millard*, 9 Tex. 551. But the better view is that under a statute intended for the protection of the rights of married women, one may intervene both for the purpose of claiming that the property was her separate estate (*Rice, Stix & Co. v. Sally*, 176 Mo. 107, 75 S. W. 398), and for the purpose of having the judgment, in case it is entered against her husband, declared that her community property is not subject to its satisfaction: *Gund v. Parke*, 15 Wash. 393, 46 Pac. 408.

l. Co-respondents—In Suits Between Husband and Wife.—Under subdivision 2 of section 1757 of the Code of Civil Procedure of New York, in any action of divorce on the ground of adultery, the plaintiff may serve a copy of his pleading on the co-respondent named therein, who may appear and defend the action in so far as the issues affect him. If service is not made on him, he may appear and demand that such service be made, and when it is made, may appear and defend. If the allegations against him are not proved, he is entitled to judgment for his costs. Under this section a co-respondent is entitled to intervene and to have a trial by jury, though the defendant suffers a default: *Rixa v. Rixa*, 35 Misc. Rep. 227, 71 N. Y. Supp. 815.

m. Creditors having no Lien.—The case of a creditor who has no lien for the security of his debt and has not reduced it to judgment, forms the most frequent illustration of a third person who may gain or lose by a judgment between others and yet whose gain or loss is of so indirect a character that it cannot entitle him to intervention: *Isaacs v. Jones*, 121 Cal. 257, 53 Pac. 793, 1101; *Askew v. Carswell*, 63 Ga. 162; *May v. Disconto Gesellschaft*, 211 Ill. 310, 71 N. E. 1001; *Johnson v. Johnson*, 132 Iowa, 457, 107 N. W. 802; *Brown v. Saul*, 4 Mart., N. S., 434, 16 Am. Dec. 175; *Lincoln v. New Orleans*

E. Co., 45 La. Ann. 729, 12 South. 937; Postal Tel. Co. v. Snowden, 68 Md. 118, 12 Atl. 549; Dennis v. Spencer, 51 Minn. 259, 38 Am. St. Rep. 499, 53 N. W. 631; Welborn v. Eskey, 25 Neb. 193, 40 N. W. 959; Kansas & C. P. R. Co. v. Fitzgerald, 33 Neb. 137, 49 N. W. 1100; Bouden v. Long A. S. B. Co., 92 App. Div. 325, 86 N. Y. Supp. 1080; Goodrich v. Williamson, 10 Okl. 588, 63 Pac. 974; Massachusetts L. & T. Co. v. Brown, 17 R. I. 568, 23 Atl. 761; Mayes v. Woodall, 35 Tex. 687; Rhoades v. Pennsylvania Co., 93 Fed. 533. If a claim has been reduced to judgment, intervention may be allowed in favor of a creditor, but this is generally because he is a judgment creditor, and as such has a lien attaching to the property in suit or is otherwise entitled to satisfaction out of it or its proceeds: Bowers v. Denton, 41 Misc. Rep. 133, 83 N. Y. Supp. 942.

To come within the reason of the rule just stated, one may be regarded as a creditor, though neither of the parties owes him anything in money. Thus, in a suit against a corporation to foreclose a trust deed, it appeared that the corporation was engaged in the business of furnishing electric light and hot-water heating service by means of wires, mains, and conductors in the streets of a city and had made contracts with sundry persons for furnishing light and heat at their residences. These persons sought to intervene on the ground that they held contracts with the corporation, that it was insolvent, that the foreclosure proceeding was instituted for the purpose of seeking a cancellation of their contracts, and they hence prayed that the receiver be directed to carry out the contracts with them, and that the court determine whether the foreclosure proceedings were collusive. Their right to intervene was, however, denied chiefly on the ground that any injury which could result to them was indirect, the court saying: "It is difficult to see upon what principle it can be seriously contended that the appellants were either necessary or proper parties to the bill to foreclose. They do not pretend that they had any right, title or lien upon the mortgaged property. The sole ground of their claim of right to appear in that proceeding and prevent a decree of foreclosure is, that they had certain contracts with the defendant company to furnish them heat and light, which contracts would be impaired by a decree of foreclosure. In other words, they were mere contract creditors of the corporation, and if they had the right to interfere in the foreclosure proceedings, then any other creditor of the corporation would have the same right, although his claim had not been reduced to judgment or otherwise made a lien upon the mortgaged property. Counsel says they were not mere contract creditors because their agreement with the company was to furnish heat and light—that is, their contracts were with a service company. But how that fact can be given the effect of changing their relation to the company from that of mere contract creditors to parties having a lien or right to the subject matter of the foreclosure proceedings is not shown, nor are we able to discover any substantial reason

or authority for the position. As said in *Marsh v. Green*, 79 Ill. 385, they will not be permitted to intermeddle when they have no substantial interest in the subject matter of the suit; and as said in *Anderson v. Jacksonville etc. R. R. Co.*, 2 Woods, 628, Fed. Cas. No. 358: 'If they have any occasion to ask any relief in relation to matters involved in said suit, or to the proceedings therein, they must file an original bill.' We entertain no doubt that under the general rule applicable to parties in chancery proceedings the court below ruled properly in dismissing the intervening petition. If we turn to the decisions rendered by the various courts in those jurisdictions in which statutes are in force authorizing intervention, we find that they hold, without exception, that the interest which will entitle a party to intervene must be an interest in the matter about which the litigation is to be, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment—that is, the interest must be one created by a claim to the demand of property in suit, or some part thereof, or a lien upon the property, or some part thereof, which is the subject matter of litigation: 17 Am. & Eng. Ency. of Law, 2d ed., 181. Thus, in *Hahn v. Volcano Water Co.*, 13 Cal. 70, 73 Am. Dec. 569, which was an action on a note and mortgage against the water company to which the defendant filed an answer of general denial, creditors of the company were admitted to intervene, alleging that the note and mortgage were executed in fraud of their rights, and were therefore void. On the right of intervention the court, by Field, J., said: 'Petition of the creditor Rawle does not disclose any right on his part to intervene. It shows that he was a simple contract creditor holding obligations against the company, but it does not show that any portion of them was secured by any lien upon the mortgaged premises. The interest mentioned in the statute which entitles a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment.' In *Cassaday v. Morgan*, 5 Mart., N. S., 500, *Pierre v. Masse*, 7 Mart., N. S., 196, and *Gastnet v. Johnson*, 1 La. Ann. 425, under a similar provision in the Louisiana code, the same doctrine is announced, and in the last case cited, the court said: 'This, we suppose, must be a direct interest, by which the intervening party is to obtain immediate gain or suffer loss by the judgment which may be rendered between the original parties, otherwise the strange anomaly would be introduced into our jurisprudence of suffering an accumulation of suits in all instances where doubts might be entertained or enter into the imagination of subsequent plaintiffs that the defendant against whom a previous action was under prosecution might not have property sufficient to discharge all his debts, for as the first judgment obtained might give a preference to the person who should obtain it, all subsequent suitors, down

to the last, would have the indirect interest in defeating the action of the first'': *Wightman v. Evanston Y. Co.*, 217 Ill. 371, 108 Am. St. Rep. 258, 75 N. E. 502.

n. **Public Officers.**—In every case wherein a public interest is involved, an officer entitled to represent the public or the sovereign may appear and offer to intervene, and the offer will generally be accepted, even when he represents the state or the United States and the sovereignty to be represented cannot be sued. Yet, as the state or United States may be interested in the decision of a suit or action pending between private parties, the court will naturally be disinclined to proceed to make a decision which, though conceded not to be binding as *res judicata*, may, nevertheless, establish propositions of all which may embarrass the sovereignty in future litigation. In such case, whether anything like strict intervention can occur or not, it is the practice, at least of the national courts, to permit the attorney general of the state or of the United States to suggest the interest of the sovereignty he represents and to be heard before any final decision is made: *The Exchange v. McFadden*, 7 Oranch, 116, 3 L. ed. 287; *Florida v. Georgia*, 17 How. 478, 15 L. ed. 181; *In re Cooper*, 138 U. S. 464, 11 Sup. Ct. Rep. 289, 34 L. ed. 993; *Stanley v. Schwalby*, 147 U. S. 508, 13 Sup. Ct. Rep. 418, 37 L. ed. 259; *Percy Summer Club v. Astle*, 110 Fed. 486.

XIII. In Suits by Attachment.

Where an action is by attachment, intervention may be sought by one not a party thereto, either (1) because, as in other cases, he wishes to assert some claim in hostility to both the original parties or to assist one of them against the other, or (2) because he is a creditor of the person attached and wishes to escape from the consequences of the attachment for the purpose of subjecting the property to some claim of his own, or (3) because, while he is indifferent respecting the cause of action sued upon and does not care who recovers judgment, he claims the property attached or some interest therein and wishes to obtain its release from attachment. The cases of the first class require no special consideration, for the right to intervene in them will not be increased nor diminished by the fact that the plaintiff has sought the incidental remedy of attachment. Where the attachment is levied and other creditors of the defendant levy junior writs or otherwise acquire liens on, or an interest in, the property which must be held subordinate to the plaintiff's lien in the event of his recovery of judgment, such junior lienholder or other person is entitled to intervene for the protection of his lien or other interest, either to the extent of defeating the action altogether or of establishing that plaintiff was not entitled to the attachment at the time the writ issued and the levy was made. This is the rule prevailing in a decided majority of the states: *Sannoyer v. Jacobsen*, 47 Ark. 31, 14 S. W. 458; *Davis v. H. B. Claffin Co.*, 63 Ark. 157, 58

Am. St. Rep. 102, 38 S. W. 662, 41 S. W. 996, 35 L. R. A. 776; Davis v. Eppinger, 18 Cal. 378, 79 Am. Dec. 184; Kimball v. Richardson-Kimball Co., 111 Cal. 386, 43 Pac. 1111; McEldowney v. Madden, 124 Cal. 108, 56 Pac. 783; Schilling v. Deane, 36 Ill. App. 513; Deere, Wells & Co. v. Eagle Mfg. Co., 49 Neb. 385, 68 N. W. 504; Barkley v. Wood (Tex. Civ. App.), 41 S. W. 717; Miller v. White, 46 W. Va. 67, 76 Am. St. Rep. 791, 33 S. E. 332. In a few of them the right of the subsequent attaching creditor to intervene has been denied on the ground that it was not supported by any statute creating it: Pennsylvania S. Co. v. New York S. R. Co., 4 Houst. 572; Garland v. Grinnell, 8 La. 57; Massachusetts L. & T. Co. v. Brown, 17 R. I. 568, 23 Atl. 761; McKee v. Coffin, 66 Tex. 304, 1 S. W. 276; State v. Superior Court, 7 Wash. 77, 34 Pac. 430; and in other states where the right has to some extent been conferred by statute, there is a tendency to construe the statute somewhat strictly and to restrict the right to cases clearly falling within the express terms of the statute. Thus, under a statute authorizing a junior attaching creditor to dispute the attachment on the ground that the debt sued for was not due or was not payable when the action was commenced, it was held that he could not intervene on the ground that the debt had been paid after such commencement: Moors v. Ladenburg, 178 Mass. 272, 59 N. E. 676; but one of the states thus denying the right to intervene, conceded the right to do so to a purchaser of the property pendente lite: Barkley v. Wood (Tex. Civ. App.), 41 S. W. 717.

We come now to the consideration of cases of the third class, namely, those in which the applicant for intervention merely claims the property attached, or some interest therein, on the ground that it was not subject to the attachment. In all cases of this class the claimant usually has a remedy by replevin or other action at law to recover either the property or its value. Nevertheless, in many of the states he is not required to resort to that remedy, but may intervene, and his intervention is treated as analogous to an action to recover possession of the property: Ringeman v. Wiggs, 146 Ala. 685, 40 South. 323; Tillar v. Liebke, 78 Ark. 324, 95 S. W. 769; Ray v. Keith, 218 Ill. 182, 75 N. E. 921; Patton v. Madison Nat. Bank, 31 Ky. Law Rep. 830, 104 S. W. 264; Drumm-Flato C. Co. v. Summers, 89 Mo. App. 300; Barnes v. Stanley, 96 Mo. App. 1, 69 S. W. 682; Torreyson v. Turnbaugh, 105 Mo. App. 439, 79 S. W. 1002; Rice, Stix & Co. v. Sally, 176 Mo. 107, 75 S. W. 398; Toms v. Warson, 66 N. C. 417; Miller v. Campbell C. Co., 13 Okl. 75, 74 Pac. 507; Geo. D. Shore & Bro. v. Baltimore & O. R. Co., 76 S. C. 472, 57 S. E. 526; Wallace v. Maroney, 6 Mackey, 221; Daniels v. Solomon, 11 App. D. C. 163; United States v. Neely, 146 Fed. 764. In other states, because there is no statute expressly authorizing it, the claimant of the property attached cannot, on that ground, intervene in the action in which it was attached, but must seek his remedy by an independent suit or proceeding: McAbee v. Parker, 78 Ala. 573; Risher

v. Gilpin, 29 Ind. 53; Allyn v. Code (Neb.), 91 N. W. 505; Haines v. Stewart (Neb.), 91 N. W. 539; Danker v. Jacobs (Neb.), 112 N. W. 579; Alpine Cotton Mills v. Weil, 129 N. C. 452, 40 S. E. 218; Jaffary v. Meyer, 1 White & W. Civ. Cas. Ct. App., sec. 1351; Stanley v. Foote, 9 Wyo. 335, 63 Pac. 940. Sometimes, though intervention may be permitted, it is not a matter of right, but may be denied in the exercise of a judicial discretion; 1. Stadden G. Co. v. Lusk, 95 Mo. App. 261, 68 S. W. 587; Alpine Cotton Mills v. Weil, 129 N. C. 452, 40 S. E. 218; Caruthers v. Lange (Tex. Civ. App.), 55 S. W. 580. If an intervention is permitted, the intervener's position is substantially that of a plaintiff in replevin, and he must assume the burden of proof upon every issue necessary to the maintenance of his claim: First Nat. Bank v. Ft. Wayne A. I. Co., 105 La. 133, 29 South. 379; Alpine Cotton Mills v. Weil, 129 N. C. 452, 40 S. E. 218; though there is a recovery for the property and can be none for its use: Ohde v. Hoffman (Iowa), 90 N. W. 750.

Statutes creating the remedy by intervention in attachment suits, whether for the purpose of contesting the validity of the attachment or of claiming the property under title paramount to that of the defendant in attachment, afford a cumulative remedy, and the fact that it is not resorted to does not estop the claimant from resorting to an independent action to enforce his claim: Sperry v. Ethridge, 70 Iowa, 27, 30 N. W. 4; Megee v. Beirne, 39 Pa. 50; Olin v. Figeroux, 1 McMull. 203; Harris v. Tenney, 85 Tex. 254, 34 Am. St. Rep. 796, 20 S. W. 82.

XIV. In Proceedings by Garnishment.

The rules applicable to proceedings by garnishment seem to be the same as in proceedings by attachment, and this whether the garnishment is in aid of an attachment or an execution, namely, that while the right to intervene is sometimes regarded as not absolute and in the discretion of the court: Paepcke-Leicht L. Co. v. Becker, 124 Ill. App. 311; and the claimant can prevail only by assuming the burden of proof: Racek v. First Nat. Bank, 62 Neb. 669, 87 N. W. 542; still he will not ordinarily be required to resort to an independent suit, but may assert his claim by intervention: Paepcke-Leicht L. Co. v. Becker, 142 Ill. App. 311; Smith v. Meyer, 84 Minn. 455, 87 N. W. 1122; Racek v. First Nat. Bank, 62 Neb. 669, 87 N. W. 542; Field v. Sammis, 12 N. M. 36, 73 Pac. 617; Smith v. Texas P. R. Co. (Tex. Civ. App.), 39 S. W. 969; Turner v. Wade (Tex. Civ. App.), 48 S. W. 542; but from this view there is a slight dissent: Schloredt v. Boyden, 9 Wyo. 392, 64 Pac. 225.

XV. In Proceedings Under Execution.

When execution issues, the original action and all the issues therein have usually been determined, and the only contest subsequently arising relates to the property levied upon and sought to be

applied to the satisfaction of the writ. These issues are usually presented and determined in actions of replevin or claim and delivery, though sometimes the claimant elects to regard the unauthorized levy as a conversion and seeks indemnity in action of trover on account thereof. In a few of the states this and like actions are not indispensable, but the claimant may present his claim in a proceeding which, if not strictly speaking intervention, is sometimes so styled, and, at all events, accomplishes a similar purpose: *Lanier v. Bailey*, 120 Ga. 878, 48 S. E. 324; *Rowland v. Gregg*, 122 Ga. 819, 50 S. E. 949; *Baisden & Co. v. Holmes-Hartsfield Co.* (Ga. App.), 60 S. E. 1031; *National Bank v. Citizens' Nat. Bank* (Tex. Civ. App.), 93 S. W. 209.

XVI. The Trial.

Little, if anything, need be said respecting the trial of actions or proceedings in which an intervention has been allowed. It is possible for the issues between the original parties and between them or some of them and the intervener to be of such a character that the court may properly proceed to try the one set of issues without at the same time trying the other: *McMillen v. Gibson*, 10 La. 517; but, on the other hand, this is generally not so, and if it is not, the court may properly refuse to separate the trials: *Grant v. Burgwyn*, 84 N. C. 560. If there is any issue presented by the intervention or upon which the intervener is entitled to be heard and it is of a character usually requiring a trial by jury, he is entitled to such trial, though neither of the other parties demands or desires it: *Lacroix v. Menard*, 3 Mart., N. S., 339, 15 Am. Dec. 161; *Rixa v. Rixa*, 35 Misc. Rep. 227, 71 N. Y. Supp. 815. Respecting the burden of proof, the same rule applies as to other litigants. If he seeks to recover property or to assert some right therein or otherwise tenders an affirmative issue and is met with a denial on the part of the other litigants, he must assume the burden of proof: *City Nat. Bank v. Crahan*, 135 Iowa, 230, 112 N. W. 793; *Wilson v. Munday*, 5 La. 483; *Conroy v. Ferree*, 68 Minn. 325, 71 N. W. 383; *Rock Island I. Co. v. Sloan*, 83 Mo. App. 438; *Graham P. Co. v. Crowther*, 92 Mo. App. 273; *Kelly-Goodfellow S. Co. v. Sally*, 114 Mo. App. 222, 89 S. W. 889; *Willard M. Co. v. Tierney & Co.*, 133 N. C. 630, 45 S. E. 1026.

XVII. The Statute of Limitations.

The operation of the statute of limitations must be considered with reference (1) to those cases in which the intervener seeks to assert some right and the statute is interposed as a defense against him, and (2) in cases in which he relies upon a statute as creating a defense in his favor or giving him a right to some affirmative relief. As to the cases of the first class, he may be regarded as having brought his action on the day on which his petition or complaint in intervention was filed, and if before that time the statute of limitations had become a perfect defense as against him, he cannot prevail: *Mason*

v. City of Chicago, 163 Ill. 351, 45 N. E. 567; Anderson v. Atchison etc. R. Co., 71 Kan. 453, 80 Pac. 946; City of Louisville v. Jacob, 27 Ky. Law Rep. 175, 84 S. W. 772. On the other hand, from the filing of his complaint, the statute of limitations ceases to operate against him: Geisenberger v. Cotton, 116 La. 651, 40 S. E. 929; Laidlaw v. Oregon Ry. & N. Co., 81 Fed. 876, 26 C. C. A. 665.

XVIII. The Judgment and the Relief Which may be Granted Therein.

Though leave to intervene is granted and a complaint pursuant thereto is filed, this does not necessarily result in a judgment on the merits with respect to the matters alleged in the complaint, for if no counterclaim or demand for affirmative relief has been filed against the intervener, he may at any time before the trial dismiss or withdraw his complaint of intervention: Sheldon v. Gunn, 56 Cal. 582; Schaetzel v. City of Huron, 6 S. D. 134, 60 N. W. 741: and though he does not expressly withdraw it, the court should enter a judgment dismissing it if he fails to appear at the trial: Noble v. Meyers, 76 Tex. 280, 13 S. W. 229. Where the intervener appears only for the purpose of assisting one of the original parties, the judgment may, of course, be for or against either of such parties, and may be proper under the verdict or findings, but where the intervener is allowed to appear and make himself a party for the purpose of claiming something in hostility to the other parties, he is entitled to such relief as may be appropriate to the issues presented by him and determined in his favor, except in so far as he may be properly met by the rule that he has no right to change the character of the proceeding and thereby obtain relief of a special or collateral character, and not within the main scope of the original action nor germane thereto: Loftus v. Fischer, 114 Cal. 131, 45 Pac. 1058. Thus, in a suit to condemn a railroad right of way for a reservoir, there is no right to intervene for the purpose of determining whether the railroad company has forfeited its franchise, and therefore its right to a right of way: Denver P. & I. Co. v. Denver & R. G. R. Co., 30 Colo. 204, 69 Pac. 568, 60 L. R. A. 383. In a suit to foreclose a mortgage, the court has no authority to determine title adverse to the mortgagor, and hence, though the claimant of an adverse title files a petition in intervention, the court cannot try his title, nor, without committing error, adjudicate in its final decree that he is without title: Ennis v. Wolff, 194 Ill. 420, 62 N. E. 842. In a suit to restrain interference with the outlet of a drain the owner of the land is not entitled, on intervention, to a judgment restraining the plaintiff from wrongfully diverting water through such drain: Orcutt v. Woodward (Iowa), 113 N. W. 848. In a suit to enforce a chattel mortgage to secure the payment of rent accruing under a lease of land, an intervener cannot be entitled to a decree setting aside a conveyance of the same land: Venmeter v. Fidelity Trust etc. Co., 107 Ky. 108, 53 S. W. 10.

In so far as the issues presented are proper for the consideration of the court, and whether they are proper, is, in our judgment, a matter determined by allowing the intervention and by such subsequent motions and proceedings as may be made or taken to test that question, the court has full authority to hear and determine them, and its determination is as conclusive for or against either of the parties, including the intervener, as is any determination made by the court acting within its jurisdiction: *Thompson v. Chaveau*, 7 Mart., N. S., 331, 18 Am. Dec. 246; *Braithwaite v. Aiken*, 3 N. D. 365, 56 N. W. 133; *Muhlenberg v. City of Tacoma*, 25 Wash. 36, 64 Pac. 925. On the other hand, it is error on the part of the court to determine any question or award any relief not within the issues presented by the intervention: *Braithwaite v. Aiken*, 1 N. D. 475, 48 N. W. 361. Though leave to intervene is granted, yet the intervener may expressly or impliedly withdraw from the intervention, in which event the court may render a judgment which, in effect, drops him from the proceeding and determines it only as between the original parties: *Harrison v. Clark*, 74 Conn. 18, 49 Atl. 186; *McCullough v. Connelly* (Iowa), 114 N. W. 301.

Not only may the final judgment in intervention amount to a conclusive determination of the rights of the parties, but the proceeding may, in advance of such determination, prevent the intervener from resorting to some other remedy. Thus, if the remedy by intervention is cumulative in the sense that one having another remedy need not resort to intervention, yet, if he does resort to it, this is an election not to pursue the other remedy, and, like other elections between remedies, is usually irrevocable: *Paris v. Sheppard*, 125 Iowa, 255, 101 N. W. 114.

XIX. Appeal.

If an intervention is allowed and the complaint being filed, some error occurs in the subsequent proceedings, the right to review the action of the court on appeal or writ of error is doubtless the same as in other cases, and the proceedings in the exercise of the right do not fall within the scope of this note. If the application for leave to intervene is denied, the order of denial does not terminate the action or proceeding, and in that sense is not final, and it has been hence held not to be subject to appeal under statutes allowing appeals from final judgments only: *Fairthorne v. Wigginton*, 11 B. Mon. 368; *Bennett v. Whitcomb*, 25 Minn. 148; *Greenwalt v. Natrona L. Co.* (Wyo.), 92 Pac. 1008; *Lewis v. Baltimore & L. R. Co.*, 62 Fed. 218, 10 C. C. A. 446. The refusal of leave to file a complaint of intervention or the striking it out, or sustaining a demurrer to it after it is filed, though it does not terminate the action or proceeding or dispose of it as between the original parties, does effectually terminate it as to the intervener or applicant, and, as to him, it is a final judgment or order. He may, therefore, appear and prose-

cute a writ of error without waiting for any further disposition of the case: *Stitch v. Dickinson*, 38 Cal. 608; *People v. Pfeiffer*, 59 Cal. 89; *Henry v. Travelers' Ins. Co.*, 16 Colo. 179, 26 Pac. 318; *Schlieder v. Martinez*, 38 La. Ann. 847; *Harman v. Barhydt*, 30 Neb. 236, 46 N. W. 489; *Rollins v. Rollins*, 76 N. C. 264; *Loven v. Parson*, 127 N. C. 301, 37 S. E. 271; *Bass v. Fontleroy*, 11 Tex. 698; ante, VI. In truth, it would appear that he must appeal from that order or he cannot appeal at all, for after he has been excluded from the case by the final action of the court on his application or petition, he is not a party to the action and cannot appeal from a final judgment entered between those who are parties: *People v. Pfeiffer*, 59 Cal. 89; *Lorber v. Connor*, 82 Iowa, 739, 47 N. W. 1006. On the other hand, granting a permission to intervene, or overruling a demurrer to a complaint of intervention, or refusing to strike it out, does not finally determine for or against anyone any of the questions involved, for the court may at a later stage of the proceedings conclude that the intervention ought not to have been allowed, or that the complaint was insufficient, and hence give judgment against the intervener. Therefore, it is our judgment that such an order is not appealable: *Jones v. New York L. Ins. Co.*, 11 Utah, 401, 40 Pac. 702; though of the decisions upon the subject falling within our observation the majority sustain an opposite conclusion: *First Nat. Bank v. Gill*, 50 Iowa, 425; *Central T. Co. v. Marietta N. G. Ry. Co.*, 48 Fed. 850, 1 C. C. A. 116. If leave has been granted and the complaint filed, the intervener becomes a party to the action or other proceeding, and as such entitled to appeal from any order or judgment therein prejudicial to him: *Gross v. Strzyzowski*, 124 Ill. App. 300; *In re Michigan C. R. Co.*, 124 Fed. 727, 59 C. C. A. 643; *Parsons v. Little*, 28 App. D. C. 218; and to be made a party to any appeal or writ of error which may be prosecuted by his adversaries, if their success in such prosecution might result in his detriment: *Kellogg v. Clark*, 15 La. 362; *Swearingen v. McDaniel*, 12 Rob. 203; *Hayden v. Mitchell* (Tex. Civ. App.), 24 S. W. 1085; *Fairfield v. Binnian*, 13 Wash. 1, 42 Pac. 632. It may happen that a decree on a complaint of intervention so disposes of questions on the merits as to become appealable, though the main suit has not reached a final conclusion: *Central T. Co. v. Madden*, 70 Fed. 451, 17 C. C. A. 236. Generally, however, the case does not so proceed and no appeal can be prosecuted until the cause is disposed of both with respect to the intervention and the original parties: *Fairfield v. Bibbian*, 13 Wash. 1, 42 Pac. 632. The courts of Louisiana have frequently held that if the amount claimed by the plaintiff is sufficient to give the supreme court jurisdiction, the interveners may appeal, though their respective claims are less than the jurisdictional amount: *Hart v. Lodwick*, 8 La. 164; *Buckner v. Baker*, 11 La. 459; *White Castle L. & S. Co. v. Hart*, 48 La. Ann. 1034, 20 South. 201.

DEMEULES v. JEWEL TEA COMPANY.

[103 Minn. 150, 114 N. W. 733.]

ACCORD AND SATISFACTION—Consideration.—The acceptance of a check and the indorsement thereof do not constitute an accord and satisfaction, if there is no consideration to support an agreement for an accord and satisfaction. There can be no accord and satisfaction of a disputed claim unless something is received to which the creditor had no legal right. (p. 316.)

THE ACCEPTANCE OF A CHECK for a Sum Conceded to be Due by the Drawer, the drawee claiming a larger amount, does not prevent the latter from applying the proceeds of the check upon the sum he claimed to be due, and then maintaining an action to recover the balance. (p. 316.)

PAYMENT, Burden of Proof Respecting.—The introduction in evidence of a check given by the defendant to the plaintiff does not make a prima facie case of payment in full so as to impose on the plaintiff the burden of proving that he had not collected and retained other sums for which defendant claimed he should account. (p. 317.)

Velikanje & Alcott, for the appellant.

Ayres & McDonald, for the respondent.

151 ELLIOTT, J. The Jewel Tea Company was engaged in the business of selling teas, coffees and spices in the city of Minneapolis. For some time prior to November, 1906, the respondent Demeules was employed by the company as a salesman and collector. To secure the faithful performance of his duties as such, Demeules deposited with the company a cash bond of \$150, upon condition that it should be returned to him upon the termination of the employment, less any amount which might then be owing to the company for money collected and not accounted for. When the employment was terminated Demeules demanded the return of the \$150. The company claimed that Demeules had failed to account for the sum of \$83.66, which amount it deducted from the \$150, and sent Demeules a check for the balance of \$66.34. This check was retained and cashed, and after crediting the amount on the claim Demeules brought suit against the company to recover the balance. The case was tried without a jury, and the court found that on November 1, 1906, when the employment ceased, there was due the defendant, for money collected and not turned over, the sum of \$20.20. After charging the plaintiff with the \$66.34 paid by the

check and \$20.20 which had been collected, judgment was ordered against the defendant for the balance of \$63.46. The court further found that the defendant offered no evidence "of failure on the part of the plaintiff in any of his duties under such deposit, except the failure to pay over the \$20.20." The defendant moved for modified findings of fact and conclusions of law, which were denied, and the appeal is from an order thereafter made denying its motion for a new trial. The assignments ¹⁵² of error raise two questions: 1. Accord and satisfaction; and 2. The burden of proof.

1. The check for \$66.34, which was accepted and retained by Demeules, contained the following recital: "Return in full of \$150.00 cash bond. Disputed and falsified balances \$83.66; amount of this check, \$66.34; total, \$150.00." The appellant claims that the acceptance of this check with the indorsement thereon constituted an accord and satisfaction. But the evidence shows that there was no consideration for such an agreement, such as is necessary under all the authorities: *Duluth Chamber of Commerce v. Knowlton*, 42 Minn. 229, 44 N. W. 2; *Marion v. Heimbach*, 62 Minn. 214, 64 N. W. 386; *Ness v. Minnesota & Colorado Co.*, 87 Minn. 413, 92 N. W. 333; *Byrnes v. Byrnes*, 92 Minn. 73, 75, 99 N. W. 426; *Hoidale v. Wood*, 93 Minn. 190, 100 N. W. 1100, and cases cited in 1 Cyc. 311.

Demeules, at the time the check was sent, claimed that the company owed him \$150. The company claimed that it owed but \$66.34. The claim was not unliquidated in the ordinary acceptation of the term. The company paid, and Demeules accepted and applied, only what the company conceded that it owed. It therefore suffered no detriment by paying that amount. It yielded nothing, and Demeules received nothing, more than the company conceded was his due. If it, while conceding that it owed \$66.34 only, had paid any greater sum whatever, it would have suffered a detriment by to that extent yielding its claim. There would then have been a consideration for the respondent's agreement to accept less than he claimed was due him. As said in *Ness v. Minnesota & Colorado Co.*, 87 Minn. 413, 92 N. W. 333: "There can be no accord and satisfaction of a disputed claim, unless something of legal value has been received in full payment thereof to which the creditor had no previous right." The company admitted that Demeules had the prior right to the \$66.34 which

it paid him. He therefore merely received and obtained money to which he was entitled, and this does not amount to an accord and satisfaction: *Marion v. Heimbach*, 62 Minn. 214, 64 N. W. 386. There are cases in other states which sustain the appellant's position; but, after giving them careful consideration, we have come to the conclusion that the principle upon which they rest is inconsistent with the prior decisions of this court.

¹⁵³ 2. The complaint alleged in substance that the plaintiff had deposited the sum of \$150 in cash with the defendant, to be repaid upon demand upon the termination of the employment, and that no part had been repaid, except the sum of \$66, although the employment had ceased and due demand for the return of the money had been made. The answer alleged that the plaintiff had failed to account for \$83.66, and that the defendant had paid the full balance of \$66.34 to the plaintiff. The reply admitted the payment of the \$66.34, and denied the other allegations of the answer. The controversy, then, was as to the appropriation of the \$83.66. When the case came on for trial, the plaintiff rested upon the admissions in the pleadings, and the defendant proceeded to prove the allegations of the answer. It showed that the plaintiff had collected and retained \$20.20, but offered no evidence as to the misappropriation of other money, except the check for \$66.34, with the indorsement thereon which has been quoted. Upon this state of the evidence, the case being submitted, the court found a balance in favor of the plaintiff.

The appellant contends that the introduction of this check, with its recital, made a *prima facie* case of payment in full, which shifted the burden to the plaintiff to show that he had not collected and retained the \$83.66 referred to in its recital. This is a misapprehension of the rule which sometimes shifts the burden of proof during a trial. The duty of going forward with evidence may shift from time to time; but the burden of persuading the trier of facts of the truth of essential allegations necessary to constitute a cause of action or defense never shifts. It is a fixed rule of law: *Terryberry v. Woods*, 69 Vt. 94, 37 Atl. 246; *Rapp v. Sarpy County*, 71 Neb. 382, 98 N. W. 1042, 102 N. W. 242. A receipt in full, or a check containing recitals which are the equivalent of such a receipt may, if unquestioned and unexplained, prove payment. It is not conclusive. In this case the evidence was all

in. The check, while not sufficient to show accord and satisfaction, was evidence which tended to show that the company had paid \$66.34, and that it then claimed that Demeules had collected and not accounted for \$83.66. The plaintiff, when called by the defendant for cross-examination, had stated the circumstances under which he accepted the check. The evidence was all before the court, and its conclusion was ¹⁵⁴ that Demeules had failed to account for \$20.20 only, and we find no reason for interfering with this result.

The orders of the court are therefore affirmed.

The Delivery and Acceptance of a Check does not ordinarily constitute payment: *Interstate Nat. Bank v. Ringo*, 72 Kan. 116, 115 Am. St. Rep. 176, and cases cited in the cross-reference note thereto. It may, however, be regarded as a conditional payment, which becomes complete when the amount due on it is actually paid: *Jacobson v. Bentzler*, 127 Wis. 566, 115 Am. St. Rep. 1052.

On Accord and Satisfaction see the note to *Harrison v. Henderson*, 100 Am. St. Rep. 390. If an agreement is fully executed to discharge a debt by the payment of a smaller sum, and such discharge is evidenced by a written receipt for the lesser sum in full satisfaction of the greater, it is a valid and irrevocable act and discharges the debt: *Dreyfus v. Roberts*, 75 Ark. 354, 112 Am. St. Rep. 67.

On the Application of Payments, see the note to *McWhorter v. Bluthenthal*, 96 Am. St. Rep. 44.

STEWART v. GREAT NORTHERN RAILWAY COMPANY.

[103 Minn. 156, 114 N. W. 953.]

KILLING OF A HUMAN BEING, Liability for.—At the common law no liability existed for wrongfully causing the death of a human being, and none exists at present unless created by statute. (p. 319.)

KILLING OF A HUMAN BEING—Who may Sue for.—Until the legislature has declared who shall bring an action for the killing of a human being and who shall be the beneficiary thereof, the common law has not been changed so as to enable the action to be maintained. (p. 319.)

SUIT UNDER STATUTE Creating Liability for Killing a Human Being.—In an action for the killing of a human being in another state the plaintiff must plead the statute of that state creating the right of action and also that part of the statute showing he may maintain an action thereunder. It will not be presumed that the statute of the state where the cause of action arose is the same as that where the action was brought. (p. 320.)

M. L. Countryman, for the appellant.

W. E. Dodge and Wm. A. Tautges, for the respondent.

¹⁵⁷ ELLIOTT, J. This is an action brought by Anna E. Stewart, as administratrix of the estate of Toby R. Irwin, deceased, against the Great Northern Railway Company, to recover damages for the wrongful killing of Toby R. Irwin by the defendant in the state of North Dakota. The defendant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, and the appeal is from an order overruling the demurrer. The defect in the complaint is the failure to plead any statute of North Dakota which confers the right to maintain this action upon the administratrix of the deceased.

At common law no liability existed for wrongfully causing the death of a person, and none exists at present unless created by statute. Such statutes have been adopted in nearly all the states, including Minnesota. The presumption that the common law is the same in a sister state as in this state does not extend to the statutory law. Therefore, before a person can recover damages in this state for the wrongful killing of a person in a foreign state, he must plead and prove the existence of a statute of that state which creates a liability and also confers upon him the right to enforce that liability. The right of the particular person to maintain the action is as essential as the liability of the defendant. Until the legislature has declared who shall bring the statutory action and who shall be the beneficiary thereof, the common law has not been changed to such an extent as to enable an action to be maintained: *Woodward v. Michigan etc. R. Co.*, 10 Ohio St. 121; *Usher v. West Jersey Ry. Co.*, 126 Pa. 206, 12 Am. St. Rep. 863, 17 Atl. 597, 4 L. R. A. 261; *McGinnis v. Missouri C. & F. Co.*, 174 Mo. 225, 97 Am. St. Rep. 553, 73 S. W. 586; *Lee v. Missouri Pac. Ry. Co.*, 195 Mo. 400, 92 S. W. 614. The foreign statute must be pleaded, and the remedy prescribed by it must be pursued: *Whitlow v. Nashville etc. R. Co.*, 114 Tenn. 344, 84 S. W. 618, 68 L. R. A. 503. See *Powell v. Great Northern Ry. Co.*, 102 Minn. 448, 113 N. W. 1017.

¹⁵⁸ This complaint alleges that the cause of action arose in North Dakota, and pleads that portion only of the statute of North Dakota which provides that "whenever the death of a person shall be caused by a wrongful act, neglect or de-

fault, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation or company which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." This creates a liability on the part of the defendant, but does not confer the right to recover the damages upon this plaintiff. As it cannot be presumed that the statute of North Dakota is the same as that of Minnesota, the complaint is defective, and the demurrer should have been sustained.

The order is therefore reversed.

The Right of Action for Death by wrongful act in another state is discussed in the monographic notes to *Attrill v. Huntington*, 14 Am. St. Rep. 353-355; *Gray v. Telegraph Co.*, 91 Am. St. Rep. 726; and in the case of *Wabash R. R. Co. v. Fox*, 64 Ohio St. 133, 83 Am. St. Rep. 739, and cases cited in the cross-reference note thereto. The legislature cannot authorize a person to enforce in the courts of the state a liability for wrongful death created by the laws of another state, when such person has no right to enforce such liability in the courts of the latter state, for such a law would be tantamount to an extraterritorial enactment: *McGinnis v. Missouri Car etc. Co.*, 174 Mo. 225, 97 Am. St. Rep. 553.

ANDERSON v. NYSTROM.

[103 Minn. 168, 114 N. W. 742.]

PLEADING WANT OF CONSIDERATION.—If, in an action upon promissory notes, the defendant alleges that he received no consideration for such notes, this is a sufficient plea of want of consideration for their execution. (p. 322.)

LIMITATION OF ACTIONS.—**Partial Payment.**—If a debtor against whom his creditor holds three promissory notes, all outlawed, makes a payment without specifying upon which it is to be credited, this does not revive any of the notes, and the holder cannot accomplish such revivor by crediting the sum paid on two of the notes. (p. 322.)

LIMITATION OF ACTIONS.—**New Promise.**—To infer a new promise from the part payment of obligations all barred by the statute of limitations, the debt must be definitely and specifically pointed out and the intention to discharge it in part made manifest. (pp. 322, 323.)

LIMITATIONS OF ACTIONS, New Promise is Inferable Only from the Act of the Debtor.—No new promise can be inferred from the act of the creditor in applying a payment to one of several obligations. (p. 323.)

CONTRACT, Consideration for, When Insufficient.—If a creditor holds several promissory notes against a decedent, all of which were barred prior to his death, and his heirs execute a new note for the amount of the old notes on the promise of the creditor not to make any trouble for the estate of the decedent, this promise is not a sufficient consideration for a new note. (p. 324.)

CONTRACTS, Consideration Consisting of Promise to Refrain from the Doing of an Act.—The mere promise to refrain from the doing of an act does not constitute a sufficient consideration to support a contract, unless some advantage accrues to the promisee or some loss or disadvantage is sustained by the promisor. (pp. 324, 325.)

W. H. Cutting, for the appellant.

C. M. Ferguson, for the respondent.

¹⁶⁹ **BROWN, J.** The facts in this case are as follows: One Ole Nystrom was, in his lifetime, indebted to plaintiff in the sum of three hundred dollars, and made and delivered to him his three promissory notes therefor, as follows: One dated December 29, 1888, for one hundred dollars, due three months thereafter; one dated June 20, 1889, for one hundred dollars, due in three months; and one dated March 23, 1891, for one hundred dollars, due November 1st, following. On April 27, 1898, after the notes were all barred by the statute of limitations, Nystrom gave his son Peter, one of the defendants in this action, fifty dollars, directing him to pay it to plaintiff upon the indebtedness represented by the notes. The money was paid to plaintiff accordingly, who, without any instructions from Nystrom or his son, who paid over the money, indorsed as of that date twenty-five dollars upon one and twenty-five dollars upon another of the three notes so held by him. Thereafter, on May 1, 1902, Nystrom died, and his estate was insolvent. On September 22, 1902, defendants, sons of Nystrom, called upon plaintiff and stated that they came to ascertain what claim he had against their father's estate. Whereupon plaintiff produced the promissory notes already referred to, computed the interest due thereon, and stated that his claim was four hundred and seventy-five dollars. Thereupon, in consideration of the surrender of the old notes and plaintiff's promise not to make the estate "any trouble on account of them," defendants made and delivered to him the

note in suit, promising thereby to pay plaintiff four hundred and seventy-five dollars on October 1, 1903. They ¹⁷⁰ failed to pay the note, and plaintiff brought this action to recover the amount due thereon. Defendants answered, denying that "they or either of them either made, executed, or delivered the promissory note mentioned in said complaint for value received, and allege that they did not, nor did either of them, receive any consideration for said promissory note." At the trial a verdict was directed for defendants, and plaintiff appealed from an order denying his alternative motion for judgment notwithstanding the verdict or for a new trial.

The primary question presented, aside from the contention of plaintiff that the answer states no defense to the action, is whether defendants received any consideration for the note in suit, and this involves the further questions: (1) Whether the old notes were barred by the statute of limitations at the time the note in suit was given; and (2) even though they were barred, whether the promise of plaintiff to make the estate no trouble on account of the old notes furnished a sufficient consideration for the note in suit. We dispose of the claim that the answer fails to state a defense without extended discussion. It affirmatively alleges that defendants received no consideration for the note. This we think sufficient to admit the defense relied upon at the trial, the merits of which are now before us, and we come directly to the principal questions in the case.

1. The first question, namely, whether the old notes were barred by the statute of limitations when the note in suit was given, is controlled by the effect to be given to the payment of fifty dollars in 1898. The facts upon this question are not in dispute. At the time the payment was made, plaintiff held three notes against Nystrom. The payment was made generally upon the indebtedness due plaintiff, and no directions were given that it be applied upon any particular note. All the notes were then outlawed, and plaintiff of his own motion applied one-half of the amount paid upon each of two of them. It is claimed by plaintiff that this payment and application was sufficient to revive the two notes, and that they were valid obligations of Nystrom when the note in suit was given. We are unable to concur in this contention.

In order to infer a new promise from part payment of an obligation already barred by the statute of limitations, the

debt must be definitely and specifically pointed out, and an intention to discharge it in part ¹⁷¹ made manifest. This must appear from the act of the debtor, as no new promise can be inferred from the conduct of the creditor in applying the payment upon one of several obligations. The authorities are quite uniform in holding that where the creditor has several separate demands, and payment is made by the debtor upon his indebtedness, without specifying any particular debt or demand, the payment does not operate to revive any of the debts or obligations: *Smith v. Moulton*, 12 Minn. 229 (352). In that case it was held that a general acknowledgment of indebtedness by a debtor to a creditor holding several claims against him does not remove the bar of the statute as to any particular debt. It there appeared that plaintiff held three promissory notes against defendant, who, after they were barred, made in writing a general acknowledgment of indebtedness, and because no particular note was indicated by the acknowledgment the court held that neither was revived: See, also, *Whitney v. Reese*, 11 Minn. 87 (138). No distinction can be made on principle between a written acknowledgment and part payment. In the case of the written acknowledgment, express recognition of the existing indebtedness and an intention to revive it is shown; while, in the case of part payment, the recognition and intent to revive is an inference the law raises from the part payment.

The decisions of this court in the cases cited would seem to be the rule both in England and in the other states in this country, though in this country the authorities are not harmonious: *Wood's Limitations of Actions*, 110. In *Burn v. Boulton*, 2 Com. B. 476, it was held that, where there are two clear and undisputed debts, the case is not taken out of the statute of limitations as to either by a part payment not specifically appropriated to one debt or the other. The appropriation or application must be by the voluntary act of the debtor, for it is his act which removes the bar of the statute: *Wolford v. Cook*, 71 Minn. 77, 70 Am. St. Rep. 315, 73 N. W. 706; *Mills v. Fowkes*, 5 Bing. N. C. 455; *Tippetts v. Heane*, 1 Crompt. M. & R. 252; *Armistead v. Brooke*, 18 Ark. 521; *Ramsay v. Warner*, 97 Mass. 8; *Pond v. Williams*, 1 Gray (Mass.), 630; *Blake v. Sawyer*, 83 Me. 129, 23 Am. St. Rep. 762, 21 Atl. 834, 12 L. R. A. 712. In the case of *Landis v. Roth*, 109 Pa. 621, 58 Am. Rep. 747,

1 Atl. 49, three promissory notes were involved, and the¹⁷² court held that a promise to pay a debt barred by the statute of limitations will operate to remove the bar of the statute only when the particular debt is unequivocally identified. "Any uncertainty," says the court, "either in the acknowledgment or identification of the debt, is fatal." For a general collection of authorities on the subject, see 25 Cyc. 1332, 1371; Wood's Limitations of Actions, sec. 110.

The case of *Ayer v. Hawkins*, 19 Vt. 26, if it be said to sustain plaintiff's contention, is at variance with the rule adopted by this court in the cases cited, which we feel constrained to follow and apply.

Of course, where a payment is made to a creditor holding several distinct claims, and no directions are given by the debtor to apply it upon any definite claim, the creditor may apply it upon any one, or distribute it among all the claims he holds; and, if they be not then barred, such application will interrupt the running of the statute from the date of payment. But where some of the claims are barred, though the creditor may apply the payment thereon, no specific application being made by the debtor, he has no implied right to so apply it for the purpose of removing the bar of the statute, and such application by him will not have that effect: *Nash v. Hodgson*, 6 De Gex, M. & G. 474; *Ramsay v. Warner*, 97 Mass. 8; *Brown v. Johnson*, 20 La. Ann. 486; 8 Columbia Law Rev. 51. It follows, therefore, that the old notes were not revived by the payment of fifty dollars made under the circumstances stated, and their surrender to defendants furnished no sufficient consideration for the note in suit.

2. We pass, then, to the second question—whether plaintiff's promise to make the estate of Nystrom no trouble constituted a valid legal consideration.

We find no difficulty in disposing of this branch of the case. The old notes were outlawed, and the estate was insolvent. Defendants were neither legally nor morally bound to pay them, and there was no trouble plaintiff could make, conceding that a promise to refrain therefrom would constitute a sufficient consideration for the new note. Whatever efforts plaintiff would have been able to make to collect the old notes from the estate would have been fruitless. He lost nothing by his promise, and was deprived, at most, of a little recreation in pursuing in the probate court an insolvent es-

tate. A promise to ¹⁷³ refrain from resorting to legal means to enforce a valid obligation might in a proper case furnish a valid consideration for a promise by a third person to pay the same; but in a case like this, where the claim threatened to be enforced was invalid and worthless, and not the obligation of the promisee, a promise not to attempt to enforce it, or to refrain from making trouble concerning it, is not a consideration recognized in the law as valuable: *Didlake v. Robb*, 1 Woods, 680, Fed. Cas. No. 3899; *Taylor v. Weeks*, 129 Mich. 233, 88 N. W. 466; *McElven v. Sloan*, 56 Ga. 208; *Schroeder v. Fink*, 60 Md. 436.

It is well established that to constitute a mere promise to refrain from doing an act a consideration sufficient to support a contract, an advantage must accrue therefrom to the promisee, or a loss or disadvantage be sustained by the promisor: *Day v. Gardner*, 42 N. J. Eq. 199, 7 Atl. 365; *Cottage v. Kendall*, 121 Mass. 529, 23 Am. Rep. 286; *University of Des Moines v. Livingston*, 57 Iowa, 307, 42 Am. Rep. 42, 10 N. W. 738; note to *Hamer v. Sidway*, 124 N. Y. 538, 21 Am. St. Rep. 693, 27 N. E. 256, 12 L. R. A. 463. Neither appears in this case. Neither party lost or gained by plaintiff's promise. The case is unlike *Perkins v. Trinka*, 30 Minn. 241, 15 N. W. 115, cited by appellant, where the parties settled and compromised doubtful and questionable rights. No doubtful or questionable rights or obligations are involved in the case at bar.

For these reasons, the learned trial court properly directed a verdict for defendants.

The Removal of the Bar of the Statute of Limitations, and the suspension of the running of the statute, by an acknowledgment or new promise, are discussed in the note to *Warren v. Cleveland*, 102 Am. St. Rep. 75. It has been affirmed that a payment need not have been made with intent that it should be applied to the payment of the debt to remove the bar of the statute; it is sufficient if made to the creditor by way of payment without directing its application: *McDowell v. McDowell*, 75 Vt. 401, 98 Am. St. Rep. 831.

On the Subject of Application of Payments, see the note to *McWhorter v. Bluthenthal*, 96 Am. St. Rep. 44.

STATE v. HALVERSON.

[103 Minn. 265, 114 N. W. 957.]

WITNESSES, Presumption as to Whether They Speak the Truth.—There is no presumption that a witness speaks the truth, and a statement to the jury that there is such presumption is both erroneous and presumably prejudicial. (pp. 326, 327.)

WITNESS, Credibility of, Instructions Concerning.—The question of the credibility of a witness is solely for the jury, and is not a matter upon which they should be guided or controlled by general statements or instructions from the court. (p. 327.)

CREDIBILITY OF WITNESS, Instruction Concerning, When Prejudicial.—If, in a prosecution for bastardy, the court instructs the jury that it is to be taken for granted that a witness speaks the truth, and consequently that the prosecuting witness tells the truth, unless the force of surrounding circumstances and the attendant facts are such as compel a belief in the minds of the jury that falsehood instead of truth was spoken, such instruction is erroneous and must be presumed to have been prejudicial to the defendant. (p. 328.)

Thomas Spillane, for the appellant.

George J. Allen and Harold J. Richardson, for the state.

²⁶⁵ ELLIOTT, J. In an action to compel the defendant to support a bastard child, the complaining witness testified to a material fact which strongly tended to show that the defendant was the father of the child. At the request of the defendant the court gave certain instructions to the effect that the particular issue upon which the complaining witness testified must be determined by the jurors from all the circumstances and evidence, and that they must determine from the evidence whether or not the ²⁶⁶ witness testified truthfully. After giving the instructions as requested by the defendant, the court, by way of explanation, added the following: "It is to be taken for granted that a witness speaks the truth on the stand, and consequently that Minnie Westrum in that particular tells the truth, unless the force of surrounding circumstances and the attendant facts are such as to compel the belief in the minds of the jury that falsehood, instead of truth, was spoken."

No exception to this part of the charge was taken at the time, but it was duly assigned as error on the motion for a new trial. The instruction related to a controlling proposition of law, and the rule stated and applied in *Steinbauer v. Stone*, 85 Minn. 274, 88 N. W. 754, and subsequent cases,

has no application. This instruction was erroneous, and must have been prejudicial to the defendant. It related to the evidence of the complaining witness, who was pecuniarily interested in the result of the action (*State v. Nestaval*, 72 Minn. 415, 75 N. W. 725), and referred to an issue which was of great importance in the case. It is true that the defendant asked for instructions specifically applicable to the testimony of this witness, and they were given by the court; but the effect of the correct instructions was destroyed by the explanation. The proceeding necessarily accentuated the importance of the particular evidence of the complaining witness.

It is sometimes said by text-writers and courts (1 Jones on Evidence, sec. 12; *Cornwall v. State*, 91 Ga. 277, 18 S. E. 154) that there is a presumption that a witness testifies truthfully. There is certainly no presumption or inference to the contrary, and it is possibly true, as a mere statement of fact, that witnesses do ordinarily tell the truth. But there is no presumption of law to that effect (*State v. Smallwood*, 75 N. C. 104; *State v. Jones*, 77 N. C. 520), and a statement such as was made to the jury by the trial court is liable to mislead. As said in *Chicago U. T. Co. v. O'Brien*, 219 Ill. 303, 76 N. E. 341: "The law has no rule which the court may lay down in instructions to the jury that there is a presumption that an unimpeached witness has testified truly, and such instructions infringe upon the province of the jury to determine the credibility of the witnesses and the weight and value of their testimony": See, also, *Hauser v. People*, 210 Ill. 253, 71 N. E. 416; *Bradley v. Gorham*, 77 Conn. 211, 58 Atl. 698, 66 L. R. A. 934.

²⁰⁷ The jurors should be allowed to take the testimony of the witness for just what, in their judgment, it is worth, in the light of all the evidence in the case and the circumstances which have been disclosed by the evidence. The question of credibility is for the jury. It is not a matter upon which it should be guided and controlled by general statements of inferences and rules of logic announced by the court. As said by Professor Thayer: "The law has no mandamus to the logical faculty. It orders nobody to draw inferences": *Preliminary Treatise on Evidence*, p. 314, note. A witness presents himself as credible and worthy of belief. If he makes a good appearance, and tells a story which is reasonable and probable, and free from anything which creates sus-

fault, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation or company which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." This creates a liability on the part of the defendant, but does not confer the right to recover the damages upon this plaintiff. As it cannot be presumed that the statute of North Dakota is the same as that of Minnesota, the complaint is defective, and the demurrer should have been sustained.

The order is therefore reversed.

The Right of Action for Death by wrongful act in another state is discussed in the monographic notes to *Attrill v. Huntington*, 14 Am. St. Rep. 353-355; *Gray v. Telegraph Co.*, 91 Am. St. Rep. 726; and in the case of *Wabash R. R. Co. v. Fox*, 64 Ohio St. 133, 83 Am. St. Rep. 739, and cases cited in the cross-reference note thereto. The legislature cannot authorize a person to enforce in the courts of the state a liability for wrongful death created by the laws of another state, when such person has no right to enforce such liability in the courts of the latter state, for such a law would be tantamount to an extraterritorial enactment: *McGinnis v. Missouri Car etc. Co.*, 174 Mo. 225, 97 Am. St. Rep. 553.

ANDERSON v. NYSTROM.

[103 Minn. 168, 114 N. W. 742.]

PLEADING WANT OF CONSIDERATION.—If, in an action upon promissory notes, the defendant alleges that he received no consideration for such notes, this is a sufficient plea of want of consideration for their execution. (p. 322.)

LIMITATION OF ACTIONS.—**Partial Payment.**—If a debtor against whom his creditor holds three promissory notes, all outlawed, makes a payment without specifying upon which it is to be credited, this does not revive any of the notes, and the holder cannot accomplish such revivor by crediting the sum paid on two of the notes. (p. 322.)

LIMITATION OF ACTIONS.—**New Promise.**—To infer a new promise from the part payment of obligations all barred by the statute of limitations, the debt must be definitely and specifically pointed out and the intention to discharge it in part made manifest. (pp. 322, 323.)

LIMITATIONS OF ACTIONS, New Promise is Inferable Only from the Act of the Debtor.—No new promise can be inferred from the act of the creditor in applying a payment to one of several obligations. (p. 323.)

CONTRACT, Consideration for, When Insufficient.—If a creditor holds several promissory notes against a decedent, all of which were barred prior to his death, and his heirs execute a new note for the amount of the old notes on the promise of the creditor not to make any trouble for the estate of the decedent, this promise is not a sufficient consideration for a new note. (p. 324.)

CONTRACTS, Consideration Consisting of Promise to Refrain from the Doing of an Act.—The mere promise to refrain from the doing of an act does not constitute a sufficient consideration to support a contract, unless some advantage accrues to the promisee or some loss or disadvantage is sustained by the promisor. (pp. 324, 325.)

W. H. Cutting, for the appellant.

C. M. Ferguson, for the respondent.

169 BROWN, J. The facts in this case are as follows: One Ole Nystrom was, in his lifetime, indebted to plaintiff in the sum of three hundred dollars, and made and delivered to him his three promissory notes therefor, as follows: One dated December 29, 1888, for one hundred dollars, due three months thereafter; one dated June 20, 1889, for one hundred dollars, due in three months; and one dated March 23, 1891, for one hundred dollars, due November 1st, following. On April 27, 1898, after the notes were all barred by the statute of limitations, Nystrom gave his son Peter, one of the defendants in this action, fifty dollars, directing him to pay it to plaintiff upon the indebtedness represented by the notes. The money was paid to plaintiff accordingly, who, without any instructions from Nystrom or his son, who paid over the money, indorsed as of that date twenty-five dollars upon one and twenty-five dollars upon another of the three notes so held by him. Thereafter, on May 1, 1902, Nystrom died, and his estate was insolvent. On September 22, 1902, defendants, sons of Nystrom, called upon plaintiff and stated that they came to ascertain what claim he had against their father's estate. Whereupon plaintiff produced the promissory notes already referred to, computed the interest due thereon, and stated that his claim was four hundred and seventy-five dollars. Thereupon, in consideration of the surrender of the old notes and plaintiff's promise not to make the estate "any trouble on account of them," defendants made and delivered to him the

bert, upon his death, the sum of two thousand dollars. The policy had a cash value of two hundred and seventy dollars. After the service of the order in supplementary proceedings, and while the same was in full force, Holbert assigned his policy to his wife, Mary C. Holbert, and thereafter she borrowed from the society the sum of two hundred and seventy dollars on the policy, which was then assigned to the company as security for such loan. On March 13, 1907, the judgment creditor, Dohs, made an affidavit setting forth the foregoing facts and applied for an order of the district court requiring Holbert to appear, answer and show cause why he should not be punished for contempt. The order was duly made and served, and on March 16th the judgment creditor appeared and showed to the court that theretofore in the supplementary proceedings one L. A. Straight had been appointed receiver of his property at the instance of the judgment creditor, Dohs; that on February 14, 1906, Straight, as such receiver, had commenced an action against Mary C. Holbert to set aside the transfer of the policy in question and to have the policy transferred and assigned to him in satisfaction of his judgment; that a demurrer was interposed to the complaint in such action, and that after hearing thereon judgment was entered sustaining the demurrer; that no amendment had been made to the complaint, and no appeal taken from the order sustaining the demurrer. It further appeared that on September 21, 1906, Straight, as such receiver, commenced a second action in the same court against Mary C. Holbert and the Equitable Life Assurance Society to set aside the assignment of the policy to her, and that the action was, on March 13, 1907, submitted to the court, and was undetermined at the time of the institution of the contempt proceedings. The two actions were identical, except that the latter was limited ²⁸⁵ to one policy, while the former action included that policy with certain others. While the contempt proceedings were pending, the second action was determined in favor of the defendant, upon the ground that the judgment in the first case was res adjudicata. The order in the contempt proceedings was thereafter vacated and the proceedings dismissed.

In a memorandum attached to the order the trial court said: "In brief, this court has already determined, and it is a matter of solemn judgment, that the receiver, representing the creditors in said proceedings, had no interest in this policy

or the proceeds thereof; that the same was not transferred by said Robert C. Holbert in fraud of his creditors; and in view of this determination, which stands unchallenged, the conclusion inevitably follows that Robert C. Holbert had good right to make the transfer complained of and is not in disobedience of the restraining order of this court." With this conclusion we agree. The receiver was appointed at the instance of this appellant. The actions were brought for his benefit, for the purpose of having the transfers of the policies, and of the particular policy in question, set aside and the proceeds thereof applied to the payment of the appellant's judgment. The court, after a full hearing, determined the issue in favor of the defendant. The order sustaining the demurrer in the first action was upon the merits: *Day v. Mountin*, 89 Minn. 297, 94 N. W. 887; *Carlin v. Brackett*, 38 Minn. 307, 37 N. W. 342. In the second action the court determined that the matter was *res adjudicata*. The appellant was privy to the actions of Straight, who prosecuted the actions on his behalf (*Dunham v. Byrnes*, 36 Minn. 106, 30 N. W. 402), and is therefore bound by the judgments rendered therein to the effect that the assignment of the policy was not a fraud upon the creditors of Holbert and was not a transfer of nonexempt property.

The order is therefore affirmed.

A Judgment Against the Receiver of a partnership in a suit by leave of court of a claim in the nature of costs incurred by him in managing the business is conclusive against the surviving partner and creditors, whether made parties to the action or not: Painter v. Painter, 138 Cal. 231, 94 Am. St. Rep. 47, and note.

HYVONEN v. HECTOR IRON COMPANY.

[103 Minn. 331, 115 N. W. 167.]

EVIDENCE—Declarations of Agent, When Admissible.—If an accident occurs in a mine while the engineer is at work, and, within twenty or twenty-five minutes afterward, and while he is still at his work, he being asked how the accident occurred, answers that he got scared and turned a brake open entirely, or turned it the wrong way, this being in the presence of the injured parties and before the doctors arrived, such declaration is admissible in evidence, whether it be treated as a spontaneous exclamation or considered as an admission by an agent in the course of his employment. (p. 333.)

A STATUTE will not be Considered as Contradictory, nor as imposing impossible conditions, where such construction can be avoided. (p. 334.)

DAMAGES—Second Breaking of a Leg After an Accident.—Where, as the result of an accident, the plaintiff's leg was broken, and some weeks afterward, while walking on crutches, he slipped and fell, breaking his leg again in the same place as before, evidence of this second breaking is admissible in an action to recover damages on the ground that the accident was due to defendant's negligence. It is for the jury to say whether the second breaking was a direct result of the first. (p. 335.)

Action to recover damages for personal injuries. Verdict for the plaintiff. The defendant moved for a new trial and subsequently appealed from an order denying the motion.

E. C. Kennedy, for the appellant.

John R. Heino, Theo. Hollister and Wm. H. Lamson, for the respondent.

³³¹ LEWIS, J. Appellant company was operating a mine in St. Louis county, and respondent was employed as a miner in underground work. A skip was operated in the shaft by means of a wire cable and a steam engine situated in the engine-house, about one hundred feet from the top of the shaft. Respondent, with four others, got in to the skip, and the engineer started to lower them to the bottom of the shaft, and when the skip had gone about twenty feet it stopped, and then ³³² dropped to the bottom, causing serious injuries to respondent and others. The injured men were immediately taken to the surface in the skip, and respondent was carried to the engine-house. Soon after arriving at the surface two or three of the men proceeded toward the engine-house, and the engineer came toward them, and one of them asked him how he let the skip go down in that manner, to

which he replied: "At first, in opening the brake it commenced to go a little too fast, and then I turned it, and turned it—open entirely." Another witness testified that the engineer was asked: "How you let the skip down that way when four bells was rung?" In answer to which the engineer said that "he got kind of scared"; that it was going too fast, and he was going to brake it, and turned the brake the wrong way. These declarations were admitted in evidence over objections upon the ground that it was hearsay evidence, irrelevant and immaterial, and no part of the *res gestae*.

In the trial court's memorandum attention is called to the confusion of the authorities upon the subject of *res gestae*, and the court observes that the declarations were made within twenty or twenty-five minutes after the falling of the skip, and within five minutes from the time the men arrived at the surface, when the general result of the accident became known to the engineer; that he was on duty at that time; that the doctors had not yet arrived; that there was some excitement; that it was in the presence of the injured party, and at the place where the disputed act of negligence occurred. We think the case is fairly within the rule announced in *O'Connor v. Chicago etc. Ry. Co.*, 27 Minn. 166, 38 Am. Rep. 288, 6 N. W. 481. The declaration was so closely connected with the transaction that it was competent evidence in the nature of an admission, whether it be treated as a spontaneous exclamation (3 Wigmore on Evidence, secs. 1745-1757), or whether it be considered as an admission by an agent while engaged in the course of his employment.

Statements of this character, by employes or agents intrusted with important duties with respect to machinery, or in the control of railway trains, have been received in evidence when made under such circumstances and at such a time as to indicate that they are entitled to credit. The rule has become so well settled with reference to this particular class of cases that no additional light can be thrown on ³³³ the subject by attempting to discuss it here, or to determine under what particular head or rule of evidence such declarations are admissible. The following citations are sufficient to indicate the position of the courts on the question: *State v. Horan*, 32 Minn. 394, 50 Am. Rep. 583, 20 N. W. 905; *New York etc. Ry. v. Rogers*, 11 Colo. 6, 7 Am. St. Rep. 198, 16 Pac. 719; *Hermes v. Chicago etc. Ry.*,

80 Wis. 590, 27 Am. St. Rep. 69, 50 N. W. 584; San Antonio etc. Ry. v. Gray, 95 Tex. 424, 67 S. W. 763; Hooker v. Chicago etc. Ry., 76 Wis. 542, 44 N. W. 1085; Roberts v. Port Blakely M. Co., 30 Wash. 25, 70 Pac. 111; Union Pacific v. Edmondson (Neb.), 110 N. W. 650.

2. It was admitted at the trial that the engineer in charge of the engine-house had no license, as provided by sections 2180 and 2181, Revised Laws of 1905; but appellant objected to the evidence for the reason that the statute was in violation of the provisions of section 33, article 4 of the state constitution, and in conflict with the provisions of section 2, article 4, and section 1, article 14 of the constitution of the United States.

Section 2181 divides engineers into four classes: Chief, first class, second class, and special engineers. In order to secure a license, a chief engineer must be twenty-one years old, and be qualified to take charge of all classes of steam boilers, and have had five years' experience in operating such boilers. A first-class engineer is entitled to take out a license, and take charge of boilers of not more than three hundred horse-power; second-class engineers are limited to one hundred horse-power; and special engineers not to exceed thirty horse-power boilers. The argument is that the statute requires that, before an engineer can take out a license for any class, he must qualify that he already had the number of years' experience required for that particular class. It is true that the word "such" is repeated in each subdivision referred to; but we have no difficulty in disposing of the objection. The terms of the statute are not necessarily contradictory. Section 2181 of the Revised Laws of 1905 is a rewriting of a part of section 489, General Statutes of 1894. The authors of the Revised Laws introduced the word "such" in each section; but it is evident that the word refers merely in general terms to boilers and machinery, and not to the particular horse-power applicable to each of the classes. The statute does not require the impossible, and its purpose is to permit ⁸³⁴ engineers of the lowest class gradually and by experience to advance to the next class, etc.

3. Respondent's leg was broken as a result of the accident, and he was confined to his bed for a period of about seven weeks before the cast was taken off. Several weeks afterward he was able to walk out with the aid of crutches. He went to a boarding-house for one night, and while walking, with

the aid of his crutches, back to the hospital, slipped and fell, breaking his leg over again in the same place. Appellant objected to any evidence concerning this second break, for the reason that the injuries caused by it occurred at a subsequent time to the original injury, and was an entirely independent matter. The objection was not well taken. The jury were instructed, in arriving at the amount of damages, to take into consideration the pain and suffering which occurred as a direct result of the injury. The second break was in exactly the same place as the first, which indicated that it had not entirely healed, and that the second break was naturally caused by the imperfect condition resulting from the first. It was for the jury to say whether the second break was a direct result of the first.

It is unnecessary to discuss the other assignments.

Affirmed.

On the Admissibility of Declarations of an Agent against his principal to fix the liability of the latter for negligence resulting in personal injuries to a third person, on the ground that the declarations are a part of the *res gestae* or are admissions made in the performance of the agent's duty, see *Leach v. Oregon Short Line R. R. Co.*, 29 Utah, 285, 110 Am. St. Rep. 708; *Redmon v. Metropolitan St. Ry. Co.*, 185 Mo. 1, 100 Am. St. Rep. 558. The general rule is that admissions of an agent are admissible against his principal when made within the scope of his authority, and when relating to a transaction being performed by his agent, but not otherwise: *Turner v. Turner*, 123 Ga. 5, 107 Am. St. Rep. 76, and cases cited in the cross-reference note thereto; *Clancy v. Barker*, 71 Neb. 83, 115 Am. St. Rep. 559; *Hartman v. Thompson*, 104 Md. 389, 118 Am. St. Rep. 422. The general question of *res gestae* is discussed in the note to *People v. Vernon*, 95 Am. Dec. 51. That time is not necessarily a controlling matter in determining the admissibility of declarations as part of the *res gestae*, see *Redmond v. Metropolitan Street Ry. Co.*, 185 Mo. 1, 105 Am. St. Rep. 558, and cases cited in the cross-reference note thereto.

FIRST NATIONAL BANK v. McCONNELL.

[103 Minn. 340, 114 N. W. 1129.]

ACTIONS on Lost Writings.—To sustain an action on an instrument alleged to be lost, the evidence must be clear and satisfactory. (p. 338.)

BANKS, Liability of on Lost Checks.—A bank is not liable to an action on a lost check which has never been presented to it for payment, though the money with which to make payment still remains on deposit with it. (p. 338.)

BANKING.—To Sustain an Action Against the Drawer of a Check, it must ordinarily be presented to the bank and payment thereof refused. (p. 338.)

BANKING—Action on Lost Check by the Payee Against the Drawers.—If the payee of a check loses it before presenting it to the bank on which it was drawn, his remedy is not by an action against such bank, but by an action against the drawer of the check. The loss of the check excuses the holder from presenting it to the bank for payment. (pp. 338, 339.)

PERFORMANCE OF DUTY, When Excused Because It has Become Impossible.—A person may be relieved from a duty imposed upon him by law where the performance has been rendered impossible by reason of causes for which he is not responsible, as where it becomes impossible for him to present a check because of its loss. (p. 339.)

BANKING—Checks, When do not Constitute an Equitable Assignment of the Drawer's Funds in the Bank so as to Prevent an Action Against Him for the Amount of His Check.—If a depositor draws checks on a bank, and they are lost before presentation, they do not amount to an assignment of his fund on deposit, so as to preclude an action against him by the payees or holders of the checks on their giving a bond to indemnify him from loss should the checks turn up in the hands of bona fide holders. (p. 340.)

BANKING.—The Drawer of a Check is Liable thereon, there being no agreement that it should be accepted as an unconditional payment. (p. 340.)

BANKING.—The Remedies of a Drawee of a Bank Check Which has been Lost before presentation are, if it is not negotiable, by countermanding the order and stopping payment, and if it is negotiable and likely to reach the hands of a bona fide holder, to insist upon an indemnity before giving a check or otherwise paying the debt intended to be discharged by the check. (pp. 340, 341.)

Action for the value of lost checks drawn by the defendant in favor of different persons and then transferred to the plaintiff, after which they were lost before presentation for payment. Judgment for the plaintiff on his giving a bond of indemnity. Appeal by the defendant from an order overruling his motion for a new trial.

W. N. Southworth and Thomas Hessian, for the appellant.

F. C. Irwin, for the respondent.

³⁴¹ BROWN, J. The facts in this case are as follows: Plaintiff is a banking corporation doing business at Belle Plaine. Defendant is a dealer in livestock at Le Sueur, and kept an account with the First National Bank of that place, drawing checks thereon from time to time in payment of debts incurred by him. On October 29, 1906, he drew a number of checks on that bank to different persons for stock purchased at Belle Plaine, which were all presented by the payees to plaintiff bank and were by it cashed in the ordinary course of business. The checks were in the usual form, payable to the order of the persons named therein, and were by them indorsed in blank when presented to and paid by plaintiff. Thereafter and on the day the checks were so cashed they were transmitted by mail to the Le Sueur bank for payment and remittance to plaintiff. They never reached the Le Sueur bank, and it is claimed by plaintiff that they were lost. Defendant had money on deposit in the Le Sueur bank at the time the checks were drawn, and has had at all times since, and the checks would have been paid had they been presented; but their loss prevented their presentment, and they have never been paid. Plaintiff informed defendant of the loss and demanded payment thereof, offering to indemnify him, should the checks be found in the hands of bona fide holders; but he refused to comply therewith, insisting that the checks be produced and presented to the bank, where they would be paid. Whereupon plaintiff brought this action to recover the face value of the checks. The court below, hearing the case without a jury, found the facts substantially as here outlined and ordered judgment in favor of plaintiff, upon its filing with the clerk of the court a proper indemnity bond, as provided by section 4718, Revised Laws of 1905. Defendant appealed from an order denying a new trial.

The assignments of error challenge the findings of fact as well as the conclusions of law reached by the court below. In reference to ³⁴² the findings of fact we have only to say that the evidence has been fully considered, with the result that in our opinion it fully supports the facts found. It is

true that, to sustain an action on an instrument alleged to be lost, the evidence of loss must be clear and satisfactory: *Rogers v. Durant*, 106 U. S. 644, 1 Sup. Ct. Rep. 623, 27 L. ed. 303; *McCart v. Wakefield*, 72 Ill. 101. But with that rule in mind we have no difficulty in sustaining the findings.

We come, then, directly to the question whether plaintiff may recover upon the facts stated. It is not claimed by defendant that the checks do not come within sections 4717 and 4718, Revised Laws of 1905, authorizing recovery upon lost instruments. The main contention, as we understand the argument of counsel, is that no action will lie against the drawer of a check until after it has been presented to the bank for payment and payment has been refused; that inasmuch as the checks in question were never so presented, no recovery thereon can be had; and, further, that the checks operated as an equitable assignment of defendant's funds on deposit in the bank and transferred title thereto to the payees, and plaintiff's remedy, as assignee of the payees, is against the bank.

1. Counsel relies in support of the first contention upon the elementary principle that the holder of a check upon a bank has no recourse upon the drawer thereof until he has presented it to the bank upon which it is drawn and payment has been refused; that such presentment and refusal are essential preliminaries to the right of action against him: 2 *Daniel on Negotiable Instruments*, 1586; *Bradford v. Fox*, 39 Barb. 203; *Farwell v. St. Paul Trust Co.*, 45 Minn. 495, 22 Am. St. Rep. 742, 48 N. W. 326.

But that rule can have no application to a lost check. No rule of law with which we are familiar would require a bank, without the consent of the depositor, to pay out the money of its depositor upon an alleged lost check, and a demand that it do so would be fruitless. Its obligation is to pay the depositor's money to holders of checks issued by him, and its protection, and the protection of all depositors, requires that the checks be produced and surrendered before payment is made. Until the check is presented, no liability attaches to the bank: *Northern Trust Co. v. Rogers*, 60 Minn. 208, 51 Am. St. Rep. 526, 62 N. W. 273; 5 Cyc. 536. Of course, liability might arise in the case of ³⁴³ a lost check where the bank, after it had been duly notified of the issuance of the same and of its loss, permitted an insolvent depositor to withdraw all his funds against which the check was drawn. But

that is not the case before us. The immediate inquiry here is whether the drawer is liable on his lost check to the owner thereof, where it was not, before the loss, presented to the bank for payment. We think there can be but one answer to this question. "*Impossibilium nulla obligatio est.*" The law never requires the doing of an impossible thing (*Dow v. State Bank of Sleepy Eye*, 88 Minn. 355, 93 N. W. 121), though it often awards damages for a failure to perform express contract stipulations, where performance was rendered impossible by reason of intervening overpowering causes other than an act of God: 9 Cyc. 627.

But the principle involved in cases of that kind does not apply to duties or obligations arising by implication of law: *Paradine v. Jane*, Ayleyn, 26; *School District v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371. In other words, a person will be relieved from the performance of a duty imposed upon him by law, where the performance is rendered impossible by reason of causes for which he was not responsible, where he would not for similar reasons be relieved from express contract stipulations. The checks in question in the case at bar were lost without the fault of plaintiff, and the rule requiring their presentment to the bank cannot be complied with. They were mailed to the Le Sueur bank for payment the day plaintiff received them, and were lost in transit. The duty to present them for payment is one imposed by law, not by express contract, and, compliance therewith being impossible, plaintiff's failure to present them is not fatal to its right to recover thereon: 9 Cyc. 628, and cases cited.

2. The further contention that the checks operated as an equitable assignment of defendant's funds in the bank to the payees, and that plaintiff's remedy as their assignee is against the Le Sueur bank, is not well taken. The question whether a check for a part of a bank deposit is in equity an assignment pro tanto of the drawer's funds is an open question in this state: *Varley v. Sims*, 100 Minn. 331, 117 Am. St. Rep. 694, 111 N. W. 269, 8 L. R. A., N. S., 828. The question arises most frequently between conflicting check-holders, or between check-holder³⁴⁴ and creditors of the drawer, and the courts are not agreed. The question is not involved in this case.

Conceding, for argument's sake, that the checks in question operated as an assignment, as between defendant and the payees, it does not follow that defendant is not liable in

this action. It is well settled that the giving of a check by a debtor for the amount of his indebtedness to the payee is not, in the absence of express or implied agreement to that effect, a discharge or payment of the debt. The presumption, in the absence of evidence to the contrary, is that the check was accepted conditionally, and the debt is not discharged until the check is paid: *Good v. Singleton*, 39 Minn. 340, 40 N. W. 359; 5 Cyc. 528; *National Bank of Commerce v. Chicago etc. Ry. Co.*, 44 Minn. 224, 20 Am. St. Rep. 566, and cases cited in note, 46 N. W. 342, 560, 9 L. R. A. 263. And whether the checks in question operated as an equitable assignment, as between defendant and the payees, or not, such was not the effect as against the Le Sueur bank. No liability attached to the bank until the checks were presented for payment, and defendant remained liable, both upon the checks and the original indebtedness: *Petrue v. Wakem*, 99 Ill. App. 463; 5 Cyc. 539; *Magee on Banks and Banking*, sec. 193. And though in a given case the bank might be held liable on an unaccepted check, under circumstances before suggested, it is clear from the authorities cited, as well as upon principle, that the drawer of a check is also liable thereon; there being no agreement that the check should be accepted by the payee as unconditional payment. It follows, therefore, that, whether the checks operated as an equitable assignment or not, the defendant is liable thereon, and plaintiff may maintain an action and recover the amount due.

No hardships result to the drawer of a check in such a case. If it be non-negotiable, he can, upon notice of the loss, fully protect his interests by countermanding the order and stopping payment: *Canterbury v. Bank of Sparta*, 91 Wis. 53, 51 Am. St. Rep. 870, and note, 64 N. W. 311, 30 L. R. A. 845; *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 202; *Egerton v. Fulton Nat. Bank*, 43 How. Pr. 216; *Florence Min. Co. v. Brown*, 124 U. S. 385, 8 Sup. Ct. Rep. 531, 31 L. ed. 424; *Albers v. Commercial Bank*, 85 Mo. 173, 55 Am. Rep. 355. If it be negotiable, and likely to reach the hands of a bona fide holder, he may insist upon indemnity before giving a new check, or otherwise paying the debt intended to be discharged ³⁴⁵ by it. In the case at bar, plaintiff informed defendant of the loss of the checks, demanded payment thereof, and offered to indemnify him from loss, before the action was commenced; but he refused to make payment. As a condition to plaintiff's recovery, the court ordered a

properly executed indemnity bond to be filed, by which all the rights of defendant are fully protected. If the checks turn up in the hands of bona fide holders, and the Le Sueur bank is compelled to pay them, the indemnity bond will stand as security for the amount paid for any loss that defendant may suffer in the premises.

Order affirmed.

Actions on Lost Instruments are discussed in the note to *Matthews v. Matthews*, 94 Am. St. Rep. 464. A court of equity has jurisdiction to entertain a suit for the recovery of the amount due upon a lost check, not negotiable for lack of indorsement: *Moore v. Durnan*, 69 N. J. Eq. 828, 115 Am. St. Rep. 635.

The Question Whether a Check Operates as an Assignment of the money for which it is drawn is one upon which the authorities are at variance: See *Pullen v. Placer County Bank*, 138 Cal. 169, 94 Am. St. Rep. 19, and cases cited in the cross-reference note thereto: *Turner v. Hot Springs Nat. Bank*, 18 S. Dak. 498, 112 Am. St. Rep. 804; *Loan and Sav. Bank v. Farmers' etc. Bank*, 74 S. C. 210, 114 Am. St. Rep. 991. According to *Clark v. Toronto Bank*, 72 Kan. 1, 115 Am. St. Rep. 173, an unaccepted check or draft in the usual form does not, in the absence of special circumstances, amount to an assignment of any part of the drawer's deposit in bank.

MORRILL v. MINNEAPOLIS STREET RAILWAY CO.

[103 Minn. 362, 115 N. W. 395.]

STREET RAILWAYS, Rules of and the Right to Make.—A street railway company has the right to make reasonable rules to facilitate its business and protect it from imposition and fraud. If such rules do not impose unreasonable and unnecessary burdens and restrictions upon the public and are consistent with the rights of the public to transportation, they will be enforced by the courts. (p. 344.)

STREET RAILWAYS—Transfer Checks.—A rule requiring transfer checks is reasonable, but it is the duty of the carrier to furnish the passenger who has paid his fare with a correct, valid transfer check. (p. 344.)

STREET RAILWAYS.—A Transfer Check is not Exclusive Evidence of the right to ride on a street-car, and the law does not impose on the passenger the absolute duty to examine the check to see that it is correct. (p. 362.)

STREET RAILWAYS.—The Contract Between a Carrier and Passenger is complete when the passenger pays his fare, and when he reaches the place where he desires and is entitled to be transferred to another car it is the duty of the carrier to furnish him with proper evidence for presentation to the next car of the right to ride thereon. (p. 362.)

STREET RAILWAYS—Transfer Checks, Duty of Seeing to Correctness of cannot be Imposed on the Passenger.—Where the ordinance of a municipality in which a street railway is operated requires it to issue transfers to passengers, this duty cannot be shifted by the railway company upon the passenger by any rule or principle which requires him to see that the transfer is properly made out. (p. 363.)

STREET RAILWAYS.—Nothing Printed on a Transfer Check Which is Contrary to the Provisions of an Ordinance, requiring a street railway company to furnish passengers with transfer checks, can have any force or effect. (p. 363.)

STREET RAILWAYS, Liability of for Ejecting Passenger Because of a Mistake in a Transfer.—A street railway whose conductor issues a transfer check to a passenger which does not entitle him to ride on the line for which he demands a transfer is liable to him in tort if he is ejected from a car to which he asked to be transferred because of a mistake in the transfer check. It is not the duty of the passenger to pay additional fare to avoid such ejection. (pp. 364, 365.)

STREET RAILWAYS, Right of Passenger to Resist Expulsion Because of a Mistake in Transfer Check.—A passenger has not the right to use force in resisting ejection from a car because of a mistake in his transfer check. He should yield quietly and not await the application of actual force. His right of action is then complete. He acts at his peril and cannot recover damages for injuries or humiliation suffered by reason of his resistance to actual force. The damages he is entitled to for his wrongful expulsion are such only as result from being required to leave the car, and cannot be enhanced by his conduct which results in an assault with its resulting injuries and humiliation. (p. 365.)

Action to recover damages for being forcibly ejected from defendant's street-car. Verdict for the plaintiff for one hundred dollars. Defendant appealed from the order denying it a new trial.

Jno. W. Arctander and Munn & Thygeson, for the appellant.

George W. Armstrong, for the respondent.

³⁶³ ELLIOTT, J. This action was brought against the Minneapolis Street Railway Company to recover damages alleged to have been caused by the wrongful and illegal expulsion of the plaintiff from one of its cars. The jury returned a verdict in favor of the plaintiff for one hundred dollars, and the appeal is from an order denying a motion for judgment for the defendant notwithstanding the verdict or for a new trial.

There was evidence tending to show that on September 5, 1906, the plaintiff entered one of defendant's cars of the Interurban line ³⁶⁴ near the Great Western depot on Wash-

ington avenue South in the city of Minneapolis. The car was crowded. The conductor collected from her a fare of five cents, which entitled her to be carried as a passenger to the end of any line of cars to which she was entitled to be transferred as provided by the city ordinances. The Interurban line of cars crossed the line known as the Eighth and Central at Hennepin avenue, and this was a regular transfer point from one line to the other. As the Interurban car approached Hennepin avenue, the plaintiff, with a number of other passengers, moved toward the rear end of the car, where the conductor was handing out transfer slips to those who were about to alight. She asked the conductor for a transfer to the Eighth and Central line, and in response to such request he gave her a transfer, which she accepted without examination. She then passed hurriedly across the street and entered a car which was standing at the crossing. The conductor intended to give her a transfer which would entitle her to ride on the car which she entered, but when it was presented on the Eighth and Central car the conductor refused it, and upon her refusal to pay another fare, ejected her from the car. When she presented the transfer, the conductor examined it and said, "This is no good," after which he tore it up and threw it upon the floor. The plaintiff informed the conductor of the circumstances under which she had received the slip, and demanded that he accept the evidence which she presented and allow her to ride on the car. The defendant's evidence tended to show that the plaintiff presented an old transfer slip, which had been issued on another line on the previous day; but upon the issues of fact the jury found in favor of the plaintiff, and we must assume for the purposes of this appeal that the facts were as stated by the plaintiff and her witnesses.

The record presents the very important and interesting question of the liability of a street railway company for damages for the expulsion by one of its agents of a passenger who in good faith tenders a transfer slip which appears upon its face to be invalid, when such apparent invalidity was caused by the negligent act of another of the company's agents. The frequency with which this question arises in large cities under modern conditions makes it desirable that the subject should receive full and careful consideration.

³⁶⁵ The right of a street railway company to make reasonable rules to facilitate its business and protect itself from im-

position and fraud is questioned by no one. If such rules do not impose unreasonable and unnecessary burdens and restrictions upon the public, and are consistent with the rights of the public to transportation, they will be enforced by the courts: Clark on Accident Law, sec. 81; Booth on Street Railway Law, sec. 337; Nellis on Street Surface Railroads, sec. 8; 4 Elliott on Railroads, 2d ed., sec. 1576. It is also conceded that a rule which requires transfer checks is reasonable. But it is the duty of the carrier to furnish the passenger who has paid his legal fare with a correct and valid transfer check. If the conductor, in response to a request, delivers a check which is void or irregular upon its face, and for that reason is refused when presented to another conductor, there is a breach of a valid contract to carry the passenger to his place of destination; and, if the passenger is ejected from the car, the company is liable for the breach of the contract. So far the authorities are practically in accord, but there is great diversity of opinion as to whether an action in tort will lie for the wrongful expulsion: Clark on Accident Law, sec. 83.

Upon the authority of one line of cases the appellant contends that, when a passenger receives a transfer slip, it is his duty to examine it and see if a mistake has been made by the conductor; that the transfer slip is the sole and conclusive evidence, as between the passenger and the second conductor, of the right of the passenger to ride on the second car; that the conductor can look only to the transfer slip for the evidence of the passenger's right, and may not consider or be governed by any statement or explanation made by the passenger. The result is that, if the transfer is not on its face such as to entitle the passenger to ride on the car, it is the right and duty of the conductor to require the payment of another fare, and upon refusal to eject the passenger from the car. If this view is correct, it necessarily follows that the passenger who is thus ejected has no right of action against the company to recover damages for the wrongful expulsion. On the other hand, the respondent contends, and the trial court in effect held, that a passenger may rightfully rely upon the acts and statements of the first conductor, whose duty it is to give a valid transfer; that it is immaterial that the company's acts are ³⁶⁶ the acts of different agents; that it is liable for the acts of each agent, and therefore an inno-

cent passenger, who is wrongfully ejected, may recover the resulting damages from the company in an action of tort.

1. As the authorities in other jurisdictions are conflicting, they have been examined with care, in order to discover, if possible, a reasonable and practical rule which will protect the legal rights of individuals without seriously interfering with the business of the carriers. Numerous cases upon both sides of the controversy and illustrating its various phases will be found collected in a note to *Sprenger v. Tacoma T. Co.* (15 Wash. 660, 47 Pac. 17) in 43 L. R. A. 706. Regardless of minor differences of theory, these cases fall naturally into two groups, one of which places the primary stress upon the right of the passenger, while the other emphasizes the importance of protecting the right of the carrier to make and enforce reasonable rules and regulations for the orderly and profitable conduct of its business.

Probably the leading case of the first group or class is *Bradshaw v. South Boston R. Co.*, 135 Mass. 407, 46 Am. Rep. 481, in which it was held that a passenger who accepts a wrong transfer from a conductor, and without reading it presents it upon the next car, has no cause of action in tort against the carrier for the damages resulting from his ejection upon his refusal to pay another fare. The duty of the conductor, the representative of the carrier, to give a proper transfer, is treated as a negligible factor. The burden of seeing that the carrier's agent complies with the rule of the company and delivers a proper transfer slip is thrown upon the passenger, without reference to whether, because of defective senses or inadequate knowledge, he is able to read or decipher the characters and designs which commonly appear upon transfer slips. With reference to the claim that the conductor should attach some importance to the statements of the passenger, the court said: "The conductor of a street railway car cannot reasonably be required to take the mere word of a passenger that he is entitled to be carried by reason of having paid a fare to the conductor of another car, or even to receive and decide upon the verbal statements of others as to the fact. The conductor has other duties to perform, and it would often be impossible for him to ³⁶⁷ ascertain and decide upon the right of the passenger, except in the usual, simple and direct way."

The court does, however, recognize the fact that a passenger who has been misled by the carelessness of the first con-

ductor is entitled to some consideration. "It is easy to perceive," said Mr. Justice Allen, "that in a moment of irritation or excitement it may be unpleasant for a passenger who has once paid to submit to an additional exaction. But, unless the law holds him to do this, there arises at once a conflict of rights. His right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules, and to conform to reasonable and settled customs and practices, in order to prevent the company from being defrauded; and a forcible collision might ensue. The two supposed rights are in fact inconsistent with each other. If the passenger has an absolute right to be carried, the conductor can have no right to require the production of a ticket or the payment of fare. It is more reasonable to hold that for the time being the passenger must bear the burden which results from his failure to have a proper ticket." That is, the passenger must bear the entire burden resulting from the negligence of one of the agents of the company, in order that another agent of the company may not be embarrassed in his work of enforcing the rules and regulations of the company, which rest upon the assumption that the first agent has done his duty. The absolute right of the passenger, who has paid his fare and has in all ways complied with the terms of his contract, to ride to his destination and be furnished by the company with the evidence necessary to enable him to do so, is regarded as of no greater importance than the duty of an agent of the company to enforce reasonable rules necessary for the ordinary conduct of its business. In *Dixon v. New England R. Co.*, 179 Mass. 242, 60 N. E. 581, it is said that "the passenger's right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules": See, also, *Crowley v. Fitchburg & L. St. Ry. Co.*, 185 Mass. 279, 70 N. E. 56.

Another leading case is *Frederick v. Marquette etc. R. Co.*, 37 Mich. 342, 26 Am. Rep. 531. This is not a street railway case; but it is not apparent that any distinction can be made in principle between ordinary railways carrying passengers and street railways. The defendant's ticket agent issued a ticket covering a shorter distance than that for which the ³⁶⁸ passenger asked and paid. The purchaser failed to read the ticket, and, after having ridden the distance which was authorized by the ticket and refused to pay the fare for the rest of the way to his destination, he was ejected from the

train. It was held that his only remedy was an action for a breach of contract, and that no action would lie for damages for the tort. The course of the decisions in Michigan has been somewhat uncertain, and it has been generally understood that the doctrine of the Frederick case was abandoned in *Hufford v. Grand Rapids & I. R. Co.*, 64 Mich. 631, 8 Am. St. Rep. 859, 31 N. W. 544 (53 Mich. 118, 18 N. W. 580). In the recent case of *Brown v. Rapid R. Co.*, 134 Mich. 591, 96 N. W. 925, the court adhered to its original decision. "Any other rule," said Mr. Justice Montgomery, "would result in unseemly contests between the passenger and conductor, and would put upon the conductor the burden of determining at his peril, by facts not evidenced by the ticket produced, whether the passenger was entitled to ride. This determination was reaffirmed in *Mahoney v. Detroit St. Ry. Co.*, 93 Mich. 612, 32 Am. St. Rep. 528, 53 N. W. 793, 18 L. R. A. 335, and *Heffron v. Detroit St. Ry. Co.*, 92 Mich. 406, 31 Am. St. Rep. 601, 52 N. W. 802, 16 L. R. A. 345, in an opinion by Mr. Justice Morse, where the case of *Hufford v. Grand Rapids & I. R. R. Co.*, 64 Mich. 631, 8 Am. St. Rep. 859, 31 N. W. 544, is distinguished on the ground that in the *Hufford* case the ticket was one purporting on its face to cover the distance to be traveled by *Hufford*. This case was again distinguished in the case of *Van Dusan v. Grand Trunk Ry. Co.*, 97 Mich. 439, 37 Am. St. Rep. 354, 56 N. W. 848, and upon the same identical ground. The rule of law cannot be said to be in doubt in Michigan."

In *Monnier v. New York C. & H. R. R. Co.*, 175 N. Y. 281, 96 Am. St. Rep. 619, 67 N. E. 569, 62 L. R. A. 357, it was held that a passenger who was unable to purchase a railway ticket before entering a train because of the absence of the ticket agent should pay the extra fare required of a passenger who pays cash on the train instead of presenting a ticket, and that upon his refusal to do so he may be ejected from the train and relegated to an action for damages against the company, based on the negligence of the ticket agent. But Judge Cullen, agreeing on this point with the dissent of Judge Bartlett, said: "Each party was bound to know and to determine for itself its legal right, and also that if the plaintiff was within his legal rights he was justified in resisting ³⁶⁹ any attempt to remove him from the cars." In view of these decisions of the court of appeals, the other New York cases are useful merely as history or illustrations.

In *Parish v. Ulster & D. R. Co.*, 99 App. Div. 10, 90 N. Y. Supp. 1000, it was held that, unless the ticket on its face authorized the person presenting it to ride upon the train, the conductor was justified in ejecting him. In *Hanley v. Brooklyn Heights R. Co.*, 110 App. Div. 429, 96 N. Y. Supp. 249, it appeared that the passenger walked the distance of a block along the car line from the place where the transfer by its terms was "good only," and it was held error to submit to the jury the question whether she had substantially violated the reasonable rules of the company. For a similar case, see *Percy v. Metropolitan St. Ry. Co.*, 58 Mo. App. 75. In *Townsend v. New York etc. Ry. Co.*, 56 N. Y. 295, 15 Am. Rep. 419, it appeared that the plaintiff purchased a ticket from Sing Sing to Rhinebeck. At Poughkeepsie he left the car and waited for the next train. He had surrendered his ticket to the conductor on the first train without obtaining any evidence of his right to stop over. He explained the matter to the conductor on the second train, and upon his refusal to pay another fare was ejected from the car. It was held that he could not recover. "I am unable to see," said Mr. Justice Grover, "how the wrongful act of the previous conductor can at all justify the passenger in violating the lawful regulations upon another train." In *Nicholson v. Brooklyn Heights R. Co.*, 118 App. Div. 13, 103 N. Y. Supp. 310, following the *Monnier* case (175 N. Y. 281, 96 Am. St. Rep. 619, 67 N. E. 569, 62 L. R. A. 357), it was held that a passenger who knows that his transfer has expired cannot recover damages for being ejected from the car, although the first conductor informed him that the transfer would be accepted.

In *Norton v. Consolidated R. Co.*, 79 Conn. 109, 118 Am. St. Rep. 132, 63 Atl. 1087, it was held that the transfer slip is the only evidence of the passenger's right which the conductor can properly accept.

In *McGhee v. Reynolds*, 117 Ala. 413, 23 South. 68, it was held that a conductor has the absolute right to rely upon the language of the ticket, which is the sole and exclusive evidence of the passenger's rights, and, if it is void on its face, the passenger who refuses to pay another fare may properly be ejected from the car: See, also, *Kansas City etc. R. Co. v. Foster*, 134 Ala. 244, 92 Am. St. Rep. 25, 32 South. 773. But in *Montgomery T. Co. v. Fitzpatrick*, 149 Ala. 511, 43 South. 136, 9 L. R. A., N. S., 370 851, it was held that an

action in tort would lie against the street-car company for the negligence of the conductor in so tearing the transfer slip that it could not be used on the next car, which resulted in the ejection of the passenger.

In *Kiley v. Chicago City Ry. Co.*, 189 Ill. 384, 82 Am. St. Rep. 460, 59 N. E. 794, 52 L. R. A. 626, and in several earlier decisions of the same court, it is held that, when a transfer is refused by the conductor, the passenger must either pay his fare or leave the car, and if he fails to do so he may be ejected, without liability on the part of the company in tort for damages.

In *Woods v. Metropolitan St. Ry. Co.*, 48 Mo. App. 125, the rule of the company required the conductor to collect "proper ticket or transfer check." A passenger who presented a transfer which had been torn in two pieces was ejected from the car because of the impropriety of the transfer, and it was held that he could not maintain an action for damages resulting from the expulsion. There was some evidence tending to show that persons sometimes picked up torn transfers from the ground where they had been thrown by passengers, and a suspicion of the conductor that this had been done by the person who presented this slip was held to justify the conductor in demanding the payment of another fare. The right of the passenger was not thought of much importance, as compared with the fact that for the conductor to investigate his claim would produce confusion, delay, and dispute incompatible with the business of a common carrier and subversive of the comfort of the general traveling public.

In Texas the right of the company to eject a passenger because the transfer slip which he presented was folded was denied, even though the passenger refused to unfold it at the request of the conductor: *El Paso E. R. Co. v. Alderete*, 36 Tex. Civ. App. 142, 81 S. W. 1246.

Western M. R. v. Schaun, 97 Md. 563, 55 Atl. 701, illustrates the palpable injustice which may result from the rule which makes the ticket the conclusive evidence of the passenger's rights. The plaintiff purchased at A an excursion ticket to B, by the terms of which the conductor on the going trip, in exchange for the original ticket, was required to issue a return ticket so punched as to describe the personal appearance of the passenger, by whom alone it might be used. The conductor took the plaintiff's ticket, and gave her a return ticket, which ³⁷¹ he punched so as to describe her as

“light, slight and young.” She was in fact dark, stout and middle-aged. She placed the return ticket in her pocket without looking at it, and on the return trip presented it to the same conductor, who refused to accept it because she did not answer to the description which he had given of her earlier in the day. She refused to pay another fare and was ejected from the car. There was evidence tending to show that the conductor was acquainted with the passenger; but it was not thought sufficient to carry the issue to the jury. It was conceded that the conduct of the conductor would have been unjustifiable, had he known that the passenger was in fact entitled to ride on the train. The knowledge of the conductor of the actual facts would seem to be of no consequence, if the ticket is the sole and conclusive evidence of the rights of the passenger, as had been held in the earlier case of *Western Md. R. Co. v. Stocksdales*, 83 Md. 245, 34 Atl. 880.

Garrison v. United R. & E. Co., 97 Md. 347, 99 Am. St. Rep. 452, 55 Atl. 371, also well illustrates the sacrifice of individual rights which results from regarding the rules and regulations of the carrier as all-important. The statute required a street railway company to issue transfers “upon the payment of each cash fare, which transfer shall be good at all points of intersection of lines of said railway for a continuous ride.” It was held that under this statute the company might properly limit the time within which the transfers might be used, and that it was not required to accept the transfer after the expiration of the time designated by the punch on the slip, although the company did not run its cars frequently enough to permit the use of the transfer within such time. But see *Jenkins v. Brooklyn Heights R. Co.*, 29 App. Div. 8, 51 N. Y. Supp. 216; *Hanna v. Nassau E. R. Co.*, 18 App. Div. 137, 45 N. Y. Supp. 437; *McMahon v. Third Avenue R. R. Co.*, 47 N. Y. Sup. Ct. 282.

In *Perine v. North Jersey St. R. Co.*, 69 N. J. L. 230, 54 Atl. 799, the ticket had been erroneously punched, and it was held that an action for the expulsion of the passenger would lie, unless the passenger by his own carelessness had contributed to the production of the situation. This makes each case turn upon the question of fact. In *Shelton v. Erie R. Co.*, 73 N. J. L. 558, 118 Am. St. Rep. 704, 66 Atl. 403, 9 L. R. A., N. S., 727, it was held that a railway ticket, in so far as it speaks at all, is conclusive ³⁷² as to the rights of the

passenger by whom it is presented: See *Hayter v. Brunswick T. Co.*, 66 N. J. L. 575, 49 Atl. 714.

In *Rolfs v. Atchison etc. R. Co.*, 66 Kan. 272, 71 Pac. 526, where a passenger presented a mileage-book which by its terms had expired, the court said that the conductor could not be required to hear, weigh and verify his story in opposition to the language of the ticket.

In *Little Rock R. & E. Co. v. Goerner*, 80 Ark. 158, 95 S. W. 1007, 7 L. R. A., N. S., 97, it is held that a passenger who is ejected from a street-car on presenting an invalid transfer check, given him by a former conductor, and refusing to pay another fare, is restricted to an action for damages for a breach of the contract.

In *Peabody v. Oregon R. & N. Co.*, 21 Or. 121, 26 Pac. 1053, 12 L. R. A. 823, it appeared that the plaintiff paid his fare to a designated station to the conductor, who gave him a drawback check on the face of which appeared the words, "Good for this day and train only." At the time of paying his fare, and before receiving the check, he asked the conductor if he might stop off at a certain station, and was informed that he might do so. The conductor of the next train refused to accept the check, and it was held that it was the duty of the passenger to pay his fare or quietly leave the train when requested to do so, and resort to his appropriate remedy for the damages he had sustained.

In *McKay v. Ohio River Ry. Co.*, 34 W. Va. 65, 26 Am. St. Rep. 913, 11 S. E. 737, 9 L. R. A. 132, it was held that if a passenger pays a railway agent fare for a certain trip, and by the mistake of the agent is given a ticket which does not answer for that trip, but for one in the opposite direction, and the conductor refuses to recognize the ticket and demands fare, which the passenger fails to pay, the ejection of the passenger from the train without unnecessary force is not a ground for action against the company. But see *Trice v. Chesapeake & O. Ry. Co.*, 40 W. Va. 271, 21 S. E. 1022.

In *Virginia & S. W. R. Co. v. Hill*, 105 Va. 729, 54 S. E. 872, 6 L. R. A., N. S., 899, a party who called for a ticket to A was by a mistake of the agent given a ticket to B, an intermediate station. He neglected to examine the ticket, and after passing B was ejected from the car. It was held that the action of the conductor was not wrongful, and that no action in tort could be maintained, unless undue force or violence were used.

³⁷³ In *Yorton v. Milwaukee etc. Ry. Co.*, 54 Wis. 234, 41 Am. Rep. 23, 11 N. W. 482, a party bought a ticket for A, and while on the train asked the conductor for a stopover at B. Instead of giving him a proper ticket, the conductor gave him an ordinary train check, which the conductor of the next train refused to accept. The court said that the conductor "was perfectly justifiable in ejecting the plaintiff from his train, when plaintiff had no proper voucher, produced no sufficient evidence of his right to ride thereon, and refused to pay fare, and he himself was ignorant of the transaction between the plaintiff and the [former] conductor."

In *Pouilin v. Canadian Pacific Ry. Co.*, 52 Fed. 197, 3 C. C. A. 23, 17 L. R. A. 800, it is held that the face of the ticket is conclusive evidence to the conductor of the terms of the contract of carriage between the passenger and the company, and that the reason for the rule is found in the impossibility of operating railways on any other principle, with due regard to the convenience of the rest of the traveling public or the proper security of the company in collecting its fares.

2. It will thus be seen that in a number of jurisdictions the decisions sustain the appellant's position and would require a reversal of the order of the trial court. As between the carrier and the passenger, the reasons assigned by these decisions seem to us entirely inadequate and unconvincing. There is, however, some force in the claim that the interests of the general traveling public require the subordination of the strict rights of the passenger, in order to avoid unseemly controversies and possible breaches of the peace. But we are not in sympathy with any rule which necessarily requires the individual to submit to imposition and abandon his legal rights, unless there is some almost overwhelming necessity therefor in public policy. The recognition of the right to maintain an action in tort for damages resulting from the wrongful expulsion of a passenger from a car does not imply a right in the passenger to forcibly resist the effort to expel him. That is a matter which relates to another phase of the question, to be considered hereafter. It is apparent that the tendency at present is toward the recognition of the right to sue in tort. As said by a recent writer: "The weight of authority in the courts, state and national, however, now is to the effect that the passenger has a right ³⁷⁴ to rely upon the acts and statements of the ticket agents or conductors, and that if expelled from the train when he has acted in good

faith and is without fault, the carrier will be liable in damages for such expulsion, whether the action is brought for a breach of the contract or solely for the tort of the conductor": Moore on Carriers, p. 743. To the same effect, see 6 Cyc. 557; note to 4 Street Ry. Rep. 234; 3 Wood's Railway Law, sec. 349. Contra, 4 Elliott on Railroads, 2d ed., secs. 1594, 1602.

The following cases illustrate the application of this general rule and state the reasons upon which it rests: In New York etc. R. Co. v. Winter's Admr., 143 U. S. 60, 12 Sup. Ct. Rep. 356, 36 L. ed. 71, it appeared that the plaintiff purchased a ticket to A, and at the time informed the agent that he wished to stop over at an intermediate station. The ticket agent instructed him to speak to the conductor about the matter. Before reaching the station where he desired to stop, the passenger informed the conductor that he wished to stop over, and the conductor, instead of giving him proper evidence of his right, merely punched his ticket and returned it to him, with the statement that the conductor on the next train would accept it. The punched ticket was tendered on the next train, with a statement of what had occurred, but the conductor refused to accept it, and upon declining to pay another fare the passenger was required to leave the train. In an action to recover damages it was held that the passenger was rightfully on the train, and that the company was liable in tort for damages resulting from the act of the conductor in ejecting him. "If he was rightfully on the train as a passenger," said Mr. Justice Lamar, "he had the right to refuse to be ejected from it and to make a sufficient resistance to being put off to denote that he was being removed by compulsion and against his will; and the fact that under such circumstances he was put off the train was of itself a good cause of action against the company, irrespective of any physical injury he may have received at that time or which was caused thereby": See 12 Rose's Notes on U. S. Reports, p. 110.

The claim that the ticket is the only evidence of the passenger's right to ride was carefully considered in Burnham v. Grand Trunk Ry. Co., 63 Me. 298, 18 Am. Rep. 220. The plaintiff purchased a ticket to N., which bore the indorsement "Good for this day only." In the absence of any other evidence, this would have been proof of a contract for transportation ³⁷⁵ on a train which went through on that day. But the plaintiff proved a different contract made with the

ticket agent at the time of the purchase of the ticket. In accordance with this oral contract he stopped over at an intermediate station and took a train the next day, from which he was ejected because of the recital on the face of the ticket. He recovered damages for the wrongful act of the conductor in an action for damages. In reference to the claim that the ticket is the only admissible evidence in the contract the court said: "But it is seldom, if ever, that the ticket embodies all the elements of the contract. The running of the trains, as well as all reasonable rules prescribing the manner and facilitating the business of carrying passengers, certainly so far as known, become a part of the contract and may be proved by either party, although not indorsed upon the ticket: *Sears v. Eastern R. R. Co.*, 14 Allen, 433, 92 Am. Dec. 780. In the case at bar the inquiry presented is, What is the contract? Not whether the rule of the company, or the contract expressed by the ticket, is reasonable. No objection is made to the authority of the company to make such a rule or contract. But did the plaintiff have such a knowledge of the rule as to make it binding upon him, or did he in any way assent to it as a part of the contract for his passage from South Paris to Northumberland? As either party may prove terms of the contract not expressed upon the ticket, so either party may prove the acceptance, or rejection, or waiver of any terms indorsed thereon. The ticket is not a written contract signed by the parties. It is at most evidence of some existing contract for a passage between two places named and that the holder has paid the fare demanded. . . . The real contract between the plaintiff and the ticket agent was made before the ticket was seen. The plaintiff paid his money upon the statement of the agent, and not upon any indorsement upon the ticket. He took the ticket, not as expressing a contract, but as proof of the contract he had already made with the agent. He had neither seen nor assented to the indorsement, nor was he asked to assent to it. As between the plaintiff and agent, the contract was definite, with no misunderstanding or suggestion of it." It was therefore held that the representations by the agent could be shown, and that after being informed of the facts the conductor had no right to eject the passenger.

The notion that the carrier can substantially relieve himself from ³⁷⁶ responsibility for the wrongful act of one of its agents by asserting the duty of another of its agents to

enforce a reasonable rule for the conduct of its general business was repudiated in *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193. It there appeared that the plaintiff purchased a ticket from North Pomona to San Diego. Before reaching San Bernardino, where it was necessary to change cars, the conductor took up the ticket without giving the passenger any evidence of her right to continue the trip on the other train. The next conductor ejected her, because she had no ticket, and it was held that she might recover damages therefor. "If the conductor who took up the ticket," said the court, "had himself, at a subsequent point in the trip, excluded her for failure to exhibit it, the liability of the defendant would not be questioned. Its liability is the same, notwithstanding for its own convenience it has intrusted the management of its trains to different conductors: *Muckle v. Rochester Ry. Co.*, 79 Hun, 32, 29 N. Y. Supp. 732. The plaintiff was not called upon to question the right of the first conductor in taking up her ticket, and it was the duty of the defendant to see that she was not thereby deprived of her right to a passage upon its cars."

In *Head v. Georgia Pac. Ry. Co.*, 79 Ga. 358, 11 Am. St. Rep. 434, 7 S. E. 217, it was held that if the purchaser of a round-trip ticket, after paying for and receiving it, performs all the stipulations of the contract on his part, or offers to do so, the company is bound to recognize and honor the ticket when and whenever duly presented, notwithstanding any omission of its agent in signing or stamping the same. •

In *Hornesby v. Georgia R. & E. Co.*, 120 Ga. 913, 48 S. E. 339, it was held that a person who fails to comply with the rule which requires a passenger to present a valid transfer check may recover damages for being ejected from the car, upon proving that his failure to have a valid check was due to a fault of an employé of the company who had authority to act for it in such matters.

So in *Louisville & N. R. Co. v. Gaines*, 99 Ky. 411, 59 Am. St. Rep. 465, 36 S. W. 174, it was held that, while the conductor had the right to rely upon the ticket—that is, as between himself and his employer—the carrier was nevertheless liable in ejecting a passenger who had been given a ticket other than that for which he had asked and paid. "The right to bring such an action," said the court, "is evident. If the fault [was ³⁷⁷ that of] the agent of the company, the remedy

by an action for tort, where the passenger is forcibly ejected, ought not to be questioned."

In *Hot Springs R. Co. v. Deloney*, 65 Ark. 177, 67 Am. St. Rep. 913, 45 S. W. 351, the right of a passenger who has been given a wrong ticket by an agent of the carrier to recover damages for being ejected from the car is sustained. But see *Little Rock R. & E. Co. v. Goerner*, 80 Ark. 158, 95 S. W. 1007, 7 L. R. A., N. S., 97.

In Pennsylvania a passenger who in good faith presented a return slip wrongfully given him by the conductor was allowed to recover damages for his exclusion from the car: See, also, *Little Rock T. & E. Co. v. Winn*, 75 Ark. 529, 87 S. W. 1025; *Baltimore O. R. Co. v. Bambrey (Pa.)*, 16 Atl. 67. The same conclusion was reached in *Laird v. Pittsburg T. Co.*, 166 Pa. 4, 31 Atl. 51, where a passenger on a street-car made a timely request for a transfer, but which was not given him until he was about to leave the car. On the margin of the transfer slip the hour of 9 A. M. was punched. This was correct; but the conductor also punched the hour of 7:30 A. M., and the second conductor refused to accept the transfer and ejected the passenger, after he had stated the facts and refused to pay another fare: See, also, *Eddy v. Syracuse R. T. Ry. Co.*, 50 App. Div. 109, 63 N. Y. Supp. 645.

There is ample authority for the rule that the burden of inspecting the transfer slip and seeing that the conductor has properly punched it cannot be thrown upon the passenger. In *Gulf etc. Ry. Co. v. Copeland*, 17 Tex. Civ. App. 55, 42 S. W. 239, it is held that a passenger may, in the absence of notice to the contrary, assume that the carrier has furnished him with a ticket which states the terms of the contract correctly, and he is not bound to inspect it and see that the agent has performed his duty. "This court," said Chief Justice Fisher, "has heretofore in several cases (notably *Gulf etc. Ry. Co. v. Rather*, 3 Tex. Civ. App. 72, 21 S. W. 951, and *Gulf etc. Ry. Co. v. Halbrog*, 12 Tex. Civ. App. 475, 33 S. W. 1029) affirmed the doctrine that the ticket or pass does not in all instances furnish the exclusive right to (sic) the passenger to transportation, and that under certain circumstances the contract as actually entered into between the passenger and the agent of the carrier may be looked to in order to ascertain the rights of the passenger." In *O'Rourke v. Street Ry. Co.*, 103 Tenn. 124, 76 Am. St. Rep. 639, 52 S. W.

872, 46 L. R. A. 614, ³⁷⁸ it appeared that the first conductor punched the passenger's ticket erroneously, so that it appeared that the time limit had expired. It was held that the face of the ticket was not the sole criterion of the passenger's right to ride, and that a condition in a transfer slip that the passenger agrees to pay the regular fare charged if there is a controversy with the conductor about the check, and then apply to the office of the company for the return of his money, is void for unreasonableness, as is also a condition printed on the slip that the passenger will examine time, date and direction, and see that they are correct. In *Memphis St. R. Co. v. Graves*, 110 Tenn. 232, 100 Am. St. Rep. 803, 75 S. W. 729, the court said: "The tickets or tokens are prepared by the company. They contain more or less of printed and other directions. Some passengers cannot read; others are children. None of them have the time or opportunity in the rush of travel to scrutinize the ticket, and in many instances, if they could, they could not understand the devices used by the company. The passenger has the right to presume the conductor has given him a proper ticket, and if he makes a mistake it is the fault of the company, for which it is liable; and if the passenger in good faith accepts the ticket, he is not bound to stop and scrutinize it to see that no mistake has been made."

The same general conclusion was reached in the well-considered case of *Indianapolis St. R. R. Co. v. Wilson*, 161 Ind. 153, 100 Am. St. Rep. 261, 66 N. E. 950, 67 N. E. 993. The plaintiff took passage on one of the defendant's street-cars, paid his fare, and requested the conductor to give him a transfer ticket to a certain other line. The conductor gave him a ticket, and upon arriving at the transfer station the passenger boarded a car of the line to which he had asked to be transferred. The conductor of the car refused to accept the ticket, because it called for a transfer to another line of the defendant's road. Regardless of explanation, the passenger was ejected from the car and recovered damages therefor in an action in tort. "The duty of inspection, under the circumstances," said the court, "the law did not exact of him; for, in the absence of any notice to the contrary, he had the right to presume that appellant's conductor and agent had correctly discharged his duty in punching the ticket and thereby indicating the transfer over the line in accordance with his request. Appellee ³⁷⁹ had nothing to do with the

preparation of the ticket; for appellant seems to have prescribed the form and contents thereof, and also the method or means to be employed to indicate or point out thereon the line of its railway over which a transferee was entitled to be carried. The many words, figures, spaces and abbreviations which the ticket furnished by appellant to appellee, as exhibited by the record, contained, would prima facie be unintelligible to many persons, and certainly it would be an unreasonable imposition to require of a passenger, upon receiving one of these tickets, the duty to inspect the same in order to discover if the conductor had made a mistake in the performance of his duty. Appellee, a mere passenger, under the circumstances was not, in the eye of the law, either presumed or bound to know the meaning of the various figures, abbreviations, punch marks, and other mystic symbols which the transfer ticket in question contained. These possibly could only be correctly interpreted or read in the light of the rules and regulations adopted by appellant company for the guidance of its conductors and employes. Neither was he presumed to know or required to take notice of these rules and regulations made by appellant for the aforesaid purpose."

The supreme court of Ohio, in *Cleveland City Ry. Co. v. Conner*, 74 Ohio St. 225, 78 N. E. 376, recognizes the right of a passenger to recover damages in an action in tort for wrongful ejection, but imposes upon him the duty of exercising ordinary care in receiving and making use of the transfer slip. In considering the grounds upon which the right of action rests, the court said: "This is not a controversy between the master and the servant, nor between the passenger and the conductor, nor yet between the carrier and the passenger solely in regard to the act of the carrier's servants in ejecting the passenger from the car; but it is an action against the carrier for the wrongful and negligent act of giving the transfer as the proximate cause of the resulting injury, which was the refusal to carry the plaintiff as he had the right to be carried and putting him off the car. Since the complaint is against the company itself, it can avail the defendant nothing to show that one of its servants obeyed a reasonable rule of the defendant in putting the plaintiff off of the defendant's car, when the defendant itself through the agency of another servant created the ³⁸⁰ conditions which caused him to be put off. . . . It is as though a single individual had

first agreed to carry the plaintiff by the St. Clair street line, and by mistake had given a ticket over the Woodland avenue line, and then, when he came to take up the ticket, taking advantage of his own mistake or wrong, refused to honor it and forcibly ejected the plaintiff. The defendant is the actor throughout this transaction, although it acted through different agencies, in giving and refusing to accept the transfer and ejecting the plaintiff. It is therefore not sound reasoning to argue that the company is not liable in tort for refusal to carry the plaintiff and ejecting him from the car upon the theory that the conductor who removed the passenger from the car under a rule of the company is personally without blame in the matter."

See, also, *Georgia R. & E. Co. v. Baker*, 125 Ga. 562, 114 Am. St. Rep. 246, 54 S. E. 639, 7 L. R. A., N. S., 103; *Lawshe v. Tacoma R. & P. Co.*, 29 Wash. 681, 70 Pac. 118, 59 L. R. A. 350; *Moon v. Interurban*, 85 N. Y. Supp. 363; *Eddy v. Syracuse R. T. Ry. Co.*, 50 App. Div. 109, 63 N. Y. Supp. 645; *Jacobs v. Third Avenue R. Co.*, 71 App. Div. 199, 75 N. Y. Supp. 679; *Baggett v. Baltimore & O. Ry. Co.*, 3 App. D. C. 522; *Ellsworth v. Chicago etc. Ry. Co.*, 95 Iowa, 98, 63 N. W. 584, 29 L. R. A. 173; *Carpenter v. Washington G. R. R. Co.*, 3 Mackey (D. C.), 225; *Kansas City etc. R. Co. v. Riley*, 68 Miss. 765, 24 Am. St. Rep. 309, 9 South. 443, 13 L. R. A. 38.

3. Certain phases of the general question have already been determined by this court. In *Pine v. St. Paul City Ry. Co.*, 50 Minn. 144, 52 N. W. 392, 16 L. R. A. 347, the manifestly proper rule was recognized that, if a passenger accepts a transfer plainly marked for a particular line, he is not entitled to take a car upon another line. The case involved no question of mistake or misconduct of an agent of the company by which the passenger was misled. He asked for a transfer over a certain line, and was given one which, although general in its terms, entitled the passenger to ride upon the car on which he attempted to use it. His expulsion was therefore wrongful, and he recovered damages in an action in tort.

In *Appleby v. St. Paul City Ry. Co.*, 54 Minn. 169, 40 Am. St. Rep. 308, 55 N. W. 1117, a passenger paid his fare and received a transfer check which entitled him to continue his journey by the next connecting ³⁸¹ car on another line.

He took the proper car after being transferred, and the conductor took up his transfer check. After the car had gone a short distance it was taken off. The conductor disappeared; but the driver of the car told the passengers to take the next car, which was then approaching on the same line. But the conductor on that car, although informed of the facts by the plaintiff, demanded another fare, and, this being refused, the passenger was ejected. In an action for damages for the expulsion, it was held that on the whole case the plaintiff was entitled to recover. He had done all that was required of him. It was the duty of the company under the circumstances to give the passenger such directions in reference to its system or course of conduct as was reasonably necessary to enable him to pursue his journey. When it became apparent that the car was being taken off without previous notice, the passenger had a right to expect information of some one as to how he was to proceed on his journey. Upon being informed that he was to take the next car, he was justified in acting upon that information. The case was distinguished from one where a person enters a car knowing that he is without evidence of his right of passage as required by the reasonable regulations of the carrier. The right of action did not rest upon the bare fact of expulsion by the conductor, but upon the conduct or neglect of the carrier which resulted in and included the expulsion. The cause of action set forth in the complaint covered the whole transaction, and it was held that upon such facts the company had neglected its duty toward the passenger to his injury, and he could recover damages in an action in tort. The court said: "Even though the conductor, in ejecting the plaintiff, may have done only what was apparently (to him) his duty . . . toward the passenger, it had justified him in assuming to continue his journey on a car from which the conductor, in accordance with the regulations of the defendant, should expel him for nonpayment of fare, . . . and under the circumstances the jury might have reasonably found that the defendant's conduct, through its agents, had justified the plaintiff in taking the car."

Krueger v. Chicago etc. Ry. Co., 68 Minn. 445, 64 Am. St. Rep. 487, 71 ³⁸² N. W. 683, is relied upon by appellant as committing the court to the doctrine for which it

contends. This reliance is possibly justified by statements made in the opinion, but not by the decision itself. The plaintiff there purchased a railway mileage-book containing two thousand miles of transportation. The date of the issue of the book was stamped somewhat illegibly thereon, and by mistake of the agent the book was punched so as to show that it expired on the day that it was issued, instead of one year later, as was intended by both parties. The purchaser signed a contract, which was printed on the cover of the book, which stated that the ticket was "void for passage after date punched in margin." The conductor to whom the ticket was presented refused to accept it, and upon the refusal of the passenger to pay fare he was ejected from the train. In an action for damages for the wrong, he recovered a verdict, which was sustained on appeal. In answer to the contention that, where a passenger presents a ticket not apparently valid on its face, it is the duty of the conductor to refuse to accept it, and to eject the passenger from the train if he refuses to pay a fare, and that the passenger is bound to know that the rules of the company require such action on the part of the conductor and to abide thereby, the court said: "So far as it goes, the proper rule on this point is stated in *Freeman's note to Commonwealth v. Power* (7 Met. (Mass.) 596), 41 Am. Dec. 465 but so far as this rule refuses to the passenger damages for being forcibly ejected, it does not apply when, from the circumstances appearing on the face of the ticket and the surrounding circumstances known to the conductor, it is probable that a mistake has been made by the company in issuing the ticket, and this probability is so strong that the conductor should, under the circumstances, investigate further before ejecting the passenger. The statements of the passenger need not be accepted in such a case, except so far as they call the conductor's attention to facts and circumstances which he can then and there observe."

There was conflicting evidence as to whether the date of the issue of the ticket was legible, and it was said that, if there was nothing on the face of the ticket to put the conductor on inquiry, he was justified ³⁸³ in ejecting the passenger. This was a statement of that which would defeat a recovery. What was said in support of the theory upon which the conclusion rests is dicta, and, in so far as it is in-

consistent with what is here held, does not meet with our approval. The case sustained the right of a passenger, who was ejected from the car because his ticket did not on its face entitle him to ride, to maintain an action in tort for damages when the circumstances were such that the conductor should as a reasonable man have paid some attention to his claim that the defect in the ticket was the result of a mistake on the part of another agent of the carrier. The decision is inconsistent with the doctrine that the ticket is the sole and conclusive evidence of the passenger's right to ride, as it recognizes the duty of the conductor to consider extraneous facts and circumstances, and requires him to reach the proper conclusion thereon upon the peril of rendering the carrier responsible for the damages resulting from the expulsion of the passenger, who is entitled, under his actual contract with the carrier, to ride on the car. The decision is also adverse to the rule which casts upon the passenger the burden of inspecting the ticket in order to see whether it is in proper form.

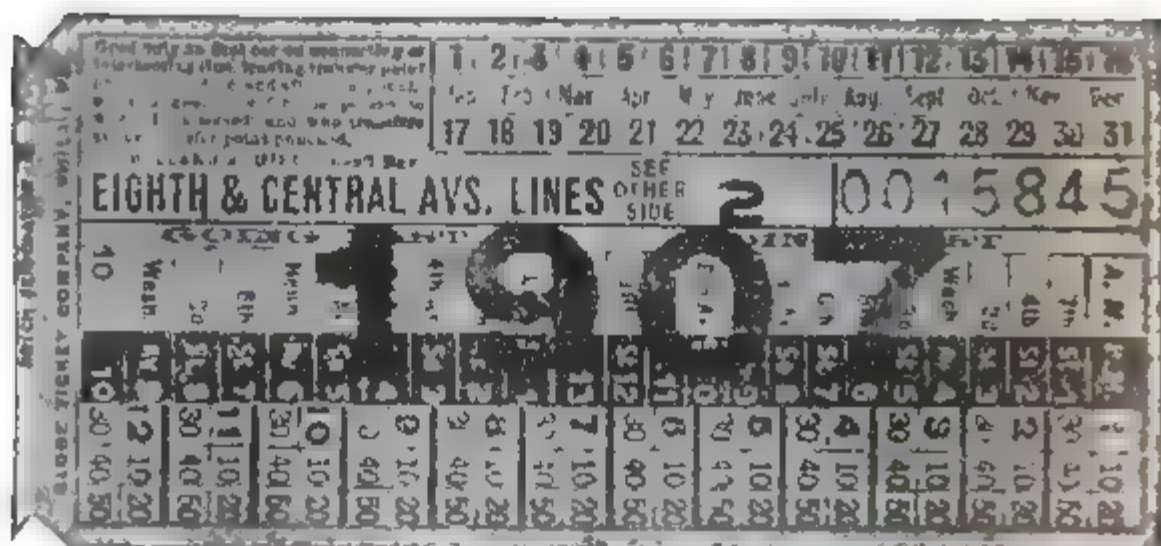
4. The result of an examination of the authorities and consideration of the reasons upon which they rest has convinced us that public policy, as well as the necessity for protecting the rights of individuals, requires us to hold that a transfer slip is not the sole and exclusive evidence of the right of the holder to ride on the street-car, and that the law does not impose upon the passenger the absolute duty to examine the slip when it is received and see that it is correct. The contract between the carrier and the passenger is complete when the passenger pays his fare. He is then entitled to be carried to the end of the line of cars to which the city ordinance entitles him to be transferred. His rights as a passenger are measured by the statutes, ordinances and decisions of the courts; that is, by the law, and not by any written contract which exists between him and the carrier. When he reaches the place where he desires, and is entitled, to be transferred to another car, it is the duty of the carrier to furnish him with proper evidence, for presentation to the conductor of the next car, of his right to ride.

384 The ordinance of the city of Minneapolis, approved April 11, 1892, provides that the "street railway company shall issue transfer checks at the junction of its street rail-

way lines in said city at Washington and Hennepin avenues, in said city, to any passenger on any of said lines who shall pay one full fare, which transfer check shall (subject to certain provisions not here material) entitle the passenger so receiving the same to a continuous passage on either of said connecting lines." By section 2 of the ordinance it is provided that the company shall forfeit to the city the sum of fifty dollars for each time it refuses so to issue a transfer check and for each time it refuses to honor the same by carrying any passenger so entitled thereto on any connecting lines. The ordinance thus makes it the duty of the street railway company to furnish a proper transfer, and this duty cannot be shifted by it to the passenger by any rule or principle which requires the passenger to see that the transfer is properly made out. The check is nothing more than a token, which the passenger is instructed by the carrier to take to the next conductor. It is not a contract between the company and the passenger, by which the company is bound to carry the passenger the remainder of his journey, subject to conditions printed thereon. The contract is made when the fare is paid. It is then complete. The ordinance determines the right of the passenger to the transfer, and prescribes when and where it must be issued and used. Nothing printed on the transfer check which is contrary to the provisions of the ordinance can have any force and effect.

In the present instance the plaintiff claimed that she received a check from the conductor of the Interurban line as she was leaving the car at the intersection of Washington and Hennepin avenues. The company claimed that the transfer check which she presented on the Eighth and Chicago car had not been issued by a conductor on an Interurban car, because it was different in color and printed matter from the checks used on that line; but the jury found that the plaintiff had received the check which she actually presented from the conductor of the Interurban car. Assuming this to be true, as we must for the purposes of this case, it is evident that the first conductor made a mistake and gave her the wrong check. The original check, ³⁸⁵ unfortunately, was not preserved. The plaintiff testified that it was destroyed by the conductor. In view of the character of the transfer slip, it would be unreasonable to impose upon

the passenger the duty of checking up the work of the conductor.



A glance at the sample slip introduced in evidence, and inserted herein, suggests that such examination, by many who ride upon the street-cars, would be utterly useless. It is admirably adapted to the use of the carrier and its agents. The various colors, fine print, and tabulated figures render it confusing and unintelligible to many persons. The significance of the figures is not explained. It is left to inference. There is no explanatory printed matter at the head of the columns of figures. That the figures refer to time is left to inference. Persons who use the transfers daily doubtless understand them, but such understanding is more the result of experience than information acquired from the slip. It is given to all kinds of travelers—the old and the young, the educated and the ignorant, the blind, and the visitor, to whom transfers are sometimes a novelty. A person trained in the study of statistical tables and tabulated data can, of course, ascertain within a reasonable time whether the slip entitles him to ride on the desired car; but an ordinary person of fair intelligence, good eyes, and a reasonable amount of patience requires more leisure for the purpose than is available during the hurried emptying of an overcrowded car, with a conductor standing on the rear platform and passing out the slips to all comers. It is the duty ³⁸⁶ of the conductor, not of the passenger, to see that a proper transfer slip is issued.

The wrong which resulted in the expulsion of the plaintiff from the car was that of an agent and representative of the carrier. The obligation imposed upon the carrier

cannot be avoided by the division of labor and duties between the different agents of the carrier. There is unity of obligation, and the act of each conductor is the act of the corporation, from whom the duty is owing to the passenger. When there is a breach of that duty on the part of one agent, which results in a wrong to a passenger by another agent, of the company, the company is liable for the results, although the latter agent may have been acting in good faith, under instructions received from his employer. The fear expressed in many of the decisions that such a rule will subject the carrier to imposition has very little foundation. There can be no recovery of damages in any case unless the passenger is able to prove that he was entitled to a good transfer and was deprived of it by the negligent act of the first conductor. The rule which we adopt has been in force in many states for years, and we are yet to learn that any serious prejudice has resulted therefrom to carriers of passengers.

5. It does not follow that, because the carrier has not the legal right to eject the passenger, the passenger has the right to use force to prevent himself from being ejected. Many of the decisions which deny to the wronged passenger a right of action for the expulsion rest upon the assumed necessity of subordinating the rights of the individual to those of the general traveling public, on the assumption that a contrary rule would result in unseemly physical encounters and breaches of the peace. But this does not necessarily follow. When a passenger is wrongfully ordered to leave the car, his right of action is complete. He must go quietly, and not await the application of actual force. The constructive force involved in the order of the representative of the carrier under circumstances which show an intention to enforce the order is all that is required. His cause of action is then complete, and if he engages in any contest of force with the conductor, he does so at his own peril, and can recover no damages for injuries received or humiliation suffered by reason of his insistence upon the use of actual force. The damages which he is entitled ³⁸⁷ to recover for the wrongful expulsion are such only as result from being required to leave the car, and cannot be enhanced by his own conduct, which results in an assault, with its resulting injuries and humiliation. This is but the application of the well-estab-

lished rule that it is the duty of a person who finds that he has been wronged to use all reasonable means to arrest the loss: *Gniadck v. Northwestern Imp. & Boom Co.*, 73 Minn. 87, 75 N. W. 894; 1 *Joyce on Damages*, sec. 194; 13 *Cyc.* 71; 1 *Sedgwick on Damages*, secs. 201, 202.

It is not claimed that the damages awarded in this case are excessive, and there is no assignment of error based upon any instructions with reference to the measure of damages. Under the rule which requires the passenger to leave the car upon demand without resistance, it is probable that the plaintiff would not have recovered so large a verdict; but as it is not greatly, if at all, in excess of what the jury would have been entitled to award, we will not interfere with it.

The order of the trial court is affirmed.

A Condition Printed on the Back of a Transfer Ticket issued by a street railway company, requiring the passenger to examine the date, time, and direction indicated by the conductor's punch marks and see that they are correct, is unreasonable and void: *O'Rourke v. Citizens' Street Ry. Co.*, 103 Tenn. 124, 76 Am. St. Rep. 639.

When the Conductor on a Street-car Gives a Transfer to a passenger which, through the mistake or negligence of the conductor, does not evidence the passenger's right to continue his journey on another line, the authorities are conflicting as to the liability of the railway company in case the passenger is expelled from the car on refusing to pay a second fare: See *Norton v. Consolidated Ry. Co.*, 79 Conn. 109, 118 Am. St. Rep. 132, and cases cited in the cross-reference note thereto; note to *St. Louis etc. Ry. Co. v. White*, 122 Am. St. Rep. 645.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

STATE v. CASEY.

[207 Mo. 1, 105 S. W. 645.]

LARCENY AND EMBEZZLEMENT, for the purposes of prosecution, are uniformly recognized as distinct offenses. (p. 371.)

LARCENY—Elements of Offense.—In every larceny there must be a trespass in the original taking of the property. A felonious intent must have existed at the time of the taking. (p. 371.)

EMBEZZLEMENT—Definition.—Embezzlement is the fraudulent and felonious appropriation of another's property by a person to whom it has been intrusted, or into whose hands it has lawfully come. (p. 371.)

EMBEZZLEMENT—Accessory.—If the principal is guilty of embezzlement, an accessory before the fact to such embezzlement who becomes the custodian of the embezzled goods lawfully in the principal's possession and assists him in feloniously appropriating and selling them, is also guilty of embezzlement, and cannot be convicted of larceny. (p. 375.)

C. O. Bishop and H. M. Walsh, for the appellant.

H. S. Hadley, attorney general, and N. T. Gentry, assistant attorney general, for the state.

⁵ **GANTT, J.** On June 12, 1906, the assistant circuit attorney of St. Louis filed an information, duly ⁶ verified, charging the defendant, in the first count, with the larceny of eighty-nine cases of Bull Durham smoking tobacco and fifteen butts of seven pounds each of Piper-Heidsieck chewing tobacco, of the value of fifteen hundred dollars; and, in the second count, with aiding, assisting and abetting one Louis Formanek, alias George Franklin, with the embezzlement of said described property, from the St. Louis Transfer Company, a corporation. The date of the alleged offense was May 2, 1906. At the December term, 1906, the defendant was tried and convicted of grand larceny. The punishment was assessed at two years in the penitentiary. The

jury found the defendant not guilty under the second count of the information. After filing formal motions for a new trial and in arrest of judgment, which were overruled, the defendant appealed.

The state's evidence tended to prove that the St. Louis Transfer Company was a corporation, with its principal office of business in the city of St. Louis, and engaged in the transfer business in St. Louis and East St. Louis. On May 1, 1906, a man who went by the name of George Franklin, but whose real name was Louis Formaneck, was one of the drivers of the St. Louis Transfer Company, driving wagon No. 33, and on the said day drove one of their wagons to the freight depot of the Southern Railroad Company at East St. Louis and received from the agent of said railroad eighty-nine cases of Bull Durham tobacco and fifteen butts of seven pounds each of Piper-Heidsieck chewing tobacco, for which he gave a receipt, signed George Franklin. The freight agent instructed Franklin, alias Formaneck, to take said tobacco to the Missouri Pacific freight depot in St. Louis. This tobacco was then of the reasonable market value of fifteen hundred dollars. Franklin, alias Formaneck, reported at the office and stable of the St. Louis Transfer Company, which was located at Third and Poplar streets, at 5 o'clock that evening, ⁷ and turned in to Daniel Sullivan, the clerk of said office, what was called a "red sheet," which purported to give the amount of goods hauled and the number of loads, from whom received and to whom delivered on that day. The tobacco in question was never delivered to the Missouri Pacific Railroad Company, but was taken, the next morning by Franklin, alias Formaneck, to a saloon which was operated by the defendant on Broadway and Sixth street in said city, and turned over to the defendant. The wagon driven by Franklin, alias Formaneck, was one of the usual transfer wagons used by the St. Louis Transfer Company, and had the name of said company painted in plain letters in two places thereon. Between 8 and 9 o'clock on the evening of May 1st, the defendant telephoned to a tobacco dealer named Fuelscher, and asked him to come to the defendant's saloon that night, saying that he had some tobacco that Fuelscher could probably use. Fuelscher walked over to the saloon and the defendant took him to one side where no one present could hear him talk, and said, "I have about one hundred boxes of twenty-five pound boxes of Bull

Durham and I will take one thousand dollars for them." Fuelscher declined to buy, saying that he did not have the money to pay for the same. The defendant then offered to let him handle it on commission, and Fuelscher asked him the price. The defendant hesitated and did not seem to know just what was the right price to put upon it, and asked Fuelscher what was the present value of Bull-Durham on the market. When Fuelscher told him it was fifty-nine cents, the defendant then agreed to sell him this lot for forty cents per pound on commission. Fuelscher then agreed to buy it if it was all right and the defendant walked out and showed him that it was still loaded on a wagon on Sixth street. Fuelscher made arrangements with Crone Brothers, who operated a livery-stable and undertaking establishment, to store this tobacco in one ^s of their rooms; this arrangement was made the next morning. The next morning Franklin, alias Formaneck, drove one of the St. Louis Transfer wagons around to Crone's livery barn and unloaded eighty-nine cases of Bull Durham smoking tobacco and fifteen butts of seven pounds each of Piper-Heidsieck chewing tobacco. The defendant had previously told Fuelscher that he had ninety-nine cases of Bull Durham tobacco. As fast as Fuelscher could sell this tobacco, he did so, and accounted to the defendant for the proceeds; the defendant urged him several times by telephone to make sales as fast as possible and send him more money. In due course of time the Southern Railroad Company was informed of the nondelivery of this tobacco, and a tracer was started and the St. Louis Transfer Company informed of the nondelivery thereof. The driver Franklin, alias Formaneck, was arrested, and the defendant telephoned to Fuelscher to come to his saloon to see him at once. When Fuelscher visited the defendant, the defendant said that that transfer driver had been "pinched" for selling that tobacco. Fuelscher expressed surprise, and wanted to know if there was anything crooked about the transaction, to which the defendant replied that there was not; that he had purchased the same at an auction sale, a wreckage sale, from the railroad company, and bought it very cheap. He further said that this driver would not "squeal" on them. This conversation occurred Saturday night, June 9, 1906. Fearing that something was wrong, Fuelscher visited the offices of the St. Louis Transfer Company on Monday morning and told them of his purchase of the tobacco from the defendant on

the night of May 1, 1906. The police officer was sent to see the defendant at his saloon, and, on asking about the tobacco, he denied all knowledge of any purchase by him or sale by him to Fuelscher. The defendant was arrested and taken before the chief of detectives, Desmond, at his office, and was informed that Fuelscher ⁹ had told of the purchase of the tobacco from the defendant and had receipts from the defendant for the payments therefor. The defendant at first denied his signatures, but afterward admitted that he had given Fuelscher receipts to the amount of two hundred and fifty dollars, but that the same was for borrowed money which he had loaned Fuelscher. On being told later on that Fuelscher had receipts amounting to three hundred and fifty dollars, the defendant said that the additional one hundred dollars was for interest on the two hundred and fifty dollars. The defendant later on saw Fuelscher and asked Fuelscher to join with him in making that statement. Fuelscher, however, denied the borrowing of any money from the defendant, and produced the receipts and testified that they were for payments made by him to defendant for tobacco. The receipts were dated May 2d, May 5th, May 8th, May 12th, May 19th, May 23d and June 2d, and purported to be on account of Durham tobacco. The tobacco that Fuelscher then had on hands and all that he could get of the eighty-nine cases, he returned to the St. Louis Transfer Company and paid said company a part of the value of what he had sold.

The defendant testified that George Franklin, alias Louis Formaneck, came to his saloon on the 1st or 2d of May and represented to him that he had some Bull Durham smoking tobacco for sale, and would like to sell the defendant a wagon-load of it. The defendant declined, saying that he did not sell five pounds of Bull Durham in a month, when Franklin asked him if he knew anybody who would buy it. The defendant suggested Fuelscher, and Franklin asked defendant to telephone Fuelscher and see if he would buy it. Defendant asked Franklin where he got so much tobacco, and Franklin said he bought it in salvage, that the tobacco was supposed to be slightly wet, as it had come out of a freight wreck. At the time defendant recommended Fuelscher he remarked to Franklin that the ¹⁰ only drawback was that Fuelscher was not worth any money.

In a little while, Fuelscher came to defendant's saloon and had a talk with Franklin and then applied to defendant for a loan of two hundred and fifty dollars to bind the sale. The defendant declined to loan any money, but Fuelscher promised to give him one hundred dollars for making the loan, so the defendant concluded to do so. The defendant then went upstairs and talked to his wife, who had the money and who objected at first to making the loan. She finally concluded to do so and gave the defendant two hundred and fifty dollars in cash, which he straightway handed to Fuelscher. The defendant denied all knowledge of the tobacco being stolen, but did not deny his signature to the receipts offered in evidence, neither did he deny the contradictory and false statements made by him at the time of and after his arrest. The defendant offered one Collinson, who was his bartender at the time, and who testified that he saw the defendant get the money from the defendant's wife and loan the same to Fuelscher. Another gentleman testified in behalf of defendant that he was in defendant's saloon at the same time and saw the defendant get some money from his wife and loan to Fuelscher; but neither knew the terms upon which the same was loaned. The defendant's wife, for some reason, did not testify.

Other facts may be noted in the further consideration of the cause, in connection with the instructions of the court, and the assignments of error.

1. The pivotal question in this case is, Conceding that the evidence in the case was sufficient to establish the guilt of the defendant of either of the offenses charged in the information, of which was he guilty—grand larceny or embezzlement? The distinction between larceny and embezzlement is one fully recognized in the criminal law of this state as well as in England. While the two offenses have much in common, ¹¹ for the purpose of prosecution they have uniformly been regarded as distinct. In every larceny there must be a trespass in the original taking of the property; that is, in larceny the felonious intent must have existed at the time of the taking: *State v. Shermer*, 55 Mo. 83, and cases cited; *State v. Ware*, 62 Mo. 597. Whereas embezzlement is the fraudulent and felonious appropriation of another's property by a person to whom it has been intrusted, or into whose hands it has lawfully come.

Section 1912 of the Revised Statutes of 1899 defines the offense in these words: "If any agent, clerk, apprentice, servant or collector of any private person, or of any copartnership, except persons so employed under the age of sixteen years, or if any officer, agent, clerk, servant or collector of any incorporated company, or any person employed in any such capacity, shall embezzle or convert to his own use, or shall take, make way with or secrete, with intent to embezzle or convert to his own use, without the assent of his master or employer, any money, goods, rights in action, or valuable security or effects whatsoever, belonging to any other person, which shall have come into his possession or under his care by virtue of such employment or office, he shall, upon conviction, be punished in the manner prescribed by law for stealing property of the kind or the value of the articles so embezzled, taken or secreted." And section 1916 of the Revised Statutes of 1899 provides: "Every person who shall buy, or in any way receive, any goods, money, right in action, personal property or any valuable security or effects whatsoever, that shall have been embezzled, converted, taken or secreted contrary to the provisions of the last four sections, or that shall have been stolen from another, knowing the same to have been so embezzled, taken or secreted, or stolen, shall, upon conviction, be punished in the same manner and to the same extent as for the stealing the money, ^{or} property or any other thing so bought or received." In the case at bar, as already said, there are two counts, one charging the defendant with grand larceny of the tobacco, and the other charging that one Louis Formaneck being then and there the agent, and servant of the transfer company, then and there by virtue of such employment, did have in his possession and under his care and control the said tobacco, did unlawfully, feloniously and intentionally embezzle and convert to his own use, without assent of the said transfer company, the said tobacco with the unlawful, felonious and fraudulent intent to deprive the owner, the said transfer company, of the use thereof, and that the defendant, Casey, then and there feloniously was present aiding, abetting and assisting the said Formaneck, the said embezzlement to do and commit. It seems too clear for controversy that if defendant was guilty either as a principal in the second count, or as an accessory before the fact, he was only guilty of the offense of which Formaneck was guilty In

State v. Fink, 186 Mo. 50, Fink was accused and convicted of the offense of receiving stolen property knowing the same to have been stolen. It appeared in that case that a driver named Wheeler was the employé of the transfer company whose duties were like those of Formaneck in this case, to drive his wagon to the railroad depots in East St. Louis and there receive freight consigned to St. Louis and deliver it to the various consignees in St. Louis. He received a large quantity of cigars from the Big Four Railroad Company in East St. Louis to be delivered in St. Louis, and instead of delivering the cigars to the consignees, he took them to the defendant Fink, who there received them knowing that it was not his property and that Wheeler had no right to deliver the property to him for any purpose. Upon that state of facts, this court said: "That there was no larceny by Wheeler from the railroad company is too clear for discussion. ¹³ The railroad company was authorized to deliver the goods to Wheeler, who was the agent and driver for the transfer company, and Wheeler, as such driver, had the right to receive the property for the transfer company; hence the receipt and possession by Wheeler from the railroad company was a lawful possession by virtue of his employment. After the railroad company delivered the goods from its depot to Wheeler, the driver for the transfer company, who was authorized to receive them, its responsibility for the goods or the possession of them ended. Wheeler did not steal the goods from the railroad company, for, under the facts in this case, he was authorized to receive them, and if he received the goods, as indicated by the testimony, by virtue of his employment as agent or driver for the transfer company, and appropriated the goods to his own use, clearly his offense was that of embezzlement, and falls within the terms of section 1912 of the Revised Statutes of 1899. . . . It may be said that Wheeler, at the time he received the goods from the railroad company, had the intent of appropriating them to his own use; that may be true; but that does not alter the fact that he had the right to receive them and did receive them by virtue of his employment, and his appropriation of them makes his offense that of embezzlement." In this case, Formaneck received the tobacco in question from the Southern Railroad Company in East St. Louis to deliver it to the Missouri Pacific Railroad Company in St. Louis, just as Wheeler, as the em-

ployé of the transfer company, received the cigars from the Big Four Railroad Company to deliver to the consignee in that case, and then with the knowledge, aid and assistance of defendant Casey, converted the tobacco feloniously to his own use, and he and the defendant were guilty of embezzlement, unless it can be said that the fact that because when Formaneck reached St. Louis in the evening ¹⁴ of May 1, 1906, it was too late to deliver the goods to the Missouri Pacific Railroad Company, and for that reason he drove his team to the warehouse of his employer, the transfer company, to leave the team and the tobacco there for the night, and after having left the team and tobacco there, went to see the defendant Casey, and he and Casey that night entered into the joint criminal arrangement of appropriating the tobacco, and that when Formaneck went to the warehouse of the transfer company the next morning and took charge of the team and the tobacco, this was a new caption with a felonious intent on the part of Formaneck and defendant to convert the tobacco to their own use and to deprive the owner of it, upon the doctrine of the common law as announced in *Pear's Case*, 2 East P. C. 685, in which it was held that the hiring of a horse on pretense of taking a journey, but in truth with intent to steal it, and evidencing such felonious intent by selling the horse, was larceny. To the same effect was *Spencer's Case*, Lew. C. C. 197; *State v. Williams*, 35 Mo. 229. In the last-mentioned case it was said by this court, however: "We do not contend that a bailee who obtains possession without a fraudulent intent can't be charged with larceny by reason of subsequent conversion to his own use, but we hold that if he obtains possession by delivery under a pretense of hiring, but with the actual design of depriving the owner of his property, he is guilty of the crime of stealing." That Formaneck received these goods from the railroad company lawfully and by virtue of his employment on the 1st of May, there can be no doubt, and there was no evidence tending to show an intention on his part to feloniously convert the tobacco to his own use until the night after he had left his team and the tobacco in the transfer company's warehouse. Did the mere fact that he left the tobacco and his team at the warehouse of the transfer company that night ¹⁵ for convenience or from necessity and returned the next morning and started with his team and the tobacco intact, change

his relationship to the transfer company? The record is absolutely barren of any instructions to him from anyone having authority to do anything different from the instructions he had received in East St. Louis at the Southern Railroad Company depot on the 1st of May, 1906, and there is absolutely no evidence to show that his agency had been changed in any manner. On the contrary, all the testimony shows there was no change in the character of the custody of the tobacco by Formanek from the time he lawfully received the same from the Southern Railroad Company by virtue of his employment as teamster for the transfer company, up to the time he delivered the goods to Fuelscher. The confidence and trust reposed in him by the transfer company on the morning of the 2d of May, 1906, was the same which had been confided in him on the previous afternoon, and that was to receive the tobacco from the Southern Railroad Company and deliver it to the Missouri Pacific Railroad Company. And we can discover no substantial ground upon which to base the contention of the state of a new and separate felonious caption of goods, but in our opinion it is a case of a receipt by the servant of the transfer company of property lawfully intrusted to his care and the felonious conversion by him and the defendant subsequently of the same property, and their offense was embezzlement and not larceny. In a word, we think that the decision in *State v. Fink*, 186 Mo. 50, 84 S. W. 921, is controlling upon the facts of this case, and that no sound distinction can be made between the two. On the other hand, this case is distinguishable from the ruling in *State v. Mintz*, 189 Mo. 268, 88 S. W. 12. In that case the original caption was felonious and fraudulent and with the intent to steal, and therein lies the distinction between this case and that; that was larceny, and this ¹⁶ is embezzlement. Having reached this conclusion, it becomes unnecessary to examine the other assignments of error. Under the instructions of the court the jury found the defendant not guilty of embezzlement or of aiding, abetting or assisting Formanek in the commission of embezzlement, and hence this cause cannot be remanded for the purpose of a trial of the defendant on that charge. As the testimony, in our opinion, was wholly insufficient to sustain the charge of larceny of which he was convicted, and as he cannot be tried for embezzle-

ment, the judgment of the circuit court is reversed and the prisoner discharged.

Fox, P. J., and Burgess, J., concur.

The Crime of Embezzlement is the subject of a note to *Eggleston v. State*, 87 Am. St. Rep. 19. Embezzlement, as defined in the statutes, consists of the fraudulent conversion or misappropriation of property received in a fiduciary capacity: *State v. Carmean*, 126 Iowa, 291, 106 Am. St. Rep. 352.

The Crime of Larceny is the subject of a note to *People v. Miller*, 88 Am. St. Rep. 559.

STATE v. CITY OF ST. LOUIS.

[207 Mo. 354, 105 S. W. 748.]

MUNICIPAL CORPORATIONS—Nuisance—Power to Abate as Against City Contractor.—A city has power to declare the acts of a contractor who holds a contract with it for the use of certain material in improving a street to be a nuisance, and stop him from mixing such material in the public street in such a way as to be injurious to the public health or destructive of the comfort of the inhabitants of the vicinity. (p. 382.)

MUNICIPAL CORPORATIONS—Public Nuisance.—A city cannot itself lawfully commit a public nuisance, nor authorize another to do so. (p. 382.)

MUNICIPAL CORPORATIONS—Administrative and Governmental Powers—Nuisance—Estoppel.—In its contracts for street improvement a city acts in its administrative capacity; but in the exercise of its police power to protect life and health, it acts in its governmental capacity, and is not estopped by its contract for street improvement to declare the acts of its contractor to be a nuisance. (p. 382.)

MUNICIPAL CORPORATIONS—Nuisance—Authorization of. A city cannot by ordinance authorize the carrying on of an operation destructive of public health, or loading the atmosphere with offensive odors, to the serious annoyance of the surrounding inhabitants. (p. 383.)

CERTIORARI—Evidence.—A writ of certiorari brings up only the record proper of the tribunal to which it is addressed and not the evidence, and when the record shows that the tribunal was dealing with a subject within its peculiar province, and that its proceedings were regular, its decision will not be disturbed. (p. 383.)

MUNICIPAL CORPORATIONS—Nuisance—Acts of Boards of Health.—The fact that a health commissioner, in discharge of a duty imposed upon him by law, prior to the meeting of a board of health of which he is a member, has declared that as operated a certain plant, in his official judgment, constitutes a nuisance and has given notice to the offender to appear before such board of health and show cause why the nuisance should not be abated, does not disqualify him from sitting at the hearing as a member of such board. (p. 385.)

CONSTITUTIONAL LAW—Due Process of Law.—If a city board of health, in the exercise of its authority under a charter and ordinances, determines, after a hearing, that an owner is maintaining a nuisance in operating a plant as then operated within the city and notifies him to abate it or suffer a prosecution, the board does not thereby deprive such owner of his property without due process of law, nor does it deprive him of any other constitutional right. (pp. 385, 386.)

Barclay & Fauntleroy, for the appellant.

C. W. Bates and C. P. Williams, for the respondents.

³⁵⁸ VALLIANT, P. J. The relators sued out a writ of certiorari in the circuit court against the defendants, the city of St. Louis, the board of health and the health commissioner of the city, the aim of which was to quash the record of the board of health declaring a certain plant, which relators were operating in the city, a nuisance, inimical to the public health. Upon the final hearing the court quashed the writ of certiorari and from that judgment the relators have taken this appeal.

From the record it appears that the relators had contracts with the city for the improvement of certain streets which required the use of a material called "binder," in the composition of which melted asphaltum at a high degree of temperature mixed with other material was used, which process of melting and mixing was being conducted by relators within the city limits, when a written complaint was filed with the health commissioner by twenty-eight resident taxpayers in the vicinity saying that the operation "sends out, fills and permeates the surrounding atmosphere in and about our homes and the streets fronting the same with a most offensive, obnoxious and foul smelling odor which is a constant source of annoyance, and makes life in and about the neighborhood in which we live intolerable." And besides the discomfort it was charged that the fumes and gases were injurious to health. Four days after receiving that complaint the health commissioner caused to be served on the relators a written notice that in his opinion the business, as they were conducting it, was a nuisance and injurious to public health, and would be so reported to the board of health on the twenty-third day of July, 1903, and notified them to appear before the board on that day and show cause why the nuisance "should not be abated, discontinued or removed." The relators appeared before the board and were represented ³⁵⁹ by

counsel; a trial was had, proof pro and con, documentary and oral, was introduced and the result was that on August 17, 1903, the trial was ended and the board of health entered on its record an order declaring that: "As operated at present the vapors evolved by the plant are offensive to the residents of the vicinity, impair the reasonable and comfortable enjoyment of their homes, are prejudicial to health, and, therefore, constitute a nuisance as defined by section 617 of the Municipal Code," and the health commissioner was directed to order the abatement, discontinuance or removal of said nuisance within such time as he might deem reasonable.

Four days thereafter the health commissioner issued a notice in writing to the relators, reciting the order of the board and notifying them to remove, abate or discontinue the operation of the plant or by making such additions, alterations and improvements as would prevent the escape of the odors, noxious fumes, gases and dust, etc., within twenty days from the service of the notice, and that on failure to do so they would be subject to prosecution and fine not less than twenty nor more than five hundred dollars according with the charter and ordinances of the city.

The following provisions of the city charter are discussed in the briefs as bearing on the merits of the cause: Article 3, section 26, clause 6, page 2486, Revised Statutes of 1899 (defining the powers of the legislative department of the city government): ". . . and to regulate or prevent the carrying on of any business which may be dangerous or detrimental to the public health, or the manufacturing or vending of articles obnoxious to the health of the inhabitants; and to declare, prevent and abate nuisances on public or private property, and the causes thereof." Clause 14, same section, page 2488, is: "Finally to pass all such ordinances, not inconsistent with the provisions of this charter, or the laws of the ³⁶⁰ state, as may be expedient, in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures, and to enforce the same by fines and penalties not exceeding five hundred dollars, and by forfeitures not exceeding one thousand dollars."

Article 12 relates to the health department. Section 1 of the article creates the office of health commissioner and board of health.

"Sec. 2. The board to consist of the mayor, the president of the council, a commissioner of police, two physicians and

the health commissioner. Three members to constitute a quorum.

“Sec. 3. The health commissioner shall have general supervision over the public health of said city, and see that its regulations, and the laws and ordinances of said city in relation thereto, are enforced and observed, and for that purpose he is authorized and empowered to make such rules and regulations, with the approval of the board, not inconsistent with this charter or any city ordinances or law of this state, as will tend to preserve and promote the health of said city; to appoint such employés, with the approval of the board of health, as may be necessary for the execution of his orders; to enter into or authorize and require any employé or police officer to enter into and examine, in the daytime, all buildings, lots and places of every description within the city, and to ascertain and report to him the condition thereof, so far as the public health may be affected by it; to declare and abate nuisances in such manner as may be provided herein, or by ordinance; but all condemnations must first be approved by the board of health, whose action thereon shall be final. He shall obey all orders not inconsistent with this charter and city ordinances, emanating from the board of health, and shall annually report to the mayor the general operations of his department ³⁶¹ during the year then ended, with such suggestions for the improvement of the same as he shall consider expedient.”

Section 6 is in part as follows: “In order to effect the abatement of nuisances or removal of accumulated filth, the health commissioner shall have power whenever in his opinion such nuisance or filth exists, and after officially so declared of record by the board of health to notify the owner or owners thereof, or his or their agents to abate or remove the same. . . . If the owner shall fail within the time . . . to comply with such order, or shall fail to show good cause to said health commissioner why he cannot or ought not to comply with such order, for which purpose he shall be entitled to be heard before said health commissioner and board of health, if he so request it, he shall be deemed guilty of a misdemeanor, and on conviction shall be fined not exceeding five hundred dollars, and the nuisance shall be abated and special tax bills rendered against the property in the same manner as against nonresidents, except that notice by advertisement shall not be necessary.”

The following city ordinances are also discussed in the briefs:

“Sec. 616. It shall not be lawful for any person, corporation or firm to erect any building for the purpose of manufacturing or producing any article, or to manufacture or produce any article, the manufacture of which is injurious to the public health, or which in the manufacture thereof emits an offensive odor to the extent of creating a nuisance to the surrounding inhabitants, without first having obtained the permission so to do from the municipal assembly by proper ordinance.

“Sec. 617. Every act or thing done or made, permitted, allowed or continued on any property, public ³⁶² or private, by any person or corporation, their agents or servants, to the damage or injury of any of the inhabitants of this city and not hereinbefore specified, shall be deemed a nuisance.”

“Sec. 631. It shall be the duty of the health commissioner, whenever he has any knowledge, or when any complaint has been made to said health commissioner by any citizen, that any business, trade or profession carried on in the city, by any person or persons or corporations, agents or managers, is detrimental to public health, or whenever any nuisance or filth exist on the property of any person or corporation, to notify such person or persons or corporation, agent or manager to show cause before the board of health at a time and place to be specified in such notice, why the same should not be abated, discontinued or removed, which notice of the health commissioner shall not be valid unless served on the party to whom it is directed at least five days before the time specified in such notice (except in case of epidemic or pestilence, when the health commissioner may, by general order, direct a shorter time).

“Sec. 632. Such notice shall be served upon said persons, corporation, agent or manager in the same manner as writs of summons are required to be served in civil cases.”

“Sec. 634. At the time fixed in such notice for the parties to appear before the board of health, said parties may appear in person, by attorney, or cause may be shown by affidavit.

“Sec. 635. After hearing all the facts in the case, if, in the opinion of the board of health, no good and sufficient cause be shown why said nuisance, business, trade, or profession should not be abated, discontinued or removed, said

board shall direct the health commissioner to order the parties to abate, discontinue or ³⁶³ remove the same within such time as the health commissioner may deem reasonable.

“Sec. 636. Any person or persons failing or refusing to obey the order or orders of the health commissioner relating to the abatement of nuisances shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty nor more than five hundred dollars; and such person or persons shall be subject to like fines for each and every day he, she or they shall continue such nuisance, business, trade or profession after the expiration of the time specified in the order of the health commissioner for the abatement, removal or discontinuance of the same. The fines mentioned in this article shall be collected as other fines paid into the city treasury.”

In the petition of relators for the writ of certiorari they aver that the order of the board declaring their plant a nuisance and ordering its abatement was void, because the board had no jurisdiction to make such an order and that its execution would deprive them of their property without due process of law and violate their rights under article 2, sections 30 and 21, constitution of Missouri, and amendments 14, section 1, United States constitution. And in their motion to quash the proceedings of the board they aver the infringement not only of their constitutional rights above mentioned but also of section 10, article 1, constitution of United States, and section 15, article 2 of the state constitution.

Defendants, in obedience to the writ of certiorari, sent the record of the board of health relating to this matter to the circuit court and moved the court to quash the writ.

After the record was lodged in the circuit court the relators suggested a diminution, in that the record as sent up omitted to show that certain proof offered by relators was rejected by the board, and they moved ³⁶⁴ that the defendants be required to amend the record by supplying that omission. Thereupon the defendants admitted that the evidence was offered as claimed and that it was rejected, but insisted that evidence was no part of the record called for by a writ of certiorari.

That evidence was to the effect that relators were operating this plant to make material to be used in the construction of the streets under their contracts with the city and that the city ordinances required that material to be used.

As already said, the circuit court on final hearing quashed the writ of certiorari and dismissed the defendants without day.

1. Appellant's first proposition is, that since what they were doing was in the line of the performance of their contract with the city, and was in the making of the mixture which their contract with the city called for and the city ordinance required, it did not comport with the city's attitude in the situation to declare the operation a nuisance and order its abatement.

We do not gather from the record that either their contracts with the city or the city ordinance under which it was made required the process of melting and mixing to be done in the streets that were to be improved, or that it was to be done as and where it was done; but even if that were so it would not justify the committing of an act destructive of the comfort of the people residing in that vicinity and injurious to the public health. The city itself could not lawfully commit such an act or authorize another to do so. The city has a dual character, administrative and governmental. In its contracts for street improvements it acts in its administrative capacity, and, to some extent, is on a plane with any other party to a business contract. But in the exercise of its police power to protect life and health it acts in its governmental ³⁶⁵ capacity and is not estopped by its contract, it could not abandon its duty in that respect even if it willed to do so.

We are referred in the brief for appellants to cases that hold that what the law authorizes to be done cannot be declared a nuisance, but that well-known principle has no application to the facts of this case, because there is no law authorizing the act here in question to be done.

Authorities are cited to show also that the city cannot create a nuisance on the property of a citizen and compel him to abate it, but that is foreign to this case.

Randle v. Pacific R. R., 65 Mo. 325, is cited to show that odors, smoke and cinders emitted from locomotive engines in a street were held not to be a nuisance for which an action would lie against the railroad company by an abutting property owner. But that case was submitted to the court with the express admission on the part of the plaintiff that the defendant had lawful authority to run its engines and trains through that street, and the court said that that admission ended the controversy.

Appellants also refer to section 616 of the general ordinances, which says that it shall be unlawful "to manufacture or produce any article the manufacture of which is injurious to the public health, or which in the manufacture thereof emits an offensive odor to the extent of creating a nuisance to the surrounding inhabitants, without first having obtained permission so to do, from the municipal assembly by proper ordinance."

If appellants mean that the municipal assembly could by ordinance authorize them to carry on an operation destructive of public health or loading the atmosphere with offensive odors to the serious annoyance of the surrounding inhabitants, we cannot agree ³⁶⁶ with them. There might arise an imperative necessity when, to prevent a greater calamity, some act temporarily offensive might be authorized, but no such a case is now before us. The record does not show that the city, by ordinance or otherwise, authorized the act, which the board of health in this instance condemned as a nuisance, to be done as and where it was being done. The record shows that there were a large number of witnesses examined on both sides, and the conclusion of the board was that the relators' works "as operated at present" were prejudicial to the public health and were a nuisance.

A writ of certiorari brings up only the record proper of the tribunal to which it is addressed; it does not bring up the evidence (*Sholar v. Smyth*, 3 Mo. 416; *Hicks v. Merry*, 4 Mo. 355; *Hannibal & St. J. R. R. Co. v. State Board*, 64 Mo. 294; *State v. Teasdale*, 101 Mo. 174, 14 S. W. 108; *Ward v. Board of Equalization*, 135 Mo. 300, 36 S. W. 648; *State v. Baker*, 170 Mo. 383, 70 S. W. 872); therefore, the court does not know whether the evidence justified the conclusion of the board or not, but the record does show that the board was dealing with a subject within its peculiar province and that its proceedings were regular; therefore, with its decision we must be satisfied.

2. Appellants contend that the health commissioner was disqualified from sitting as a member of the board of health, and that since without him there was no quorum when the board acted in this case, there was no lawful condemnation of the relators' works.

The alleged disqualification of the health commissioner was, in the opinion of appellants, caused by the fact that before the board met to consider the case, to wit, in the written notice

issued by the health commissioner to relators, calling them to appear before the board to answer the charge, he stated that in his opinion the works as operated constituted a nuisance, and ³⁶⁷ were detrimental to the public health. It is contended that in a proceeding of this kind the party to be affected is entitled to the same degree of impartiality and freedom from preconceived opinions in the members of the board as the law prescribes for a juror who is to try a cause in court of justice, and we are referred to section 3785 of the Revised Statutes of 1899, relating to jurors challenged for cause. We do not agree to that proposition. Proceedings of this kind from necessity must be conducted with less strictness than the trial of a law suit in a court of justice. Such proceedings must be conducted honestly and fairly and with good common sense, but not necessarily with judicial strictness. If a juror has formed or expressed an opinion in a cause to be tried, we put him aside and call another, but if we put the health commissioner aside, whom will we call in his place, and if several other members of the board have seen the object complained of and have formed the opinion that it was a nuisance and said so, how is the city to proceed to condemn it?

The health commissioner is a city officer exercising duties appertaining to his office alone, independent of his membership in the board of health: Charter, sec. 3, art. 12. But he is also a member of the board of health, and in addition to his duties as health commissioner he has the duties of a member of the board to perform. In that respect he is like the mayor, who besides being mayor and charged with the duties of that office, is also a member of the board of health and charged with duties appertaining to that function. In the absence of the mayor the charter provides that the health commissioner shall preside at the meetings of the board of health.

By section 3, article 12, the health commissioner is required to enter into premises and examine their condition as affecting public health, and "to declare ³⁶⁸ and abate nuisances in such manner as may be provided herein, or by ordinance."

Then comes section 631 of the general ordinances, above set out, making it his duty, "whenever he has any knowledge," or when a citizen complains to him, that a business is being conducted in a manner injurious to public health or constituting a nuisance, to notify the person so conducting

the business to appear before the board of health at a time and place to show cause why the nuisance should not be abated. Thus, he is required to issue the notice on his own knowledge or on the complaint of a citizen. If complaint is made and instead of issuing the notice at once he should deem it more prudent to visit the premises himself to see if there is reasonable ground for the complaint, it would be within the line of his duty to do so, and if, after inspection, he was satisfied that the thing was a nuisance, it would not be improper for him to so inform the proprietors. The charter provision above quoted does not authorize him to abate the nuisance on his own judgment of condemnation, but after saying that he shall declare and abate nuisances, adds: "But all condemnations must be first approved by the board of health, whose action thereon shall be final." Thus the law in express terms authorizes the health commissioner "to declare" the nuisance, but requires his condemnation to be approved by the board of health before it is put into execution. Section 3, article 12 of the charter does not mean that the health commissioner must in every case first declare the thing a nuisance before the board can pass judgment of condemnation on it, but it does mean that it is the duty of the health commissioner, when a matter injurious to public health is brought to his notice or comes under his observation, to declare it a nuisance by force of his own official judgment, and give notice to the offending parties to appear before the board and ³⁶⁹ show cause why the offense should not be abated, and he does not by discharging that duty disqualify himself from the performance of other duties imposed by law in furtherance of the same subject.

3. Appellants complain that by the proceeding of condemnation before the board of health, if it is permitted to stand, they are deprived of their property without due process of law; that the state is impairing the obligation of their contract with the city and denying them the equal protection of the law in violation of their rights under the state and federal constitutions.

Appellants' complaint on these points lies more in their apprehension of what may hereafter occur than what in fact has occurred. The city has not, so far as this record shows, laid its hands on the property of relators or on the relators themselves. The health commissioner and the board of health have, in the exercise of their authority under the city charter

and city ordinances, declared the relators' plant, as it was then and there being operated, a menace to public health and a nuisance, and have notified relators to either abate it or remove it, or so alter the mode of operation as to obviate the offensive character of the plant, giving them twenty days in which to do so, and admonishing them that if they neglected to do so, they would be subject to a prosecution under the city ordinance wherein they were liable to a fine not less than twenty nor more than five hundred dollars. That is the extent of the injury, if any, relators have suffered. If hereafter they should be prosecuted, the courts in which the trials may be had, or through which they may pass on appeal, will take care of relators' constitutional rights.

We find no error in the record.

The judgment is affirmed.

All concur.

A City cannot Authorize any Use of the Public Streets which amounts to the creation of a nuisance: *Angosta v. Reynolds*, 122 Ga. 754, 106 Am. St. Rep. 147. Thus, it cannot authorize a private individual unreasonably to obstruct them in his own interest: *Brawer v. Baltimore etc. Heating Co.*, 99 Md. 367, 105 Am. St. Rep. 304; *People v. Harris*, 203 Ill. 272, 96 Am. St. Rep. 304; *First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 46. As to the liability of a municipality granting permission to use a part of the street as a place to deposit building materials, see *Columbus v. Penrod*, 73 Ohio St. 209, 112 Am. St. Rep. 716.

HOLMES v. MURRAY.

[207 Mo. 413, 105 S. W. 1085.]

DAMAGES—Prima Facie Case.—In an action to recover damages for the killing of sheep by dogs, the plaintiff makes out a prima facie case by evidence tending to show that the defendant was the owner of the dogs which killed the sheep, and that he was the owner of the sheep which were worth the amount of money alleged as their value. (p. 388.)

CONSTITUTIONAL LAW—Due Process of Law.—A statute providing that in every case where sheep or other domestic animals are killed or maimed by dogs, the owner of such animals may recover against the owner or keeper of such dogs the full amount of damages, and the owner shall forthwith kill such dogs, is not unconstitutional as depriving the owner of such dogs of his property without due process of law by undertaking to hold him liable for the vicious habits and traits of his dogs or those kept by him, regardless of his knowledge of their vicious characters. (p. 389.)

DAMAGES for Sheep-killing Dogs—Dogs Owned by Servant or Member of Family.—If a person harbors a dog or permits his servant, or daughter who lives with and keeps house for him, to keep such an animal on the premises, he is a keeper of such animal within the meaning of a statute making the owner or keeper of a dog liable for sheep or other domestic animals killed or maimed by a dog or dogs. (p. 391.)

EVIDENCE—Sheep-killing Dogs.—In an action to recover damages for the killing of sheep by defendant's dogs, evidence that his daughter had the dogs killed soon after the killing of the sheep is inadmissible, without showing that defendant consented to having the dogs killed. (p. 392.)

F. D. Steele and W. Cloud, for the appellant.

French & Mayhew, for the respondent.

415 WOODSON, J. The plaintiff instituted this suit against the defendant before a justice of the peace, in Barry county, for the recovery of forty-two dollars, damages sustained by him in consequence of the killing of eight of his sheep, alleged to have been done by defendant's dogs.

The suit is based upon section 6975 of the Revised Statutes of 1899.

There was a trial before the justice, which resulted in a judgment for the plaintiff, from which the defendant **416** appealed to the circuit court of that county; upon a trial de novo in the circuit court the jury found for the plaintiff and assessed his damages at the sum of thirty-six dollars, and judgment was rendered accordingly; and in due time and in proper manner defendant appealed the cause to this court.

The plaintiff introduced evidence tending to prove that he was the owner of the sheep and that they were worth forty-two dollars, and they were killed by three dogs; that the dogs which did the killing belonged to the defendant. Over the objections and exceptions of defendant, the court permitted the introduction of evidence tending to show that defendant's daughter without his knowledge, had two of the dogs killed sometime after the sheep were killed.

Whereupon defendant asked a demurrer to the evidence, which was by the court overruled, and he duly excepted.

The evidence for defendant tended to prove that he was a widower, with no family except his daughter, who lived with and kept house for him, for which he paid her wages. Some of the evidence tended to show the daughter owned two of the dogs, while portions of it tended to show all of them

belonged to him. His entire evidence tended to prove that neither his nor his daughter's dogs killed the sheep.

At the request of the plaintiff the court gave two instructions in his behalf, to the giving of one of which the defendant duly excepted and saved his exceptions, and which is as follows:

"2. The court instructs the jury, that even though you may believe from the evidence that the dogs in question were owned by the daughter of defendant, and that she lived with and made her home with her father, the defendant; and that such dogs were knowingly permitted to be kept on the place and premises of defendant; then in such case the defendant is, ⁴¹⁷ within the meaning of the statutes, the keeper of such dogs, and is responsible for any damage they may do."

The court then gave certain instructions for defendant, and refused No. 2 asked by him, which is as follows:

"2. The court instructs the jury that if they believe from the evidence that it was the dogs belonging to and owned by Miss Mary Murray or any other person than the defendant that killed plaintiff's sheep, then your verdict must be for the defendant."

The appellant makes the following assignments of error: 1. The court erred in overruling the demurrer to plaintiff's testimony; 2. The court erred in refusing instruction numbered 2 asked by the defendant; 3. The court erred in admitting testimony showing that Miss Murray, after the sheep are alleged to have been killed, caused her dogs to be killed.

1. The defendant's demurrer to the evidence presents two legal propositions for determination: First, that there was not sufficient evidence introduced to make out a *prima facie* case for plaintiff; and, second, that section 6975 of the Revised Statutes of 1899 is unconstitutional and void.

As to the first proposition we desire to state that, after a careful reading of the entire evidence in the case, we are unable to concur in the views of the learned counsel regarding the sufficiency of the evidence to make out a case for the jury. It tended to show that the defendant was the owner of the dogs which killed the sheep, and that the plaintiff was the owner of the sheep, and that they were worth forty-two dollars. This made out a *prima facie* case under the statute referred to, and it was, therefore, the duty of

the court to submit ⁴¹⁸ the issues to the jury: *Barth v. Kansas City El. R. R. Co.*, 142 Mo. 535, 44 S. W. 778.

The second proposition commanding consideration is that section 6975 of the Revised Statutes of 1889 is unconstitutional, in that it violates section 30 of article 2 of the constitution of 1875, which provides: "That no person shall be deprived of life, liberty or property without due process of law."

Section 6975 reads as follows: "In every case where sheep or other domestic animals are killed or maimed by dogs, the owner of such animals may recover against the owner or keeper of such dog or dogs the full amount of damages, and the owner shall forthwith kill such dog or dogs," etc.

The contention of defendant is that this section undertakes to hold him liable for the vicious habits and traits of his dogs or those harbored by him, regardless of his knowledge of their vicious characters, and that the enforcement of this statute would deprive him of his property without due process of law.

This is a misconception of the meaning of the constitutional provision referred to. The court, in the discussion of that section of the constitution, said, in the case of *Mathews v. St. Louis R. R. Co.*, 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161: "We accept Mr. Webster's definition of the law of the land: 'By law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.'"

There is nothing in the statute which denies the defendant any rights; but, upon the other hand, the defendant was duly summoned to appear and defend the suit; he was given a full and careful hearing; and after complete inquiry as to both the ⁴¹⁹ law and the facts of the case, he was adjudged to pay the damage. That is all the letter or the spirit of the constitution guaranteed unto him. The legislature in no manner attempted to deprive defendant of his property without due process of law, but simply changed the common-law rule of his liability so as to impose a stricter liability.

The St. Louis court of appeals said, in discussing this statute, that "at common law a person could not be made

liable for injuries inflicted by vicious dogs belonging to him or under his control, unless the complaint averred and it was established on the trial that such owner or keeper was advised of the mischievous traits of his dogs. The statute merely dispenses with all proof of scienter, and did not undertake to create a new or independent cause of action. It merely changed the common-law rule so as to impose a stricter liability: 2 Shearman & Redfield on Negligence, 4th ed., sec. 628''; *Jacobsmeier v. Poggemoeller*, 47 Mo. App. 560.

The same enunciation of the law under similar statutes has been made in the following cases: *Brent v. Kimball*, 60 Ill. 211, 14 Am. Rep. 35; *Ballou v. Humphrey*, 8 Kan. 219; *Trompen v. Verhage*, 54 Mich. 304, 20 N. W. 53; *East Kingston v. Towle*, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174; *Fish v. Skut*, 21 Barb. (N. Y.) 333; *Job v. Harlan*, 13 Ohio St. 485; *Kerr v. O'Connor*, 63 Pa. 341; *Slinger v. Henneman*, 38 Wis. 504; *Regina v. Perrin*, 16 Ont. 446; 2 Cyc. 370.

This is the same conclusion reached by this court in *Mathews v. St. Louis etc. R. R. Co.*, 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161. It was held that prior to the enactment of section 2615 of the Revised Statutes of 1899, a railroad company was not liable for damage done to the property by fire escaping from its engines without the owner of the property should allege and prove that the company allowed the fire to escape through the negligence and carelessness of its agents and servants in charge of its engines; and that ⁴²⁰ after the passage of that statute it was not necessary to allege or prove the negligence in order to justify a recovery thereunder.

Under the doctrine thus announced before the plaintiff would be permitted to recover damages for injury done to his sheep by vicious dogs, he would be required to prove to the satisfaction of the jury, in a court duly organized and constituted to hear and determine such matters, that he was the owner of the sheep and that the defendant's dogs injured or killed them; and from the evidence the jury would have to determine the amount of the damages. This is in no sense the taking of property without due process of law, and we must, therefore, decide this question against the defendant.

2. The defendant contends that the action of the trial court in refusing to give instruction numbered 2 asked by

him was reversible error. In effect it declared the law to be, that if the jury believed from the evidence that the dogs belonged to the daughter and that they killed plaintiff's sheep, then they would find for the defendant.

We are unable to lend our assent to that declaration of the law. Even admitting the dogs belonged to the daughter, yet the uncontradicted evidence on both sides disclosed the fact that the daughter lived with and kept house for the defendant, and that he paid her wages for her services, and that with his knowledge and consent they were kept at his house. The law is well settled that if a person harbors a dog, or permits his servant to keep such an animal on his premises, that will constitute such person a keeper of the animal within the meaning of the statute: *Jacobsmeier v. Poggemoeller*, 47 Mo. App. 560; *Barrett v. Walden & M. R. R. Co.*, 3 Allen, 101; *Shearman & Redfield on Negligence*, 4th ed., sec. 635.

⁴²¹ Plaintiff's second instruction given is the counterpart of the one refused for defendant and just considered. The reasons given by us for sustaining the action of the court in refusing defendant's said instruction sustain the action of the trial court in giving plaintiff's second instruction; and for that reason it will not be necessary to further notice it.

3. It is finally insisted by defendant that the court erred in admitting evidence which showed that the daughter had the dogs killed without first requiring plaintiff to show that she did so with defendant's knowledge and consent.

This is a more serious proposition than either of the other two before considered. The issue was sharp and well defined. The plaintiff's evidence tended to show that the dogs which killed the sheep belonged to the defendant or were harbored by him, while the defendant's evidence was equally direct and positive that neither his dogs nor those of his daughter did the killing. It was contended before the court and argued to the jury that the fact that the dogs were killed after the sheep were killed was in the nature of an admission on the part of defendant that his dogs killed the sheep, or that he had knowledge of the fact that they did kill them.

In discussing this question in the case of *Peeler v. McMillan*, 91 Mo. App. 316, the Kansas City court of appeals used this language: "The defendant also complains because the court refused to instruct the jury to the effect that because he killed his dog it was no evidence that it maimed plain-

tiff's sheep. In view of the fact that the statute imposes a fine of one dollar upon owners for each day, after notice that their dogs kill sheep, we are of the opinion that the evidence that the defendant killed his dog shortly after the plaintiff's sheep were killed is somewhat persuasive of the belief upon his part of the sheep-killing ⁴²² tendency of his said dog, and that he must have had some knowledge that prompted him in doing so. We think the court was justified in refusing to give the instruction."

Conceding the ruling of the Kansas City court of appeals in that case to be correct, yet the rule there announced falls far short in its application to the facts in the case at bar. While there is one loose and disconnected expression of one of defendant's witnesses, which, if taken alone, would tend to prove defendant concurred in having the dogs killed, yet when the entire evidence is taken and construed together, it is perfectly clear the daughter had the dogs killed upon her own responsibility, for the reason that she thought there was great danger of serious trouble between her father and plaintiff, and in order to prevent that she, without his knowledge or consent, had the dogs killed. Under this state of facts it cannot be logically contended that, because she had them killed, the jury would be warranted in taking that fact into consideration in determining the liability of the defendant.

We are, therefore, clearly of the opinion that the action of the court in the admission of that evidence, in the absence of evidence tending to show he had knowledge of and consented to the killing, was prejudicial error; and for that reason the judgment is reversed and the cause remanded for a new trial.

All concur.

If a Vicious Dog is kept on premises occupied by a husband and wife, although both the premises and the dog are owned by her, still it has been held that the keeping of the dog is a matter over which he is authorized to exercise control as the head of the family, and if it escapes and injures third persons, he alone is answerable: *Strause v. Leipf*, 101 Ala. 433, 46 Am. St. Rep. 122; but it has been held that a married woman cannot be charged with harboring a dog "as owners usually do" under proof showing no more than that the dog belonged to her husband, and that she permitted it to remain on the home premises, the legal title to which was in her: *Burch v. Lowary*, 131 Iowa, 719, 117 Am. St. Rep. 443.

The Constitutionality of Statutes and ordinances providing for the summary impounding or destruction of dogs is considered in the note to Armstrong v. Brown, 90 Am. St. Rep. 211.

STATE v. CANTY.

[207 Mo. 439, 105 S. W. 1078.]

NUISANCE, PUBLIC—Suit to Enjoin a public nuisance is properly brought in the name of the state at the relation of the attorney general in the circuit court of the county wherein the nuisance exists. (p. 398.)

NUISANCE, PUBLIC—Definitions.—Any act which is an offense against the public order, common good and public decency or morals, or any public exhibition which tends to corrupt the morals, to disturb the peace or the general good order and welfare of society is a public nuisance, and this includes all exhibitions, the natural tendency of which is to pander to vicious and disorderly members of society. (p. 400.)

NUISANCE, PUBLIC—Bullfights.—A public bullfight is a public nuisance, and may be enjoined. (p. 402.)

NUISANCE, PUBLIC—Bullfight Arena.—An arena erected for the purpose of conducting bullfights therein, and in which bullfighting is actually carried on, is a public nuisance, and its use for that purpose may be enjoined. (p. 403.)

INJUNCTION—Commission of Crime.—A court of equity has no jurisdiction to enjoin the commission of crime generally. (p. 404.)

NUISANCE, PUBLIC—Injunction.—A court of equity has jurisdiction to restrain an existing or threatened public nuisance by injunction. (p. 405.)

NUISANCE Including Crime—Injunction.—A court of equity has jurisdiction to restrain an existing or threatened public nuisance by injunction, although the offender or offenders are amenable to the criminal laws of the state. (p. 407.)

NUISANCE, PUBLIC—Injunction.—Property Rights need not be involved in the litigation before a court of equity will grant injunctive relief to abate a public nuisance. (p. 407.)

NUISANCE, PUBLIC—Bullfights—Injunction.—A corporation, its managers, performers, and employes may be perpetually enjoined from using certain premises for the purpose of holding bullfights, although such bullfight is a crime and the participants therein may be punished as criminals. (p. 407.)

NUISANCE, PUBLIC—Injunction—Right to Jury Trial.—One who has not yet acted, but who merely proposes to commit an act which is not only criminal in its character, but also flagrantly offensive as a public nuisance, has no constitutional right to commit the act in order that he may thereafter enjoy the right of a trial by jury, and may be enjoined from committing such act. (p. 408.)

H. S. Hadley, attorney general, and J. Kermish, assistant attorney general, for the appellant.

T. J. Rowe, T. J. Rowe, Jr., and H. Rowe, for the respondents.

442 WOODSON, J. This is an equitable proceeding instituted by the state ex rel. the attorney general in the circuit court of St. Louis county, for the purpose of enjoining respondents from giving a public bullfight performance in an arena prepared for that purpose, upon the premises of the Beredith Realty Company, in said county, near the World's Fair Exposition, which was at the time in progress. A trial was had, and the finding was for respondents, and a decree was rendered dissolving the temporary injunction theretofore entered and dismissing the bill. In proper form and in due ⁴⁴³ time the attorney general appealed the cause to this court.

The petition was substantially as follows: That the defendants had, on divers occasions, unlawfully and willfully managed and conducted, and proposed to continue to manage and conduct a public exhibition and performance, known as a bullfight and bull-baiting, in an arena constructed for that purpose, in St. Louis county, state of Missouri, near the city of St. Louis; that at such performances many thousands of people attended, being each charged an admission fee of fifty cents; that great publicity was given to such performances by advertising in the public press to induce the people to attend, and that it is the intention of the defendants to unlawfully continue to conduct and use such place so constructed, as aforesaid, for the purpose of fighting and baiting bulls. That the defendant, the Beredith Realty Company, a corporation, owns the premises upon which said arena is constructed, and unlawfully, knowingly and willfully suffer and permit the defendants to use and occupy said premises for the purpose of fighting and baiting bulls in the presence of a large number of people, and that it is the intention of defendants to continue such performances and to use said premises for that purpose for a long time to come; that if such exhibitions continue, it will seriously endanger the lives of the participants, and that it will bring together from all parts of the country, lawless, violent, turbulent and dangerous assemblies of many thousands of people, causing riots and affrays and seriously endangering the safety and lives of many people, to the prejudice of the good name and general welfare of the people. That the bullfighting and bull-baiting so carried on, and threatened to be carried on, is contrary to the good morals and public peace and gen-

eral welfare of the people of the state, and constitutes a continuing violation of law, and is a public ⁴⁴⁴ nuisance; that such performances are a continuing nuisance, and that the state has no adequate remedy at law, except by the interposition of the injunctive power of a court of equity. The petition concludes with a prayer for injunctive relief against the defendants.

The answer is a general denial.

There is but little, if any, dispute regarding the facts of this case. Those established by the state are substantially as follows:

The St. Louis Humane Society was back of, and responsible for, this proceeding, and the various members thereof were the principal witnesses on behalf of the state. An arena was constructed for bullfighting, in St. Louis county, near the Administration entrance to the World's Fair grounds, and was about one hundred and fifty or two hundred feet square, inclosed, with a seating capacity of four or five thousand. Above the entrance was a picture of a bull, and a large sign with these words, "Bullfight Arena," and near one corner of the arena there was a poster displaying the following words: "Bullfight Arena. A Death-defying Spectacle." Prior to the institution of this suit several performances had been held in the arena by respondents, and they intended and threatened to continue giving them for an indefinite period of time; the first of which was on Sunday afternoon, September 4, 1904, all of which were the same in character, differing only in detail; and for that reason a statement of the facts regarding one performance will apply equally well to all. That performance was as follows:

The first part of it was a parade around the arena; the bullfighters went in dressed in Spanish costumes, leading horses, and, after retiring, one of the respondents opened a gate and let in a bull, and he came in on the run and jump; there were several men standing around, dressed for the occasion, called matadors, with ⁴⁴⁵ red cloaks or capes; as soon as the bull entered he made for one of those men, and the man threw his cloak in his face and jumped away, and then everyone of them went through the same performance; after the bull and men had completed that part of the performance one of the men would take a cane and go through the form of killing it, as with a sword in a Spanish or

Mexican arena, but the bull was not in fact stabbed, killed or injured by that act. The action of the matadors greatly excited and maddened the bull, and he would rush around the arena after those people, and attempted to gore them, and he caught one of them and smashed him with his head and horns against the side of the arena—he looked pale as if hurt and he then disappeared and never appeared again in the arena. He told one witness he was quite seriously hurt and was attended by a physician. There were “escapes” constructed of posts and boards in various parts of the arena, behind which the matadors could and did dodge when too closely pursued by the bulls, and the man who was injured was trying to get behind one of them when caught by the bull.

Mr. Robert, another matador, was also struck by a bull at the same performance, and knocked to the ground, and was in great danger of being killed or injured by the bull when the other matadors came to his timely assistance and distracted the attention of the bull. Robert afterward stated to the witness that he was black and blue from the effects of the stroke of the bull. This bul^l was kept in the arena fifteen or twenty minutes, and after he was taken out two or more were brought in; they came rushing in the same way as the first one, and charged the matadors in the same way, and “came very near catching several of them.” All the bulls did all they could to catch the men, but only the first succeeded in doing so. They would rush against the “escapes” in trying to gore the men.

⁴⁴⁶ The fourth animal turned in was an “old black steer” with one of his horns broken and hanging down and bleeding. When he was brought in two men were dressed up like horses, and he charged them, and they caught him by the broken horn, and he would strike the “escapes” with same in his charges, which would make it bleed worse. Another man came into the arena with a barrel around his body and the bull charged and knocked him down, but did him no injury—he was rescued by his fellow-performers. The bulls were greatly infuriated, and would snort and bellow when charging the men.

There were twenty of the bulls. They came from the ranch of Louis Terriers, Socorro, Mexico, and were fighting

bulls. Terriers raises bulls for fighting purposes and none other.

Mrs. Marian Cerevera, the wife of a bullfighter, who went to St. Louis to make a contract for her husband with the Richard Norris Bull Fight Company to give bullfights, testified that the performance were genuine bullfights, except the bull was not killed at the end of the show, as is done in Spain and Mexico; that she saw a man by the name of Sanandares pinned against the fence; he was down on his knees when some of the bullfighters came to his rescue; they had a crazy fellow, he was brought there with my husband's company because he was crazy, and he would go up to anything; he was in a horse made out of a basket, and he rode up to the bull, he was knocked down by the bull and he was unable to rise, and the bull tried to charge him, but he was taken away by the bullfighters. "I think the bulls were doped, judging from the appearance of the animals." On cross-examination, she testified that she tried to stop the bullfighting and went to see the governor about it; that the reason she wanted it stopped was because "these same people have murdered my husband. three or four of them got my husband ⁴⁴⁷ in a room and had another man—if they hadn't murdered my husband, they would not be allowed to give as many bullfights as they saw fit, so far as I am concerned; if my husband had been living I would have put a stop to it, if I could." Mr. Roberts came to me at my place of business in "Creation" and told me if I interfered with the bullfight he would bring Carlton Bass, the man who murdered my husband, here and have him work here in St. Louis. That was said because he thought it would make me feel badly to see the man who killed my husband.

On Sunday evening a crowd of women, bare-headed, entered the arena, with short aprons on, yelling and hollering. They met a lot of Mexicans and they were yelling and throwing their hats up and the women were yelling—two of them were selling beer in Dreamland and the German village. There were from twelve to fourteen hundred people who witnessed the performance on that Sunday evening, many of whom were excited and yelled and hollered and threw their cushion seats into the arena, and two men used vulgar language and the sheriff made them stop.

There were men on the outside of the inclosure advertising the sight by calling through a megaphone, and over the entrance was the following: "Bullfight Arena," and on the north side was the following: "Felix Roberts, Celebrated French Matador. Troupe of 40 Experts. Thrilling, Exciting, Unique. 20 Real Imported Wild Spanish Bulls. Death-Defying Spectacle. Arena at Administration Entrance to World's Fair, near Skinker Road. Admission 50 cents. Opening Performance Sunday, September 4th. Labor Day, September 5th."

The defendants' evidence did not tend to materially contradict the evidence introduced by the state, but tended to show that the crowd was composed of good people and was orderly and well-behaved; that it did ⁴⁴⁸ not become any more excited or demonstrative or holler any more than the crowds which generally witness a first-class baseball or football game. That there was no disturbance or breach of the peace. That before the trial of this proceeding took place the state had arrested and tried several of the defendants upon criminal charges and that all of them had been duly acquitted.

1. It is too well settled to challenge discussion that the suit was properly brought in the circuit court of St. Louis county, in the name of the state at the relation of the attorney general: *State v. Zachritz*, 166 Mo. 307, 89 Am. St. Rep. 711, 65 S. W. 939; *State v. Stobie*, 194 Mo. 14, 92 S. W. 191; 1 *Beach on Injunctions*, secs. 351-355.

2. The contention of the attorney general is that the defendants were maintaining and conducting, and threatened to continue to maintain and conduct a public nuisance, and with keeping and using the property and premises where such nuisance was maintained and threatened to use it for such purpose; and he further contends that such nuisance should be abated and enjoined by a court of equity, because the nuisance is an offense against public order, the common good and public decency and morals. The defendants contend that the petition does not state facts sufficient to entitle plaintiff to the relief prayed for, and that under the evidence and proof the decree of the trial court was for the right parties.

Those respective contentions present the two propositions to be decided:

1. Is a bullfight such as the one described by the evidence a common or public nuisance within the meaning of the law?

2. If so, has a court of equity jurisdiction to interfere by injunction and prevent it; or should the state be driven to the criminal law for redress?

⁴⁴⁹ This brings us first to the consideration and determination of what is a public nuisance within the meaning of the law.

Mr. Joyce, in his valuable work on the Law of Nuisances, section 5, defines a public or common nuisance in the following words: "A public or common nuisance is an offense against the public order and economy of the state by unlawfully doing any act or by omitting to perform any duty which the common good, public decency or morals, or the public right to life, health, and the use of property requires, and which at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights of property of the whole community, or neighborhood, or of any considerable number of persons; even though the extent of the annoyance, injury or damage may be unequal or may vary in its effects upon individuals. Another factor in defining a nuisance is, that consideration should be given to the places where the public have the legal right to go or congregate, or where they are likely to come within the sphere of its influence." And in section 409, the same author says: "A disorderly and disreputable theater is a common nuisance and so is a prizefight."

1 Wood on Nuisances, third edition, section 68, says: "A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or of the general order and welfare of society, is a public nuisance. Under this head are included all puppet shows, legerdemain, obscene pictures, and any and all exhibitions, the natural tendency of which is to pander to vicious tastes, and to draw together the vicious and disorderly members of society."

According to these definitions any act which is an offense against the public order, common good and public decency or morals, or any public exhibition ⁴⁵⁰ which tends to corrupt the morals, to disturb the peace or the general good order and welfare of society, is a public nuisance; such as puppet shows, legerdemain, obscene pictures, disorderly thea-

ters and prizefights, and all and any exhibitions the natural tendency of which is to pander to vicious and disorderly members of society: *Reaves v. Oklahoma*, 13 Okl. 396, 74 Pac. 951; *Commonwealth v. McGovern*, 116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280.

According to the evidence in this case there can be no doubt but what the bullfights in so far as the bulls were concerned were genuine fights and partook of the ferocity and brutality which has ever characterized them in Spain and Mexico. Two matadors were knocked down and injured more or less by the bulls the first night, and might have been seriously injured or killed had it not been for the timely arrival and assistance of their associates; and two others were knocked down, one of them a crazy man, but both escaped injury through the assistance of their fellows.

While it is true the evidence discloses that the matadors did not use the sword, as is the practice in Spain and Mexico in such fights, nor inflict injury or death upon the bulls, yet that very fact made it more hazardous and dangerous for the matadors. If they had been furnished with swords they would have been more able to have stopped the mad career of the infuriated bull, and thereby escaped the deadly charge of the Socorro brute, without relying exclusively upon the timely arrival and prompt assistance of their fellow matadors, or the convenient "escapes" erected along the wall of the arena.

The managers in disarming those poor bullfighters and placing them in the arena with those mad bulls were almost, if not quite, as guilty of as great a crime as the Romans were in ancient times, who threw the criminals and Christians into the public arena with the wild beasts to be torn to pieces and killed by them for the ⁴⁵¹ edification and amusement of the morbid and vicious populace.

To-day the matadors have modernized the arena and reduced the fighting largely to a science, and when properly armed they can defend themselves with some degree of safety, but when disarmed they are placed back on an exact plane and equality with the unfortunate Romans, except they have the "escapes" behind which they may retreat if they are quick and dexterous enough to evade the swift and mad charge of the infuriated bull; otherwise he must share the same gory fate as the Romans of old, if perchance some associate does not in the nick of time divert his attention from

him by a red flag. But in either event and under the most favorable circumstances, and when the matadors are properly armed with swords, they are often killed or injured, as everyone knows as a matter of history and common knowledge.

The state is deeply interested in the lives and well-being of all her citizens, and of those who come within her borders, and much more so than she is in the lives and safety of the bulls. The immunity of the bull from punishment under the system of fighting as shown by the evidence in this case in no manner or degree lessened the interest of the state in the lives and limbs of the men who were engaged in those highly dangerous combats and struggles. But in the case at bar one of the steers injured and broke one of his horns, which hung down over his face, and in that condition, with blood flowing therefrom, he would charge and recharge the men and dummy horses, and strike the broken horn against the dummy or the "escapes," and thereby caused the flow of the blood to increase, which must have been very painful and no less cruel to the dumb brute.

This is not all; the evidence shows that one man was killed in some controversy regarding the exhibition. ⁴⁵² While his widow does not make a very favorable impression upon us as a witness, yet as she was not contradicted, we must conclude that three or four of the men got him in a room, and while in there one of them killed him. She said murdered him, but, however that may be, it shows that there were some vicious and dangerous men gathered there and that they killed a man, and when charged with murder it did not make sufficient impression upon them to call for an explanation on their part.

The supreme court of Kentucky, in passing upon a prize-fight, said: "If the fight had occurred, doubtless it would have attracted some of the better and law-abiding class of citizens, curious to see such a spectacle as a prizefight; but for every such reputable citizen thus attending there would have been present a dozen gamblers, confidence men, bunco steerers, or pickpockets, gathered from all parts of the United States, men of idle, vicious and criminal habits and practices, whose business is to prey upon the public in some form or other, and many of them would remain in the community after the combat to ply their nefarious callings. Such an assembly would easily be led into a riot, or other unlawful

disturbance of the public peace. In addition to the evil suggested, there would be the contaminating effect of such a meeting upon the youth of the city and state, which might prove of incalculable injury to their morals and future welfare. Such a gathering, too, would demand increased vigilance in the protection of the property of the city and its inhabitants, be a menace to good order, and disturb the peaceful pursuits and happiness of citizens who would be unwilling to patronize such an enterprise": *Commonwealth v. McGovern*, 116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280.

And among the greatest of the evils connected with the holding of the bullfights, in the arena, would be the ⁴⁵³ presence of large crowds of lawless and turbulent men from all parts of the country. And what was said by the Kentucky court regarding the prizefight applies equally as well and forcible to bullfights. "An injunction against the use of the building advertised as the place of the fight would go far toward preventing the assembling of this crowd, and thereby avert incalculable mischief, which could not well be averted by the criminal courts, or their ministerial officers, after the assembling of the audience at the place of the combat, or in the act of assembling": *Commonwealth v. McGovern*, 116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280.

The same sentiments and views may be truthfully said of bullfights. It would have the natural tendency to draw the vicious criminal elements from all over the country to that one center, and their power for evil and the commission of crime in a great city like St. Louis with her thousands upon thousands of visitors at the World's Fair could not be foreseen or estimated, and the evil influences thereof would not have been confined to the limits of the city of St. Louis, but would have followed the youth of the country to the confines of the nation.

As it was, the fair proved to be a great attraction for the criminal element, and if they could have found so hospitable a rendezvous as the arena, doubtless it would have been filled with a large class of lawless and desperate men and women, who would have been a danger and menace to the city and state, and would have endangered the public peace and safety and might have resulted in riot and bloodshed.

"These are rights, though not susceptible of a pecuniary estimate, which it is the duty of the state to protect by every means at its command": *Commonwealth v. McGovern*, 116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280.

In treating of disorderly houses, Mr. Wood, in his excellent work on the Law of Nuisances, third edition, ⁴⁵⁴ volume 1, section 37, says: "So, too, a disorderly house is a common nuisance, and while bawdy-houses legitimately come under this head, yet it embraces a large class of other houses, kept for entirely different purposes, and to constitute which prostitution need not be an element."

In section 38 he says: "A disorderly house is any place of public resort in which unlawful practices are habitually carried on, or which become a rendezvous or place of resort for thieves, drunkards, prostitutes, or other idle, vicious and disorderly persons, who gather there to gratify their depraved appetites, or for any purpose; for such persons are regarded as dangerous to the peace and welfare of the community, and their presence at any place in considerable numbers is always a just cause for alarm and apprehension. . . . And a place where liquor is sold under a license in excessive quantities, whereby persons become intoxicated, and where brawls result therefrom, is a disorderly house, and indictable as a nuisance; for no person has a right to carry on upon his own premises or elsewhere, for his own gain or amusement, any public business clearly calculated to injure and destroy public morals, or to disturb the public peace."

All the authorities to which we have been cited confirm the doctrine above announced, and many more we have investigated are to the same effect. And if we are to be governed by those authorities, we are unable to see how it can be logically contended that an arena erected for the purpose and in which bullfighting is actually carried on, as disclosed by this record, is not a public and a common nuisance. We so believe it to be and have no hesitancy in declaring it to be such.

3. The second contention of the respondent is that even though it be conceded that the arena was a public nuisance, yet a court of equity has no jurisdiction ⁴⁵⁵ to abate the nuisance by injunction, but must resort to criminal prosecutions of the persons who maintain and conduct the nuisance.

The learned counsel for respondents, it seems to us, misconceives the position of the state upon that proposition. There are two offenses charged in the bill; one for maintaining a disorderly house, and the other for maintaining a public nuisance therein. While the injunctive remedy is prayed against both, yet the principal object of the bill is to abate

the disorderly house by enjoining the owners thereof from permitting it to be used for the purposes named in the bill.

We have no hesitancy in holding that the individual members of the company who conducted the bullfights cannot be enjoined from so doing, because that is a crime which is punishable by conviction under the criminal laws in a criminal prosecution. Nor has a court of equity, in the absence of statutory authority, jurisdiction to enjoin the maintenance of a bawdy-house, or any other house not of a public character.

In the discussion of this very question the supreme court of Kentucky in the case of *Neaf v. Palmer*, 103 Ky. 496, 45 S. W. 506, said: "It is not alleged that there are offensive sights or sounds about the obnoxious premises, but only that the property is made less valuable in the vicinity, and that the moral atmosphere is tainted and pestilential. The injury is wholly consequential. It seems to us under these circumstances criminal courts had best be left to enforce criminal laws. These are confessedly adequate for the purpose of suppressing such evils."

And the same court in the case of *Commonwealth v. McGovern*, 116 Ky. 212 (75 S. W. 261, 66 L. R. A. 280), on page 238, in discussing the *Neaf-Palmer* case, *supra*, used this language: "There was nothing in the case, *supra*, to indicate that the bawdy-house complained of could not be suppressed ⁴⁵⁶ by the ordinary methods appertaining to the criminal court, and the damages resulting to the plaintiff's property from the existence of the bawdy-house being wholly consequential and speculative, it would, of course, have been improper in that case to employ the writ of injunction in aid of the mere property rights of the individual."

The apparent and what actual conflict that may exist between the authorities upon this proposition grows out of the failure to draw the distinction between private and public nuisances. The offense must not only be a nuisance, but must be of a public character, which affects the entire community or a large portion of it, and conducted at a place where the public have a right to go and congregate. It never was the law, in the absence of legislative authority, that courts of equity could enjoin the commission of crime generally: *Cranford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514.

This court has uniformly held that a court of equity has no jurisdiction to enjoin the commission of a crime, but that

resort must be had to the criminal courts, which possess ample power to punish and prevent crime: *State v. Schweickardt*, 109 Mo. 496, 19 S. W. 47; *State v. Zachritz*, 166 Mo. 307, 89 Am. St. Rep. 711, 65 S. W. 999; *State v. Uhrig*, 14 Mo. App. 413.

But the power and jurisdiction of a court of equity to enjoin the maintenance of a public nuisance is of a very ancient origin, and is a well-established doctrine.

Judge Story, in treating this question, said: "In regard to public nuisances, the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so called, but also to purprestures upon public rights or property": 2 *Story's Equity Jurisprudence*, 13th ed., sec. 921. And in section 923 the same author says: "In cases of public nuisances, ⁴⁵⁷ properly so called, an indictment lies to abate them and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction." And he further says in section 924: "The ground of this jurisdiction of courts of equity in case of purpresture as well as of public nuisances undoubtedly is their ability to give more complete and perfect remedy than is attainable at law, in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigation. In the first place, they can interpose where courts of law cannot, to restrain and prevent such nuisances as are threatened or are in progress, as well as to abate those already existing. In the next place, by a perpetual injunction the remedy is made complete through all future time; whereas an information or indictment at the common law can only dispose of the present nuisance, and for future acts new prosecutions must be brought.

Mr. Pomeroy states the law as follows: "A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of the attorney general of England, and at the suit of the state, or the people, or municipality, or some proper officer representing the commonwealth, in this country": 4 *Pomeroy's Equity Jurisprudence*, 3d ed., sec. 1349.

And Mr. Joyce says: "A disorderly and disreputable theater may be enjoined although a common nuisance. So may a prizefight": *Joyce on Law of Nuisances*, sec. 409.

In discussing the power and jurisdiction of the court of equity to abate a public nuisance by injunction, the supreme court of Illinois said: "The jurisdiction of the court over the subject matter of the suit was also undoubted. The court of chancery may grant preventive as well as remedial relief; and this may be done where the act threatened would be punishable under ⁴⁵⁸ the criminal law as a nuisance": *People v. St. Louis*, 5 Gilm. 351, 48 Am. Dec. 340.

In the case of *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205, the supreme court of the United States said: "Equally untenable is the proposition that proceedings in equity for the purposes indicated in the thirteenth section of the statute are inconsistent with due process of law. 'In regard to public nuisances,' Mr. Justice Story says, 'the jurisdiction of courts of equity seems to be of very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so called, but also to purprestures upon public rights and property. . . . In cases of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction': 2 Story's Equity, secs. 921, 922. The ground of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of the courts of equity to give a more speedy, effectual and permanent remedy than can be had at law. They can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury": Also see *State v. Mayor*, 5 Port. (Ala.) 279, 30 Am. Dec. 564; *Attorney General v. Railroad*, 1 Drew & S. 161; *Attorney General v. Forbes*, 2 Mylne & C. 132; *Springfield v. Robberson Ave. Railroad Co.*, 69 Mo. App. 514; 21 Am. & Eng. Ency. of Law, 2d ed., 733; *Attorney General* ⁴⁵⁹ *v. Jamaica Pond Aq. Corp.*, 133 Mass. 361; *United States v. Debs*, 64 Fed. 724.

So we are thoroughly satisfied from both reason and authority that in a case of this character, where the nuisance sought to be enjoined is itself and in its very nature both public and at the same time injurious to the public safety and good morals, a court of equity has full power and jurisdiction to abate the existing nuisance and to perpetually enjoin the owners of the property from maintaining or conducting the same in the future.

4. The contention of respondents that a court of equity has no jurisdiction to abate a public nuisance where the offenders are amenable to the criminal laws of the state is not tenable, as is fully shown by the following authorities: 2 Story's Equity Jurisprudence, 13th ed., secs. 923, 924; Cranford v. Tyrrell, 128 N. Y. 341, 28 N. E. 514; People v. St. Louis, 5 Gilm. 351, 48 Am. Dec. 340; 21 Am. & Eng. Ency. of Law, 2d ed., 704; Attorney General v. Jamaica Pond Aq. Corp., 133 Mass. 361; Carleton v. Rugg, 149 Mass. 550, 14 Am. St. Rep. 446, 22 N. E. 55, 5 L. R. A. 193; Reaves v. Oklahoma, 13 Okl. 396, 74 Pac. 951.

5. The respondents' contention that property rights must be involved in the litigation before a court of equity will grant injunctive relief has no application to proceedings to abate a public nuisance: State v. Zachritz, 166 Mo. 307, 89 Am. St. Rep. 711, 65 S. W. 999; Cooper v. Hunt, 103 Mo. App. 9, 77 S. W. 483; Commonwealth v. McGovern, 116 Ky. 212, 75 N. W. 261, 66 L. R. A. 280.

6. The last insistence of the respondents is that under the evidence in the case, the finding and judgment of the trial court were for the right parties.

This contention is only partly true. The court erred in dismissing the petition and in refusing to perpetually enjoin the Beredith Realty Company, its owners and managers, from permitting the use of its premises for the holding of bullfights, and to that extent ⁴⁶⁰ the judgment is reversed and the cause remanded, with direction to the circuit court to reinstate the cause, and enter a decree perpetually enjoining the Beredith Realty Company, its owners and managers, from holding bullfights in or upon its premises, and to re-enter the judgment in favor of all other respondents.

Valliant, P. J., and Lamm and Graves, JJ., concur in all except what is said in regard to the jurisdiction of a court of equity to enjoin an act criminal in its character; as to that their views are expressed in the two separate opinions

of Valliant, P. J., and Lamm, J. The majority of the court being of the opinion that the judgment should be reversed and the cause remanded with directions to the circuit court to enter judgment against all the defendants as prayed in the petition, it is so ordered.

SEPARATE OPINION.

VALLIANT, P. J. A court of equity will not undertake to enforce the criminal law, therefore it will not enjoin the commission of a threatened act merely because the act would be a crime, but, on the other hand, neither will it withhold its equitable relief in a case in which, for other reasons, it has jurisdiction merely because the act when committed would be a crime. An act displayed before a public audience which is debasing in its character, debauching in its influence on public morals and brutalizing in its effect on the spectators is a public nuisance which a court of equity has jurisdiction to enjoin, and the court is not robbed of its jurisdiction merely because the act besides being a nuisance is also a crime. In such case a court of equity will give its attention to the public nuisance and ignore the criminal character of the act.

A man charged with the commission of a crime has ⁴⁶¹ a constitutional right to a trial by jury, but a man who has not yet acted but who merely proposes to commit an act which is not only criminal in its character but also flagrantly offensive as a public nuisance, has no constitutional right to commit the act in order that he may thereafter enjoy the constitutional right of trial by jury.

Lamm and Graves, JJ., concur.

SEPARATE OPINION.

LAMM, J. I agree with the result reached by my brother Woodson in so far as the decree is reversed and one directed to be entered against the corporate defendant, its owners and managers; but not with the direction that the decree be re-entered in favor of the other respondents. It is not a case for making two bites of one cherry. All the respondents seem to me to be in the same boat and tarred with the same stick; all were engaged in a common enterprise in creating and maintaining a continuing public nuisance of a kind so bad that to color it by expletives would weaken the facts. What was new was low; what was old was bor-

rowed from an age of savagery. The wholesome instincts of our people are one with the policy of our law in abominating such a spectacle.

The facts and the law make it a public nuisance, as shown by the opinion of my brother. This being so, equity should smite it as with a rod, without paltering, and spare not. I fail to comprehend how the corporate defendant can be guilty of hatching and maintaining that form of a mischief, on one hand, while other active agents in its maintenance, to wit, the individual men and women, masquerading as bullfighters, and who use the corporate premises to create and maintain the nuisance, on the other, go scot-free.

True it is these individuals may be guilty of violating the criminal law in some shape or form, and thus ⁴⁶² may be amenable to punishment as for crime. True, the general rule is that equity will not enjoin the commission of a crime. Therefore, in so far as the matadors, picadors, toreadors, banderilleros, chulos (and all the other bullfighters, however named or labeled) are guilty of violating the criminal law, let them be charged, arraigned, tried and punished in criminal courts in apt time, due order and ancient form. But the matters complained of are not alone crimes. They are of a dual sort, and may be viewed from another point of view. Thus, in so far as these people, while committing crimes, if any, also aid, abet, sanction and participate in the creation and maintenance of a continuing public nuisance, they came within reach (and ought not to escape the outstretched arm and corrective hand) of a court of conscience; for, absent them and their doings, there is no public nuisance. Their acts unite with the acts of the other respondents to make the nuisance itself. Hence, equity should not bother itself to pick and choose between the lot—make fish of one and fowl of the other—but treat them as it finds them, viz.: bound together in a bundle as members of one body, “hail-fellow-well-met”—birds of a feather—voluntarily united in a joint violation of law in maintaining a public nuisance, and, hence, not divided by that law for the purpose of injunctive restraint.

Suppose the owners of the premises could not be found, or the title to the premises were cunningly hid away, must a public nuisance continue debauching public morals and breeding depravity when those whose acts are maintaining it are known and within reach?

It is argued there is no precedent. If that were so, it ought not to avail anything. The day of making precedents is not passed. If there be no precedent, the time has come to make one. But *Hamilton-Brown Shoe Co. v. Saxey*, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. 1106, is precedent enough. True, ⁴⁶³ irreparable injury to property rights lay at the foundation of the cause of action in the *Hamilton-Brown* case, but irreparable injury to public morals is certainly of as grave concern as mere dollar and cent loss; and what is said in that case, on principle, covers this.

The judgment should be reversed and the cause remanded with directions that the court below enter a decree as prayed in the bill.

Valliant, P. J., and Graves, J., concur in this.

What Constitutes a Public Nuisance is the subject of an extended note to *Acme Fertilizer v. State*, 107 Am. St. Rep. 195. A poolroom or turf exchange, maintained to facilitate betting on horseraces, is a common-law nuisance, whether or not the betting is prohibited by statute: *State v. Vaughan*, 81 Ark. 117, 118 Am. St. Rep. 29.

The Maintenance of a Nuisance may be Enjoined, notwithstanding it is punishable as a crime: *State v. Vaughan*, 81 Ark. 117, 118 Am. St. Rep. 29; *Columbian Athletic Club v. State*, 143 Ind. 98, 52 Am. St. Rep. 407; note to *Crichton v. Dahmer*, 35 Am. St. Rep. 674.

STATE v. McCORD.

[207 Mo. 519, 106 S. W. 27.]

LOCAL OPTION LAWS—Petition—Qualified Voters.—The petition for a local option election is as much a part of the record as the order of court submitting the question of local option to the voters, and in determining whether the petitioners were qualified voters, the petition cannot be ignored, but must be considered. (p. 413.)

LOCAL OPTION LAWS—Judgment of County Court—Collateral Attack.—The county court, upon presentation to it of a petition for a local option liquor election, has jurisdiction of the matter and the right to determine whether the petitioners are legal voters, and having so decided its judgment cannot be collaterally attacked. (p. 413.)

LOCAL OPTION LAWS—Order for Election.—If the order of the county court submitting the question of local liquor option to the voters of a district recites that the requisite number of petitioners have signed and presented such petition for the consideration of the court, such order has reference to the petition signed and

presented by the persons who represented themselves therein as legal voters and none others. (p. 413.)

LOCAL OPTION LAWS—Order of County Court—Jurisdiction. In determining the jurisdiction of the county court to issue an order submitting the question of local liquor option to the voters of a district, the petition for the order and the order itself should be taken together for consideration, as they constitute but one record, and it is sufficient if jurisdiction appears from the entire record. It is not essential that such jurisdiction should appear from any particular part of the record. (p. 414.)

LOCAL OPTION LAWS—Jurisdiction of County Court—Collateral Attack.—When a petition is presented to the county court by the requisite number of legal voters of a county asking such court to submit to the voters of the county the proposition to vote on the question whether or not intoxicating liquors shall be sold in the county, it acquires jurisdiction of the subject matter of the controversy and of the petitioners, and the validity of its proceedings thereafter with respect to the same matter is not subject to collateral attack. (p. 414.)

LOCAL OPTION LAWS—Sufficiency of Petition—Jurisdiction of County Court.—It is not essential that the petition for a local liquor option election should be couched in the exact language of the statute, and a substantial compliance therewith is sufficient to authorize the county court to take jurisdiction of the matter and make the order for election. (p. 414.)

Harrington & Long and G. A. Watson, for the appellant.

H. S. Hadley, attorney general, N. T. Gentry, assistant attorney general, G. P. Hays and L. Walker, for the state.

523 **BURGESS, J.** This case was certified to this court from the St. Louis court of appeals, upon a division of opinion in that court, a majority of the members thereof concurring in opinion reversing the judgment of the circuit court, the other member dissenting. There is no controversy as to the facts, which are stated by Judge Nortoni substantially as follows:

The defendant was convicted on a charge of selling intoxicating liquors in violation of the local option law, and, after unsuccessful motions for new trial and in arrest of judgment, appealed to the St. Louis court of appeals. The main question raised was as to the adoption of the local option law in Christian county, the defendant maintaining that the local option law is not in force in said county, in support of which contention he points to what he terms irregularities in the proceedings antecedent and leading up to the publication of notice declaring the same to have been adopted.

It appears that on the fourth day of May, 1905, a petition was presented to the county court of Christian county, pray-

ing that the proposition of adopting the local option law be submitted to the voters of that county. The county court found such petition to have ⁵²⁴ been signed by "one-tenth of the qualified voters and taxpayers of Christian county, Missouri," and upon such finding ordered an election for July 10th, "to determine the proposition whether or not spirituous and intoxicating liquors, including wine and beer, should be sold" in that county. The election was held, a majority of the votes cast were found to be in favor of the adoption of the local option law, and in due time the county court published the result, in compliance with section 3031 of the Revised Statutes of 1899, thereby putting the provisions of the law in force.

The defendant contends that the judgment and order of the county court, of date May 4th, by which it submitted the proposition to adopt the law, is void for the reason that it is not predicated upon the petition of one-tenth of the qualified voters of such county, as required by section 3027 of the Revised Statutes of 1899, which provides:

"Upon application by petition, signed by one-tenth of the qualified voters of any county who shall reside outside of the corporate limits of any city or town having at the time of such petition a population of twenty-five hundred inhabitants or more, who are qualified to vote for members of the legislature, in any county in this state, the county court of such county shall order an election to be held in such county at the usual voting precincts for holding any general election for state officers, to take place within forty days after the reception of such petition, to determine whether or not spirituous and intoxicating liquors, including wine and beer, shall be sold within the limits of such county lying outside of such corporate limits of such city or town."

The petition to the county court for the submission of the question of local option to the qualified voters of the county is in substantial compliance with the requirements of the statute. It recites: "We, the undersigned ⁵²⁵ legal voters in said Christian county, do hereby petition your honorable body to submit to the voters of said Christian county the proposition to vote on the question whether dramshop license shall not be granted in said county, commonly called local option, according to section 3027 of the Revised Statutes of 1899 of the state of Missouri."

Upon the presentation of this petition, as stated before, the county court found that it was signed by "one-tenth of the qualified voters and taxpayers of Christian county": but the order of the court further recited that it appeared to the court "from the sworn testimony produced in open court by Rev. W. H. Son, J. A. Wasson and S. D. Wells and William McVeigh that the required number of petitioners have signed and presented said petition for their consideration," etc.

The question, then, is, Were the petitioners qualified voters of the county? In determining this question we must not ignore the petition, nor any part of the record, but consider all together. The petition is as much a part of the record as the order submitting the question of local option to the voters, and is an indispensable prerequisite to the making of the order. It says, "We, the undersigned legal voters," etc., and the order of submission recites that the petition prayed the court to make an order submitting to the qualified voters of said county an election to determine whether or not spirituous liquors should be sold, and, further, that the requisite number of petitioners had signed and presented said petition.

It will be observed that the only petition presented to the court shows upon its face that it was signed by legal voters, and there is no showing to the contrary. It was only upon a petition signed by one-tenth of the legal voters of the county that the court was authorized to submit the question of local option ⁵²⁶ to the qualified voters of the county, and the court having jurisdiction of the matter had the right to determine whether the petitioners were legal voters or not. Having so decided, its judgment cannot be attacked collaterally. The mere fact that the words "and taxpayers" follow the words "one-tenth of the qualified voters" in the order of submission did not deprive the court of its jurisdiction, it having already attached, and did not, in our opinion, render the order void. Besides, where the order of submission recites that the requisite number of petitioners had signed and presented said petition for the consideration of the court, it has reference to the petition signed and presented by the persons who represented themselves therein as legal voters, and none others. It is not essential that such jurisdiction should appear from any particular part of the record: *State v. Schneider*, 47 Mo. App. 669. In determin-

ing this question in the case in hand, the petition and order should be taken together, because they constitute but one record, and it is sufficient if jurisdiction appears from the entire record: *Sappington v. Lenz*, 53 Mo. App. 44; *Adams v. Cowles*, 95 Mo. 501; *Sutton v. Cole*, 155 Mo. 206. To our minds, it is clear that the question was fairly submitted to the legal voters in the county; that "taxpayers" not legal voters did not, so far as the record discloses, sign the petition or vote at the election, and that the words "and taxpayers" were inadvertently, and without authority, inserted in said order of submission.

When the petition was presented to the county court by the requisite number of legal voters of the county, asking said court to submit to the voters of said county the proposition to vote on the question whether or not spirituous and intoxicating liquors should be sold in the county, it acquired jurisdiction of the subject matter of controversy and of the petitioners, ⁵²⁷ and the validity of its proceedings thereafter with respect to the same matter is not subject to collateral attack, as is sought to be done in this case.

As the petition presented to the county court on which the order for the local option election was based petitioned the court "to submit to the voters of said county the proposition to vote on the question whether dramshop license shall not be granted in said county, commonly called local option, according to section 3027 of the Revised Statutes of 1899 of the state of Missouri," while said section provides that the county court, after the reception of the petition, shall order an election to be held "to determine whether or not spirituous and intoxicating liquors, including wine and beer, shall be sold," it is claimed by defendant that the petition in question was insufficient to authorize the court to take jurisdiction of the matter, and make the order for election. While the petition is not couched in the exact language of the statute, we think it a substantial compliance therewith, and when considered in connection with the words "commonly called local option, according to section 3027 of the Revised Statutes of 1899 of the state of Missouri," which words form part of the petition, it seems well enough. Certainly, no one signing the petition or voting at the election could have been misled by its informality. As was said by Smith, P. J., speaking for the court, in *State v. Weeks*, 38 Mo. App. 573: "If it appeared by the petition of the requisite number of the quali-

fied voters that such was their will, that fact would authorize the exercise of the jurisdiction, no difference what the form of the petition may be. . . . When proceedings under the local option statute are drawn in question as for sufficiency, we are not disposed to invoke the application of the strict rules of construction by which are usually tested proceedings for the condemnation of private ⁵²⁸ property for public use": State v. Smith, 38 Mo. App. 618.

Our conclusion is that the petition was a sufficient compliance with the requirements of the statute to justify the making of the order for the election.

For these considerations the judgment of the circuit court is affirmed.

All concur.

Local Option Statutes are discussed in respect to their constitutionality in the note to Chicago etc. B. B. Co. v. Greer, 114 Am. St. Rep. 317.

SMART v. KANSAS CITY.

[208 Mo. 162, 105 S. W. 709.]

NEW TRIAL—Grounds for Considered on Appeal.—A party obtaining an order for a new trial from which an appeal is taken, the record showing the grounds for the new trial, is not precluded from showing by such record that he was entitled to a new trial on some one of the grounds stated, although the trial court specified only one, and that one not a sufficient reason for granting the new trial. (p. 427.)

WITNESSES—Physician and Patient—Waiver by Bringing Suit.—A person by bringing suit and asking damages for personal injury inflicted by a third person does not thereby waive the incompetency of his physician or surgeon to testify regarding information acquired from him while attending him in a professional capacity for such injury. (p. 427.)

WITNESSES—Physician and Patient.—A physician or surgeon is disqualified to testify in all cases regarding information acquired by him from a patient while attending him in a professional capacity, and which information is necessary to enable him to prescribe for such patient. (p. 431.)

WITNESSES—Physician and Patient.—Assistant Physicians or Surgeons in a hospital to which a person is taken for treatment are incompetent to testify, over objection, as to anything connected with the treatment or condition of such person while there. (p. 431.)

PHYSICIAN AND PATIENT.—The relation of physician and patient is one of contract, either express or implied, and can be created in no other way. (p. 432.)

WITNESSES—Physician and Patient.—It makes no difference, so far as the physician's disqualification to testify against his patient is concerned, whether he acquires the confidential communications from a poor or pay patient, in a private residence or in a hospital, or from a charity patient in a public hospital. (p. 433.)

WITNESSES—Physician and Patient.—A physician rightfully in a hospital exercising authority over patients therein, examining their persons, advising treatment, and removing patients from their wards to the operating-room for clinical purposes, with the knowledge and consent of those in charge of the institution, is incompetent to testify, over objection, as to anything connected with the treatment or condition of a patient while in such hospital. (p. 434.)

PHYSICIAN AND PATIENT—Creation of Relation—Confidential Communications.—It is not necessary, to create the relation of physician and patient, that the physician should actually treat the patient, and if he makes an examination of the patient with the knowledge and consent of the latter, he believing that the examination is being made for the purpose of treating him, the relation is created by implication, and it is wholly immaterial what the secret object or purpose of the physician was in making it in so far as it affects his right to disclose the conditions or communications of the patient. (p. 435.)

WITNESSES—Physician and Patient—Confidential Communications.—A patient in a hospital has the right to assume, and rely upon the assumption that a physician apparently in charge of the hospital is rightfully there, and as such has authority to examine and prescribe for him, and the physician will not afterward be heard to say that he was not connected with the institution and had no authority to treat the patient, for the purpose of allowing him to disclose the physical condition of such patient while in the hospital. (p. 435.)

WITNESSES—Physician and Patient—Privileged Communications.—Information acquired by a physician by looking at the patient or by examination is as much within the rule excluding as evidence confidential communications as are the verbal communications which take place between them. (p. 439.)

EVIDENCE—Hospital Record—Privileged Communications.—An official hospital record into which has been copied the attending physician's diagnosis of the case of a certain patient is a privileged communication, and not admissible in evidence against such patient's objection. (p. 439.)

EVIDENCE—Expert—Hypothetical Question.—If an expert witness is present during the entire trial except about ten minutes, an objection to a hypothetical question propounded to him and based upon what he has heard, on the ground that it is not based on the entire evidence, should not be sustained, especially when that part of the evidence which the witness has not heard is immaterial to the question. (p. 442.)

EVIDENCE—Experts—Conclusion of Witness.—If, in an action to recover for personal injury, there is an issue whether the amputation of plaintiff's leg was rendered necessary by the accident or by tuberculosis of the knee, it is improper to allow a physician testifying as an expert to state the cause of the amputation, and his testimony must be limited to an inquiry as to whether the accident was a sufficient cause to necessitate the amputation, and the jury must be left to determine the cause thereof. (p. 443.)

MUNICIPAL CORPORATIONS—Defective Sidewalk—Instructions.—If in an action against a city to recover for personal injury caused by falling over a coal-hole projecting above the sidewalk, the evidence as to the extent of the projection is conflicting, an instruction that if the city negligently allowed the coal-hole to remain in a dangerous condition for travel on the sidewalk, on account of its extending above the level thereof, the plaintiff could recover, is proper, although it ignores the distance of the projection. (p. 444.)

TRIAL—Instructions.—A person cannot complain of error in instructions which he adopts as his own. (p. 444.)

MUNICIPAL CORPORATIONS—Defective Sidewalks—Negligence.—In an action against a city to recover for personal injury caused by a fall on a defective sidewalk, if it is shown that the city knew, or, in exercising ordinary care, should have known, of such defect, if any, in the sidewalk in time to have had reasonable opportunity to have repaired it, or had reasonable opportunity to have caused it to have been repaired in time to have prevented the accident, and neglected to do so, the city is liable. (p. 445.)

MUNICIPAL CORPORATIONS—Defective Sidewalks—Damages—Amputation of Leg.—In an action against a city to recover for personal injury caused by a fall on a defective sidewalk, the jury, in estimating the damages, may take into consideration the fact that plaintiff's leg was amputated, if the amputation was caused by the fall, but not if it was rendered necessary by disease. (p. 445.)

DAMAGES—Personal Injury—Aggravated Ailments.—In an action to recover for personal injury, a recovery may be had for the aggravation of existing ailments. (p. 446.)

H. J. Latshaw, Jr., for the appellant.

E. C. Meservey and W. A. Knoots, for the respondent.

170 WOODSON, J. This is a suit which was instituted by the plaintiff against the defendant in the circuit court of Jackson county, asking damages in the sum of twenty-five thousand dollars for personal injuries sustained by her through the alleged negligence of defendant in permitting a coal-hole in one of its streets to become out of repair and remain in a dangerous condition for pedestrians to pass over, and that while passing over it she stumbled and fell upon her knee and side, and, as a result, received an injury to her right knee, which resulted in the amputation of her right leg above the knee.

As there are no complaints lodged against the pleadings, it will serve no good purpose in setting them out in this opinion.

The evidence tended to establish the following facts:

On February 26, 1898, plaintiff was walking south on the west side of Wyandotte street in defendant city, with a bundle of clothing she had made and was carrying to the owner.

In front of 1012 Wyandotte street there was a coal-hole in the sidewalk, constructed of a metallic cylinder and a round lid; the evidence for plaintiff tended to show the cylinder extended ¹⁷¹ from two to four inches above the stone sidewalk, while that of the defendant tended to show it extended above the surface of the walk not to exceed one-half to three-quarters of an inch; and all the evidence tended to show that it had been in the same condition for years that it was in on the day of the injury; that when she reached said coal-hole she struck her right foot against it, which caused her to trip and fall, and thereby caused her knee to strike the metal cover and greatly bruise and injure it, and pushed the knee-cap to one side, toward the inner side of her limb; that bystanders assisted her to a passing buggy, and she was driven to her home, where she remained a few days, where the limb was examined by a massagist, who was not admitted to practice, and her knee was found to be bruised and very much swollen, and the knee-cap dislocated, as before stated, all of which caused her to suffer much pain; that within a few days she was taken to the City Hospital, which we gather from the record belonged to the city, though there is no positive evidence of that fact in this record; there she received proper care and medical treatment but continued to grow worse for two months, when it became necessary, in order to save her life, to amputate her right limb above the knee. Plaintiff admitted that she had four or five years before the injury complained of and suffered from tuberculosis of her right knee joint; that some five or six years prior to this injury she, while skating, fell on the ice and injured this same knee, at Winona, Missouri, her then home. Sometime later she was treated for that injury at Bethany Hospital, in Kansas City, Kansas, where it was discovered she had tuberculosis in that knee joint; and, in 1894, Dr. Gray operated on this same knee joint, in St. Margaret's Hospital, Kansas City, Missouri, for tuberculosis of the knee joint, and discharged her as well from that institution in October, 1894. He also testified that ¹⁷² he never knew of a case of tuberculosis of the knee where it was necessary to amputate the limb in order to save the patient's life. The evidence also tended to show that she was in the City Hospital for like treatment in May and April, 1896; and some time in 1897 she received a fall from a street-car, and again injured this knee. She had been

a cripple most of the time from the date of her fall on the ice, while skating, and walked with a cane most of the time and with a crutch occasionally, and at times used neither; and the evidence tended to show she had neither at the time she sustained the injury sued for. She suffered more or less pain all the time, ever since her knee was first injured at Winona.

The plaintiff's testimony tended to show that the fall on the sidewalk so injured and aggravated the tuberculosis of her knee joint that amputation was necessary, and that the amputation would never have been necessary had she not received the injury complained of; while the defendant's evidence tends to show that the tuberculosis condition alone made the amputation necessary.

The evidence showed that plaintiff at the time of the injury was earning six or seven dollars a week.

Dr. Brummel Jones, being called as a witness on the part of the plaintiff testified as follows:

"Q. Have you been present, Doctor, in this courtroom during the entire evidence for the plaintiff in this case?
A. I have.

"Q. Have you heard all of it? A. With the exception probably of ten minutes yesterday afternoon I have. I was probably five or ten minutes away.

"Q. Did you hear all the testimony given in the case with the exception of those ten minutes? A. I did.

"Q. When was the period of ten minutes, Doctor?
A. Well, I came into the courtroom about ten ¹⁷³ minutes past 1, and my understanding was that court convened at 1, so that is a supposition.

"Q. Ten minutes after 1 you got here? A. Yes, sir; about that.

"Q. I will read to you, Doctor, all the testimony taken in this case during the ten minutes you were absent. . . .

"Defendant objects for the reason that it is immaterial. Objection sustained by court.

"Q. Then I will ask you this question, Doctor: Presume that the evidence which was given during the ten minutes did not refer to the injury to the plaintiff, nor to the extent of that injury, nor to her previous health, nor to her present health or anything connected with her condition, but referred entirely to the fall, the way the plaintiff fell, and the

condition of the sidewalk upon which she fell; presume that to be true and presuming further, Doctor, that the testimony which you have heard given here, all the rest of that testimony, is true, what would you say, in your opinion as a medical expert, as to the reason why this plaintiff's leg was amputated?

"Defendant objects to the question for the reason that the case is not in a condition for expert testimony to be required or admitted. It is an attempt to bring in this doctor, who knows nothing about the case except as he has heard it from the witnesses on the stand, and ask him why Dr. Coffin, after examination by other physicians, amputated the leg. The evidence of that is Dr. Coffin and the other physicians who examined the knee. Their evidence might be admissible because they know the facts and saw and examined the plaintiff, but this is a physician who knows nothing of the case except as he has heard the witnesses testify.

"Plaintiff objects to arguing the case at this time.

"By the Court. They have a right to introduce ¹⁷⁴ expert testimony and base it upon his knowledge and experience.

"Defendant objects to the hypothetical question for the reason that the proper foundation has not been laid and all of the facts connected with this woman's physical condition have not been stated in the hypothetical question, and some of the material facts have been left out of that question.

"Objection overruled by the court.

"Defendant further objects for the reason the question is not in proper form, but calls for his opinion from what he heard in the courtroom and it is possible he didn't hear distinctly.

"Objection overruled by the court.

"Defendant excepts to the ruling of the court.

"Q. (By Mr. Latshaw.) Doctor, taking it for granted that during the ten minutes you were not in the courtroom the testimony then produced in the case referred entirely to the sidewalk and its condition, and the manner of the plaintiff's fall, and that no testimony was given during your absence from the courtroom during that ten minutes in regard to her condition or in regard to the amputation, or in regard to her health either before or since the accident, or any evidence that affected her health or her limb or its previous condition, and assuming that the evidence you have heard here, which is all of the other evidence in the case on the

plaintiff's part, is true, what, then, would you say as your opinion as a medical expert in regard to what was the cause of the amputation of the plaintiff's limb?

"Defendant objects to the question for the reason that it is assuming facts that the doctor cannot by any means know to be true, and an assumption of things that happened when he was out of the courtroom and he must be qualified.

"Objection overruled by the court.

¹⁷⁵ "Defendant excepts to the ruling of the court.

"By Mr. Latshaw. We now offer to read to this witness the ten minutes' testimony that was given during the time he was absent from the courtroom yesterday afternoon, that testimony being at that time read to the jury from the bill of exceptions in the former trial and not recited by witness upon the stand.

"Defendant objects to the offer for the reason it is immaterial.

"Objection sustained by the court.

"A. You want me to state what, in my judgment, was the cause of her limb being removed?

"Q. Yes, sir. A. Or the cause of the necessity for its removal?

"Q. Yes, sir.

"Defendant objects. Objection sustained by court.

"By Mr. Williams. Q. Why was it removed, not the cause of its being so?

"By the Court. Go ahead.

"A. Well, I don't see my way clear to answer, but I will say, that I think, in my judgment, it was removed on account of the diseased condition that existed there.

"Q. Now, Doctor, in your opinion as a medical expert, under the evidence in this case that you have heard, what is your opinion as to what brought that disease to that particular limb and that particular part of it?

"Defendant objects for the reason it is incompetent, irrelevant and immaterial, not a proper question and not a proper subject for hypothetical questions, and the foundation has not been laid properly.

"Objection overruled by court.

"Defendant excepts to the ruling of the court.

"A. I would say that the injury precipitated the amputation, sir."

176 Defendant placed Dr. J. D. Griffith on the stand, and, after testifying at some length as an expert, he stated he was present and witnessed the amputation of plaintiff's leg, and after answering some eight or ten other questions, "defendant offered to prove by Dr. Griffith that he was present at the amputation and saw the leg amputated," to which offer plaintiff objected because he was present as a physician, and the court sustained the objection. Prior to this, the doctor testified that, "If I remember rightly, I saw her or she came to me at the Sister's Hospital, if I am not mistaken, or at my office, or somewhere, before she went to the City Hospital. I am not absolutely certain about it." He testified that he was not connected with the hospital, and that he was merely a visitor there at the time the amputation was performed.

Defendant also offered to prove by Doctors Stanley, Enne and Lane that the amputation was performed because of the tuberculosis in her knee. The plaintiff objected to the offer because Doctors Stanley and Lane were assistant surgeons in the hospital, and, as such assisted in the amputation of the limb, and that Enne acquired his information while treating her for the injuries received when she fell from the street-car in 1897, which objection was, by the court, sustained.

Defendant then offered to prove by Dr. Fulton that witness is a physician and surgeon; that he saw plaintiff once, he thinks only once, which was, he thinks, in the fall or early winter of 1897, which would be about nine or ten months prior to plaintiff's fall on the sidewalk for which this suit was brought; when he saw plaintiff, she was lying on a cot in the City Hospital; Dr. Thrush was her physician in attendance at that time; that witness was holding clinics at the City Hospital and was looking for subjects to bring into the operating-room; that this patient (plaintiff) was 177 not exhibited before the class, she not being just the kind of material he wanted that day; he simply looked at the patient, and looked at her right leg; that he did not treat her, but merely advised treatment.

To this offer plaintiff said: "We have no objection to the first part of that offer, but we do object to the doctor testifying that he examined the patient's leg and advised as to what treatment should be used."

Objection sustained by the court.

Respondent then further offers to prove by Dr. Fulton "that he remembers the condition he saw plaintiff in on that day, and that he said to Dr. Thrush: 'Why don't you take it off?' (referring to plaintiff's right leg); that upon the day he saw plaintiff in the City Hospital he pulled up the cover, looked at her leg and advised Dr. Thrush, her physician, to have it amputated at that time; that that was his sole connection with the case; that he simply made that remark and then went away."

Respondent further offered to prove by Dr. Fulton that his "suggestion" to Dr. Thrush was "wholly voluntary"; that he had no conversation with plaintiff, and said nothing to her; that his examination was not made for the purpose of prescribing treatment; that he didn't make a diagnosis, merely suggested a diagnosis; that he did not prescribe for her, but merely made a suggestion as to what he thought would have to be done in that light; that whatever information he received at that time he got from that examination, which was a cursory examination; that he had no information aside from that examination; that the leg was bare, and that he looked at the leg but did not touch it; that he noticed there was a swelling and what he considered a pretty bad condition of the limb; that this condition was of the knee, and probably below the knee; that he made a sufficient examination to enable ¹⁷⁸ him to form an opinion as between these conditions, that it was either malignant growth or tuberculosis; that his conclusion as to the condition of that limb was that it was either sarcoma or tuberculosis, and whichever it was, in his judgment, it would have to be amputated.

To all of which plaintiff objected, and was by the court sustained.

Dr. F. C. Frederick testified for defendant substantially as follows:

"I am in charge of the records at the City Hospital; been employed there since 1892; kept the records for the last five years; have the official records with me kept in accordance with ordinances of the city; have examined them with reference to dates and circumstances pending confinement of Stella Smart at City Hospital; the first date of admission is May 26, 1895; she was in the hospital at that time until June 14, 1895; the diagnosis of that was tuberculosis.

"Plaintiff objects to the diagnosis because it is not a part of the records of the hospital.

"Q. Is the diagnosis a part of the record? A. Yes, sir; it is on the record-book, the same as the other part.

"By Mr. Williams. I now ask the witness the question as to the diagnosis.

"By the Court. I don't know who made it. A. The surgeon in charge.

"By the Court. Did he tell you about it? A. No, sir; it was put on the record.

"By the Court. Who put it down? A. The house surgeon.

"By the Court. You don't know whether it was correct or not? A. No, sir; whatever he put down was correct so far as I was concerned. It was there on the record.

179 "Plaintiff objects for the reason it is incompetent.

"Objection sustained by court. No exception."

The next time she was in the hospital was April 8, 1896, and she was discharged May 18, 1896; the next time she was in the hospital was August 24, 1896, being the third time.

"A. She was in the hospital until the 10th of September, 1896."

The next time she was in the hospital was March 15, 1898, her leg being amputated April 13th; she was discharged September 19, 1898.

"Q. Doctor, I will get you to state again how the diagnosis of the various cases is put on record? State whether or not it is done in every instance. A. It is a regular duty performed by the house surgeon. Whenever he sees a case and satisfies himself that

"Plaintiff objects to the witness detailing the custom of the house surgeon.

"By the Court. What the doctor wrote on the book is not admissible for two reasons.

"By Mr. Williams. You mean it is a privileged communication, confidential information, and we can't prove it?

"By the Court. Yes, sir; if he gets it from the patient.

"Q. Your understanding is that the diagnosis is first made by the physician in attendance, and that he copies that diagnosis and it is written down by the physician into that record?

"Plaintiff objects to his understanding of the matter.

"By the Court. He means what really occurs.

"A. That is the process in each case."

The defendant duly excepted to all the rulings of the court in excluding the offers before mentioned.

At the close of plaintiff's evidence in chief the defendant¹⁸⁰ asked a demurrer to the evidence, which the court refused to give and defendant duly excepted.

The court gave eleven instructions to the jury on behalf of plaintiff, only three of which are assailed in this court, and they are as follows:

"1. The court instructs the jury that if you find and believe from the evidence that on February 26, 1898, and for a long time prior thereto, Wyandotte street was a public street within the defendant Kansas City, and that the sidewalk on the west side of said Wyandotte street and directly in front of No. 1012 Wyandotte street was at all said times a public sidewalk upon said street, and that at all times a coal-hole, with the covering and lid thereon, was in said sidewalk, then it became the duty of said defendant, Kansas City, to exercise ordinary care in keeping said sidewalk in front of No. 1012 Wyandotte street in a reasonably safe condition for persons lawfully walking thereon, and if you further find from the evidence that defendant, Kansas City, neglected said duty by allowing the covering and lid on said coal-hole to be, on said February 26, 1898, and to remain for a long time prior thereto in an unsafe and dangerous condition for travel on account of the covering and lid of said coal-hole extending above the level of said sidewalk, and if you further find and believe from the evidence that defendant, Kansas City, either knew of said condition of said coal-hole or by the exercise of ordinary care or caution could have known thereof in time to have had reasonable opportunity to have repaired said defect, if any, or had a reasonable opportunity to have caused the same, if any, to have been repaired in time to have prevented the accident to plaintiff hereinafter referred to, but failed and neglected so to do; and if you further find and believe from the evidence that on said twenty-sixth day of February, 1898, plaintiff, Stella Smart, was walking south on said¹⁸¹ sidewalk in front of No. 1012 Wyandotte street she struck her right foot against or under the said covering of said coal-hole and was thrown to the sidewalk and injured without any negligence on her part contributing thereto, then you are to find for the plaintiff.

"2. If you find for plaintiff, then in assessing her damages you may take into consideration all physical pain, if

any, and mental anguish, if any, she suffered on account of the injuries, if any, she received by falling over the coal-hole in front of 1012 Wyandotte street, on February 26, 1898, if you find and believe from the evidence that she did fall at said time and place. And if you further find and believe from the evidence that plaintiff, on account of said injuries, if any, was compelled to lose her means of livelihood, you may take this into consideration and allow her such amount therefor, not to exceed seven dollars per week, as you may find and believe from the evidence she is entitled to. And if you also find and believe from the evidence that on account of said injuries it became necessary to amputate plaintiff's right leg and that the same was amputated on account thereof, then you may take that fact into consideration in assessing her damages, and allow her such sum as you may find and believe from the evidence she is entitled to, not to exceed in all the sum of twenty-five thousand dollars.

"3. The court instructs the jury that even though you should find and believe from the evidence that plaintiff had tuberculosis in her right knee or in her right leg, or in her system generally, or had any other disease latent in her system, still, if you find and believe from the evidence that she was injured under the conditions and at the time and place set out in instruction number one (1), then the court instructs you that defendant is responsible to plaintiff for all effects which naturally and necessarily follow the injury, if ¹⁸² any, in the condition of health in which plaintiff was or plaintiff's said right leg or right knee was at the time, and it is no defense that the injuries, if any, may have been aggravated and rendered more difficult to cure by reason of plaintiff's state of health or that by reason of latent diseases the injuries, if any, were rendered more serious to her than they would have been to a person of robust health."

And at the request of the defendant, the court gave eight instructions, and refused two, but no point is made of that refusal in this court.

The jury found for plaintiff and assessed her damages at the sum of five thousand dollars, and judgment was rendered in her favor for that sum. Defendant in due time filed its motion for a new trial, which was by the court sustained; and to the action of the court in sustaining said motion the plaintiff duly excepted, and has brought the case to this

court on an appeal from the order of the court sustaining said motion, which order is as follows:

“And now the motion for a new trial heretofore filed is taken up by the court for hearing and determination; and after fully hearing and duly considering the same, and being duly advised in the premises, the court orders that said motion be sustained on the grounds and for the reason that the court erred in refusing to allow the witness, Dr. Fulton, to testify, to which action of the court in sustaining said motion the plaintiff now here excepts.”

1. The sole ground assigned by the court for granting defendant a new trial in this cause is, that it erred in refusing to allow the witness, Dr. Fulton, to testify to the matters offered to be proved by him, which are set forth in the accompanying statement. Defendant contends that it has the right to call the attention of this court to any other errors committed ¹⁸³ by the circuit court in the trial of the cause, and have them passed on also.

In passing upon the question indicated, this court held that the party obtaining the new trial has no occasion to appeal, but if the record discloses the grounds for a new trial, he is not precluded from showing by the record brought to this court by his adversary that he was entitled to a new trial, notwithstanding the trial court specified only one, and that one perhaps not a sufficient reason for granting the new trial: *Emmons v. Quade*, 176 Mo. 22, 75 S. W. 103; *Bradley v. Reppell*, 133 Mo. 545, 54 Am. St. Rep. 685, 32 S. W. 645, 34 S. W. 841; *Haven v. Missouri R. R. Co.*, 155 Mo. 216, 55 S. W. 1035; *Thompson v. Metropolitan St. R. R. Co.*, 140 Mo. 125, 41 S. W. 454. Under this ruling we will consider any and all questions presented by this record which we deem necessary for the proper disposition of the case.

2. And as the court granted the new trial upon the supposed error in the refusal to permit Dr. Fulton to testify on behalf of defendant, we will first dispose of the question of confidential communications.

Defendant takes the broad position that the plaintiff by bringing this suit and asking damages for personal injuries thereby waived the incompetency of her physician and surgeon to testify regarding information acquired from her while attending her in a professional capacity. The statute regarding confidential communications between physician and patient, in so far as applicable to this case, is as follows:

"The following persons shall be incompetent to testify. . . . Fifth, a physician or surgeon, concerning any information which he may have acquired and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon": Rev. Stats. 1899, sec. 4659.

The meaning of this section is not veiled in doubt. It disqualifies the physician and surgeon from testifying to any information acquired by them while attending ¹⁸⁴ their patients in a professional capacity. The wisdom of such a law is addressed to the legislative branch of the government and not to the judiciary; the latter has to deal with its meaning and not the policy of the statute. That policy is not only well grounded in this state, but is firmly rooted in the jurisprudence of a majority of the states and territories of the Union; for this reason the courts should give the statute full force and effect and not nullify it upon a mere pretext of an implied waiver of its provisions. Such a rule may, and doubtless does, work a hardship and an injustice in many cases, but that is greatly overshadowed and outweighed by the benefits it brings to the human family at large and to society in general.

If we correctly understand defendant's contention, it is this: the bringing of an action, in which an essential part of the issue is the existence of a physical ailment, is a waiver of the privilege of all communications concerning that ailment. And Mr. Wigmore, in his work on Evidence, says: "The whole reason for the privilege is the patient's supposed unwillingness that the ailment should be disclosed to the world at large; hence, the bringing of a suit in which the very declaration, and much more the proof, discloses the ailment to the world at large, is of itself an indication that the supposed repugnancy to disclosure does not exist. If the privilege means anything at all in its origin, it means this as a sequel": 4 Wigmore on Evidence, sec. 2389.

It seems to us that this is too narrow a view to take of the statute. If you could limit the inquiry to the particular injury sued for, there might be some apparent force in the contention for a waiver, but such injuries, when inflicted upon weak and diseased people, will more than likely aggravate the previous ailments, and rather than disclose such troubles, they might prefer to waive the aggravation and limit the recovery ¹⁸⁵ of damages to the apparent rather than

to the real extent of the injury; and, again, a person might be suffering from some temporary loathsome disease at the time of the injury, and the one might have no effect upon the other or bear no relation whatever thereto. In either of those cases, we are unable to see any good reason for holding he or she may not place the seal of secrecy upon the lips of the physician or surgeon, who, through his confidential relation to the patient, has learned of those ailments, which, if made known, might and often do injuriously affect the business and social standing of such persons in the community where they reside. If it was not for this wise and beneficent statute, all the diseases to which the human flesh is heir could, and in many cases would, be uncovered and held up to public view, with no corresponding benefits to be derived therefrom, either as a defense to the case or in mitigation of damages. But independent of what we have just stated, if the contention of defendant is true, that the mere filing of the petition in court in such cases waives the statutory privilege, then said section 4659 has no force or effect, and is an absolute nullity, because said section begins by stating "the following persons shall be incompetent to testify," etc. If this statute is waived by the mere filing of the suit, then the patient cannot avail himself or herself of its provisions, and the disqualification of the physician and surgeon is removed, and they are thereby authorized to disclose all information acquired by them in the examination and treatment of their patients. If no suit is brought by the patient, there could be no occasion for the physician or surgeon disclosing the confidential communications; but the instant one is brought and trial had, and that being the only possible occasion upon which the patient could avail himself of the statutory privilege, he is met with the proposition of implied waiver, and, as an inevitable ¹⁸⁶ result, the statutory privilege could not be invoked in that case, nor in any other. In other words, as long as suit is not instituted, the physician is disqualified by the statute, and in that case there is no express or implied waiver, but under that condition he could not testify because there is no case pending in which to testify; but if suit is instituted, that fact waives the statutory privilege, and he becomes a competent witness and is authorized to disclose all confidential communications. Such reasoning leads to an absurdity, and totally emasculates the statute.

Defendant contends that this court is committed to the doctrine of waiver by the opinion in the case of *Cramer v. Hurt*, 154 Mo. 112, 77 Am. St. Rep. 752. We do not so understand that case. That was a suit by the husband against a practicing physician to recover damages sustained by him for the loss of services, and the society of his wife, caused by an abortion committed upon her by the physician. In that case the physician was permitted to testify in his own behalf regarding information acquired by him while treating her upon the occasion complained of, and an objection was made as to his competency as a witness under section 8925 of the Revised Statutes of 1889, which is the same as section 4659 of the Revised Statutes of 1899, now under consideration. The defendant contended that the statute did not apply to a case like that, because, first, the rule of necessity, a well-known rule of evidence, was an exception to the statute and applicable to his case, and, second, that the wife waived the statutory privilege by voluntarily offering herself as a witness in behalf of her husband. After citing and discussing many authorities from this and other states supporting the doctrine of necessity, Judge Burgess disposed of the defendant's first contention in the following language: "So in the case at bar, while holding that both defendant and Mrs. Cramer are competent witnesses in the case ¹⁸⁷ with respect to the conversations between them in regard to his treatment of her in his professional capacity, and his manner of treatment, what he did, etc., is a departure from the prevailing rule of the law of evidence, we think it is fully justified by the authorities, upon the ground of the necessity of the case." And in disposing of the second contention, Judge Burgess said: "Moreover, we think Mrs. Cramer is a competent witness in the case on general grounds of public policy, for if it be known that a married woman is a competent witness for her husband, in a suit for damages by him against a physician who produces an abortion upon her without the consent of her husband, in consequence of which her health is injured and he is deprived of her services to which he is entitled by law, and expenses are entailed upon him in her nursing and for medical treatment, it might to some extent at least put a stop to such revolting and unnatural practices. As the knowledge derived by defendant with respect to the condition of plaintiff's wife was privileged on her part and

which she had the right to waive (*Blair v. Chicago & A. R. R. Co.*, 89 Mo. 383, 1 S. W. 350; *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510; *Davenport v. Hannibal*, 108 Mo. 471, 18 S. W. 1122; *Groll v. Tower*, 85 Mo. 249, 55 Am. Rep. 358), it is claimed that she did waive the protection of the statute by offering herself as a witness in behalf of her husband. But the abstract of the record nowhere shows that she offered herself as a witness, and shows nothing more than that 'Mrs. Cramer, being duly sworn on behalf of plaintiff, testified as follows': Nor does it appear that the plaintiff is representing his wife in this case, or that he was at any time authorized by her to waive this privilege": *Cramer v. Hurt*, 154 Mo. 112, 77 Am. St. Rep. 752, 55 S. W. 258; *Henry v. Sneed*, 99 Mo. 407, 17 Am. St. Rep. 580, 12 S. W. 663; *Moeckel v. Heim*, 134 Mo. 576, 36 S. W. 226; *Ex parte Marmaduke*, 91 Mo. 228, 60 Am. Rep. 250, 4 S. W. 91. The Cramer case in express terms held the wife to be a competent witness upon the grounds of public policy, and that the husband ¹⁸⁸ could not waive the protection of secrecy offered her by section 4659, but that if she saw fit to do so, she could waive the statutory privilege and testify in his behalf, upon the grounds of public policy and necessities of the case.

The authorities cited firmly hold to the doctrine that a physician or surgeon is disqualified to testify in all cases regarding information acquired by him from a patient while attending him or her in a professional character, and which information was necessary in order to enable him to prescribe for such patient: *Smoot v. Kansas City*, 194 Mo. 513, 92 S. W. 363; *Gartside v. Connecticut Mut. L. Ins. Co.*, 76 Mo. 446, 43 Am. Rep. 765; *Smart v. Kansas City*, 91 Mo. App. 586; *Streeter v. City of Breckenridge*, 23 Mo. App. 244.

3. We will next consider the insistence of defendant, that the trial court committed error in excluding the testimony of Doctors Griffith, Stanley, Enne and Lane.

The only fact defendant offered to prove by Dr. Griffith which was excluded by the court was that he was present at the time the amputation of the leg was performed. We are unable to see in what possible way defendant was prejudiced by that ruling of the court. The defendant did not go further and offer to prove or disprove by Dr. Griffith any

fact in issue in the case; but confined the offer to prove the mere fact of his presence upon that occasion. There was no error in that ruling of the court.

We come now to the consideration of the competency of Doctors Stanley and Lane. They were assistant physicians and surgeons in the hospital where plaintiff was taken for treatment upon the occasion in controversy, and they assisted in the treatment and amputation of plaintiff's leg. Under and by virtue of their appointment, contract, or by whatever arrangement they became assistant physicians in that hospital ¹⁸⁹ they were constituted the physician and surgeon of each and every patient who entered that institution for treatment, and they had no legal or moral right or authority to view, treat or operate upon any of them, except by virtue of that appointment or contract. Even their very presence there is traceable to and authorized by that authority and none other; and the intrusion of a physician or surgeon into an institution of the character in question, and his assumption of authority to observe and examine patients without the permission of those in charge, and by the consent of the patients, would constitute him a trespasser. Such is not tolerated by the law, and would not and should not be permitted by those in charge.

The relation of physician and patient is one of contract, either expressed or implied, and can be created in no other way. In cases of this character the physician or surgeon in accepting such a position impliedly, at least, agrees to treat such patients as are accepted into the institution, and when he assumes to examine them, either by their express agreement or by their implied or tacit consent, which may be inferred from the act of entrance into the institution, and which will be inferred in the absence of evidence indicating a contrary intention in either event, whenever the minds of the physician and patient meet by either express or implied contract, the statute places the seal of secrecy upon all information acquired by the physician in such professional capacity.

The same rule of law applies as fully and effectually to the assistant physician as it does to physician and surgeon in chief: *Renihan v. Dennin*, 103 N. Y. 573, 57 Am. Rep. 770, 9 N. E. 320; *Prader v. National Accident Assn.*, 95 Iowa, 149, 63 N. W. 601; *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185.

The rule has also been applied to the partner of the attending physician, even though the partner never prescribed for

the patient: *Raymond v. Burlington etc. R. R.*, 190 65 Iowa, 152, 21 N. W. 195; *Aetna Life Ins. Co. v. Deming*, 123 Ind. 384, 24 N. E. 86, 375.

It makes no difference in principle, so far as the physician's disqualification is concerned, whether he acquires the confidential communications from a poor or pay patient, in a private residence or hospital, or from a charity patient in a public hospital.

The same statute disqualifies an attorney from divulging the confidential communications between himself and his client, and it makes no difference whether the client is poor or rich, nor whether he lives in a palace or in a poor house—the same rule applies in both cases. The poor and needy are as much protected by the law as the rich and strong. Certainly the statute makes no such distinction or exception, and we do not feel justified to write such exceptions into the statute: *Elliott on Evidence*, secs. 634, 635; *Grossman v. Supreme Lodge*, 6 N. Y. Supp. 821.

It necessarily follows from what has been stated that neither Stanley nor Lane was competent to testify to any information they acquired while acting in their professional capacity.

Clearly, Dr. Enne was not a competent witness to testify to information acquired by him during his treatment of plaintiff for the injuries she received by falling from the street-car in 1897.

The court properly excluded his testimony from the jury: *Smoot v. Kansas City*, 194 Mo. 513, 92 S. W. 363; *Glasgow v. Metropolitan St. R. R. Co.*, 191 Mo. 347, 89 S. W. 915.

The same principle of privileged secrecy applies to Dr. Fulton's evidence as was applied to the evidence of Doctors Stanley and Lane. When we look at the facts surrounding Dr. Fulton, they are not materially different from those regarding the two former physicians. The record discloses he had some kind of arrangement by which he had access to the hospital and the right to examine patients, select such as he wished, ¹⁹¹ and take them into an operating-room for use in the clinics, which he had authority to hold in the institution in which plaintiff was confined. It is true, the record shows Dr. Thrush was the physician in charge of the institution and was the chief attendant of the plaintiff upon that occasion, yet the very evidence defendant offered shows Dr.

Fulton approached plaintiff while in bed, "pulled up the cover, looked at her and advised Dr. Thrush, her physician, to have it amputated at that time," because, as the offer shows, he thought she had "either sarcoma or tuberculosis, and whichever it was, in his judgment, it would have to be amputated." Under that state of facts defendant offered to prove by Dr. Fulton the examination of her leg made by him, that she was suffering from sarcoma or tuberculosis of the knee joint, and that he advised Dr. Thrush to amputate the leg. To this evidence the plaintiff objected, because the facts stated constituted him her physician, and that under section 4659 of the Revised Statutes of 1899 he was disqualified from testifying to the facts contained in the offer made, which objection was by the court sustained, but afterward the court granted the defendant a new trial because of the alleged error in excluding that evidence from the jury; and from the order sustaining the motion for a new trial the plaintiff appeals to this court, as before stated, claiming there was no error in the ruling of the court in excluding that evidence.

Defendant contends Dr. Fulton was not plaintiff's physician, and was, therefore, a competent witness to testify as to the condition of her leg some ten months prior to the date of the injury in question, while the plaintiff, upon the other hand, contends he was her physician, and had no right to disclose those confidential matters.

The defendant proceeds upon the theory, because Dr. Fulton did not treat plaintiff nor did not intend ¹⁹² to do so, he was not on that account her physician, and in support of that contention cites the following authorities, all of which hold that if the relation of physician and patient does not exist, the physician may testify, to wit: *Schermer v. McMahon*, 108 Mo. App. 36, 82 S. W. 535; *Henry v. New York etc. R. R. Co.*, 57 Hun, 76, 10 N. Y. Supp. 508; *James v. State*, 124 Wis. 130, 102 N. W. 320; *Scripps v. Foster*, 41 Mich. 742, 3 N. W. 216; *Matter of Freeman*, 46 Hun, 458; *Griffiths v. Metropolitan St. R. R. Co.*, 171 N. Y. 106, 63 N. E. 808; *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730; *People v. Sliney*, 137 N. Y. 570, 33 N. E. 150; *Fisher v. Fisher*, 129 N. Y. 654, 29 N. E. 951; *In re Will of Bruendl*, 102 Wis. 45, 78 N. W. 169; *Webb v. Metropolitan St. R. R.*

Co., 89 Mo. App. 604; Elliott v. Kansas City, 198 Mo. 593, 96 S. W. 1023, 6 L. R. A., N. S., 1082.

We cannot concur with the defendant in its contention that the relation of physician and patient never existed between plaintiff and Dr. Fulton, simply because he never treated her, nor ever intended to do so.

This record shows Dr. Fulton was rightfully in the hospital, was exercising authority over the patients, examining their persons, advising treatment, and removing patients from their ward to the operating-room for clinical purposes; and all this with the knowledge and consent of those in charge of the institution. If he was not rightfully there, then he was not only a trespasser in the institution, but was guilty of the crime of assault and battery by approaching plaintiff's bed, where she was lying, and pulling up the covers and exposing her person and making the examination. We will not presume he was guilty of a crime, because the law presumes everyone innocent until he is proven guilty beyond a reasonable doubt. Besides all this, there is no evidence in this record tending to show but what plaintiff thought and believed he was one of the attaches of the institution, and, as such, had the authority to do what he was doing there.

It is not necessary, in order to create the relation of physician and patient, that he should actually treat the patient. If he makes an examination of the ¹⁹⁸ patient, with her knowledge and consent, she believing that the examination is being made for the purpose of treating her, then the relation is created by implication, and it is wholly immaterial what the secret object or purpose of the physician was in making it; and in the absence of evidence to the contrary, the plaintiff had the perfect right to assume and rely upon the assumption that the physicians who were apparently in charge of the hospital were rightfully there, and, as such, had the authority to examine and prescribe for her, and he will not afterward be heard to say he was not connected with the institution and had no authority to examine or treat her. If such a thing as that could be done, then the privilege accorded the patient could be taken from her by trick or fraud.

This question has received the careful consideration of many courts of this country. Judge Rombauer, one of the ablest jurists this state has ever produced, said: "It appeared from Dr. Frazer's testimony that he examined the patient to be

enabled to prescribe for her, which rendered him *prima facie* incompetent to testify to his knowledge derived from such examination, whether acquired from conversation or observation. There is nothing in the record to show that the relation of physician and patient did not exist between him and the plaintiff—that is to say, there is nothing to show that the patient in speaking to him was advised that he came to examine her in the interest of defendant, and not in her interest. . . . There is no offer to show that the witness was called to testify to other facts than such as he learned from the examination of the patient, and which were covered by the statutory privilege”: *Weitz v. Mound City R. R. Co.*, 53 Mo. App. 39.

Nor is there any evidence in this record to show that Dr. Fulton made the examination of plaintiff in ¹⁸⁹⁴ his search for subjects for his clinics, and not in her own interest; but, upon the contrary, he then and there, after the examination, advised Dr. Thrush to amputate her limb. Under such circumstances she would naturally suppose the examination was made in her own interest and not in the interest of another. If she had known all the facts she could have lawfully refused Dr. Fulton the privilege of making the examination.

In the case of *Haworth v. Kansas City etc. R. R.*, 94 Mo. App. 215, 68 S. W. 111, the offer was as follows: “I offer to show by this witness that he made a physical examination of the plaintiff, Walter Haworth, on the fourteenth day of May, 1901, just after receiving the injury for which this suit is brought, and he made such an examination, not as the physician of Walter Haworth but as the physician of the defendant company, and that Haworth at the time knew he was a physician, and I offer to show from that examination that nothing was discovered save and except a scalp wound.” In passing upon that offer, Judge Goode said: “The court rightfully refused to permit this physician, who attended the plaintiff professionally, to testify what he learned while treating him, since it was objected to as privileged: *Rev. Stats. 1899, sec. 4659*; *Gartside v. Connecticut Mut. L. Ins. Co.*, 76 Mo. 446, 43 Am. Rep. 765; *Streeter v. City of Breckenridge*, 23 Mo. App. 244; *Corbett v. St. Louis etc. R. R.*, 26 Mo. App. 621; *Freel v. Market St. C. R. R. Co.*, 97 Cal. 40,

31 Pac. 730; Raymond v. Burlington etc. R. R. Co., 65 Iowa, 152, 21 N. W. 195."

In a case in New York, "Dr. Bontecon was requested by the attending physician to be present at the testator's house for consultation with him relative to the testator's condition and treatment, and, in pursuance of such request, he did attend. He was called as a witness for the contestants, and testified that he saw the testator, and advised a prescription for him." In passing upon this evidence, Judge Earl, speaking for the court, said: "It is true the testator did not call him, or procure his attendance; but he did not ¹⁹⁵ thrust himself into his presence or intrude there. He was called by the attending physician, and went in his professional capacity to see the patient, and that was enough to bring the case within the statute. It is quite common for physicians to be summoned by the friends of the patient, or even by strangers about him; and the statute would be robbed of much of its virtue if a physician thus called were to be excluded from its provisions, because, as contended by the learned counsel for the appellant, he was not employed by the patient, nor a contract relation created between him and the patient. To bring the case within the state it is sufficient that the person attended as a physician upon the patient, and obtained his information in that capacity": *Renihan v. Dennin*, 103 N. Y. 573, 57 Am. Rep. 770, 9 N. E. 320.

This question came before the supreme court of Iowa upon this state of facts: "Dr. C. S. Chase, a surgeon in the employ of defendant, as such visited the deceased at the instance of the defendant on the day following the accident. He called to ascertain the extent of the injuries, how they were received, to diagnose the case, to consult with the attending physician, and to approve or disapprove the treatment, and, if necessary, to administer treatment. During the course of his interview with the deceased, he informed him why he had called, and reduced to writing statements made by the deceased as to how the accident occurred, which statement the deceased signed. This statement, and the doctor's evidence as to the other statements made to him by the deceased as to how the accident happened, were admitted in evidence over plaintiff's objections as being incompetent." The court, in passing upon the admissibility of that evidence, said: "This case is clearly within the rule in *Raymond v.*

Burlington etc. R. R. Co., 65 Iowa, 152, 21 N. W. 195, and under the ruling in that case the objection should have been sustained": Keist v. Chicago etc. R. R., 110 Iowa, 32, 81 N. W. 181.

¹⁹⁶ In another New York case Dr. Noll was introduced as a witness, and defendant endeavored to prove by him what he found to be the condition of plaintiff's health at some previous time when he examined her in the German Hospital. The trial court excluded from the jury his testimony, and in passing upon that ruling the general term of the supreme court used this language: "The correctness of this ruling is assailed on the ground that Dr. Noll was neither the attending physician nor his assistant, and that no relation of doctor and patient existed between him and the deceased. The testimony of the doctor as to his functions at the time he saw Mrs. Grossman is somewhat contradictory. He said he and Dr. Wolf made the rounds of the hospital together, and generally examined the cases together, but that he was not the physician attending Mrs. Grossman, or prescribing for her. 'I went there just out of curiosity, to acquire information in interesting cases,' said the witness. 'I went with Dr. Wolf, who was the attending physician. We generally tried to confirm diagnosis. I went there to find out the condition of the patient, and the ailments.' At the very beginning of his examination as to his competency to testify, however, the witness had stated to the court that when Dr. Wolf went to examine the patient he accompanied him, 'and assisted him in making the examination.' He also said that he was a physician in the hospital, and had charge of the different wards with Dr. Wolf. Upon the statements of the witness, to the effect that in association with Dr. Wolf he had charge of the different wards in the hospital; that he assisted Dr. Wolf in making the particular examination the result of which he was asked to disclose; and that he partly attended the patient, we think the court properly held that the witness was disqualified. 'To bring the case within the statute,' says Judge Earl in Renihan v. Dennin, 103 N. Y. 573, 57 Am. Rep. 770, 9 N. E. ¹⁹⁷ 320, 'it is sufficient that the person attended as a physician upon the patient and obtained his information in that capacity'": Grossman v. Supreme Lodge, 6 N. Y. Supp.

821; Prader v. National M. Accident Assn., 95 Iowa, 149, 63 N. W. 601; Edington v. Mutual Life Ins. Co., 67 N. Y. 185; Grattan v. Metropolitan L. Ins. Co., 24 Hun, 43.

Information acquired by the physician by looking at the patient or by examination is as much within the statute as are the verbal communications which take place between them: Smoot v. Kansas City, 194 Mo. 513, 92 S. W. 363; Gartside v. Connecticut Mut. L. Ins. Co., 76 Mo. 446; Kling v. Kansas City, 27 Mo. App. 231.

The court has upon several occasions clearly drawn the line between competency and incompetency of such witnesses: Hamilton v. Crowe, 175 Mo. 634, 75 S. W. 389; Hollaway v. Kansas City, 184 Mo. 19, 82 S. W. 89; Smoot v. Kansas City, 194 Mo. 513, 92 S. W. 363.

The defendant's next contention is that the court erred in excluding the evidence of Dr. Frederick. He was one of the attending physicians at the City Hospital, and was the keeper of, and had charge of, the records of the institution, which were required to be kept by the ordinances of the city. The defendant offered to prove by him the diagnosis of plaintiff's case, as shown by said official record, when she was in the hospital in the years 1895, 1896 and 1898, the latter when her leg was amputated. The plaintiff objected to the evidence offered because the entries made were privileged communications, first made to the attending physicians in order that they might correctly diagnose her case and to properly treat her. The diagnosis of the case was made by an examination of the patient and by interrogating her regarding the complaint. This is necessary to be known by the physician in order that he may prescribe the proper treatment, and when he once acquires that information the law declares it to be ¹⁹⁰⁸ confidential communications, and disqualifies the physician from divulging the same upon the witness stand.

Mr. Elliott in his work on Evidence, in the discussion of such statutes, says: "It seems to be conceded in both opinions that hospital physicians, who attend such persons at the hospital, could not testify as to what they learned while so attending him": 1 Elliott on Evidence, sec. 635; Grossman v. Supreme Lodge, 6 N. Y. Supp. 821.

This is undoubtedly the rule as announced by all the authorities, and that being so, it seems that it must follow as a natural sequence that when the physician subsequently copies

that privileged communication upon the record of the hospital, it still remains privileged. If that is not true, then the law which prevents the hospital physician from testifying to such matters could be violated both in letter and spirit, and the statute nullified by the physician copying into the record all the information acquired by him from his patient, and then offer or permit the record to be offered in evidence containing the diagnosis, and thereby accomplish, by direction, that which is expressly prohibited in a direct manner.

The only intimation of any law to the contrary we have been able to find is in a footnote to section 635 of Elliott on Evidence, volume 1, which reads as follows: "On the other hand, if one voluntarily goes to a public hospital where a record is required to be kept, is there not some reason for saying that there is no privilege, or that he waives his privilege, at least so far as the law requires a public record to be kept?" Mr. Elliott cites no authority whatever in support of the above suggestion, nor does he even dignify it by giving it a position in the text of his valuable work on Evidence. But if that suggestion is sound law, what is the use of going through the empty form of writing the diagnosis into the record? Why not call the physician ¹⁹⁰ and let him testify direct as to those matters? Certainly the testimony of the physician would be more satisfactory than the record, because he would be under oath when giving his testimony and would be subject to cross-examination. In the case at bar Dr. Frederick testified that he did not know whether the entries made in the record were true or false; that the house surgeon writes the diagnosis in the record, and that he had no personal knowledge as to the truthfulness of the things written.

The mere fact that the ordinance of the city requires such a record to be kept is no reason on earth why the statute regarding privileged communications should be violated. That record is required to be kept for the benefit of the institution and not for the benefit of outside litigants. It is not the object or purpose of the ordinance to repeal the statute in question, but even if it were, it would be null and void, because in conflict with the statute. The object of the statute is to guarantee privileged communications between all patients and their physicians, and it is wholly immaterial whether they are in or out of hospitals. The only case where

the patient is denied the protection of this statute is where his or her case falls under the rule of necessity, heretofore mentioned and so ably discussed by Judge Burgess in the case of *Cramer v. Hurt*, 154 Mo. 112, 77 Am. St. Rep. 752, 55 S. W. 258.

4. This brings us to the consideration of the ruling of the court regarding the admissibility of the evidence of Dr. Jones, who was offered as a witness, and testified on behalf of plaintiff, over the objections and exceptions of the defendant. Dr. Jones was introduced to testify as an expert, and a full statement of what occurred while he was on the witness-stand is set out in the statement accompanying this opinion. Dr. Jones had been present in the courtroom during the entire trial and heard all of plaintiff's testimony excepting ²⁰⁰ the reading of a portion of the deposition of Miss Murray, which referred entirely to the condition of the sidewalk where plaintiff was injured and in no way referred to the plaintiff's health. Plaintiff then asked the following question:

"Q. Doctor, taking it for granted that during the ten minutes you were not in the courtroom the testimony then produced in the case referred entirely to the sidewalk and its condition, and the manner of the plaintiff's fall, and that no testimony was given during your absence from the courtroom during that ten minutes in regard to her condition or in regard to the amputation, or in regard to her health either before or since the accident, or any evidence that affected her health or her limb or its previous condition, and assuming that the evidence you have heard here, which is all of the other evidence in the case on the plaintiff's part, is true, what, then, would you say as your opinion as a medical expert in regard to what was the cause of the amputation of the plaintiff's limb?

"Defendant objects to the question for the reason that it is assuming facts that the doctor cannot by any means know to be true, and an assumption of things that happened when he was out of the courtroom and he must be qualified. Objection overruled by court. Defendant excepts to the ruling of the court.

"By Mr. Latshaw. We now offer to read to this witness the ten minutes' testimony that was given during the time he was absent from the courtroom yesterday afternoon, that testimony being at that time read to the jury from the bill

of exceptions in the former trial and not recited by witness upon the stand.

"Defendant objects to the offer for the reason it is immaterial. Objection sustained by court.

"A. You want me to state what, in my judgment, was the cause of her limb being removed?

²⁰¹ "Q. Yes, sir. A. Or the cause of the necessity for its removal?

"Q. Yes, sir.

"Defendant objects. Objection sustained by the court.

"By Mr. Williams. Q. Why was it removed, not the cause of its being so?

"By the Court. Go ahead.

"A. Well, I don't see my way clear to answer, but I will say that I think, in my judgment, it was removed on account of the diseased condition that existed there.

"Q. Now, Doctor, in your opinion as a medical expert, under the evidence in this case that you have heard, what is your opinion as to what brought that disease to that particular limb and that particular part of it?

"Defendant objects for the reason it is incompetent, irrelevant and immaterial, not a proper question and not a proper subject for hypothetical questions, and the foundation has not been laid properly.

"Objection overruled by court. Defendant excepts to the ruling of the court.

"A. I would say that the injury precipitated the amputation, sir."

The defendant's first objection to the hypothetical question asked this witness is, that it was based upon only a part of the evidence, the part the doctor heard, and that there were other parts of the testimony he had not heard. Ordinarily, such an objection is well taken: *Connell v. McNutt*, 109 Mich. 329, 67 N. W. 344; *Sanchez v. People*, 22 N. Y. 147.

But in this case the plaintiff offered to read that part of the Murray deposition which he had not heard, and the defendant objected to the reading because it was immaterial, and the court sustained the objection. In the part of the evidence the witness did not hear ²⁰² was immaterial to the question, then there was no error in the court's action in permitting the witness to answer the question without having it read to him. And in addition to this, even though the

deposition had been material, the defendant is in no position now to take advantage of that error, because he led the court into committing the error by objecting to its being read, on the ground that it was immaterial. The defendant will not be allowed to state in one breath that it is material and in the next that it is not material. This court has repeatedly held that litigants will not be permitted to blow hot and cold in that manner.

The defendant's second objection to the hypothetical question propounded to Dr. Jones is of a more serious character. The grounds of that objection are, that the question and answers are conclusions of the witness, and permitted him to select one of the two causes which the evidence tended to show might have caused the necessity for the amputation, and thereby invaded the province of the jury. There was much evidence in this case which tended to show that the amputation was rendered necessary by reason of the tuberculosis of her knee joint. The jury should have been left untrammelled to find from the evidence which one of the alleged causes actually rendered the amputation necessary. The hypothetical question should have been limited to the inquiry, as to whether or not the fall upon the street was a sufficient cause to produce the condition in plaintiff's knee as would necessitate the amputation of her leg two months after receiving the injury complained of, and then the jury should have been permitted to determine which of the two causes—the fall or the tuberculosis—was responsible for the amputation. When Dr. Jones was permitted to state that "the injury precipitated the amputation," he threw an improper weight into the ²⁰³ scales of justice upon the side of plaintiff, and to the serious detriment of defendant. It is useless to discuss this question further, because I am unable to add anything of importance to the full, clear and able discussion of this same question by Valliant, J., in the opinion of the court written by him in the case of *Glasgow v. Metropolitan St. R. R. Co.*, 191 Mo. 347, 89 S. W. 915.

We do not wish to be understood as holding that the plaintiff could not introduce proper evidence to prove her fall caused the necessity for the operation, or that the fall aggravated or hastened the amputation; but, in either case, the jury and not the expert must answer the question.

5. Defendant presents several objections to instruction numbered 1, given for the plaintiff, but we are of the opinion that

but two of them are of sufficient importance to require our consideration.

It is first contended that the instruction ignores the distance the coalhole extended above the surface of the sidewalk. The evidence upon that question was conflicting—that for plaintiff showed it extended above the surface of the sidewalk from two to four inches, while that of the defendant showed it did not exceed three-quarters of one inch.

Where the evidence is conflicting upon any question in the case, then it is for the jury, under proper instructions, to determine which is correct. Instruction numbered 1 relating to the point now in hand is as follows: “. . . and if you further find from the evidence that defendant, Kansas City, neglected said duty by allowing the covering and lid on said coal-hole to be, on said February 26, 1898, and to remain for a long time prior thereto in an unsafe and dangerous condition for travel thereon on account of the covering and lid of said coalhole extending above the level of the sidewalk,” etc. The distance the coal-hole projected above the surface of the walk was disputed, ²⁰⁴ and it was for that reason left to the jury to find whether that extension was or was not such an obstruction in the sidewalk as would render it unsafe and dangerous to pedestrians in passing over it in the ordinary modes of travel. The instruction correctly stated the law regarding that question.

The defendant recognized the correctness of that instruction by asking the following: “If the sidewalk when and where the plaintiff claims she fell was in a reasonably safe condition for travel in the ordinary modes by persons exercising ordinary care for their own safety, then the city has performed the obligation imposed by law, and is not liable,” etc. There is no difference in principle between the two instructions, and even though they announced an erroneous statement of the law, the defendant is in no position to take advantage of that error, because the error, if error it be, was committed as much at the request of the defendant as at that of the plaintiff. A party cannot complain of error in instructions which he adopted in his own: *Christian v. Mutual L. Ins. Co.*, 143 Mo. 460, 45 S. W. 268; *Soldanels v. Missouri Pac. R. R. Co.*, 23 Mo. App. 516; *Nagel v. St. Louis T. G. R. R. Co.*, 104 Mo. App. 438, 79 S. W. 502.

And the second objection lodged against said instruction numbered 1 is, that it requires the city to have repaired the

sidewalk in time to have prevented the accident to plaintiff, because it makes the defendant an insurer of safety of its streets and sidewalks. That part of the instruction complained of is in the following words: “. . . and if you further believe from the evidence that defendant, Kansas City, either knew of said condition of said coal-hole, or by the exercise of ordinary care or caution could have known thereof in time to have had reasonable opportunity to have repaired said defect, if any, or had a reasonable opportunity to have caused the same, if any, to have been repaired in time to have prevented ²⁰⁵ the accident hereinafter referred to, but failed and neglected to do so, . . . then you will find for the plaintiff.”

Counsel for defendant misconceives the meaning of the instruction. It nowhere tells the jury that it was the duty of the city to have repaired the sidewalk in time to have prevented the injury to plaintiff, but, upon the other hand, it told the jury that if the city knew, or by the exercise of ordinary care could have known of the defect, if any, in time to have had reasonable opportunity to have repaired said defect, if any, or had a reasonable opportunity to have caused the same, if any, to have been repaired in time to have prevented the accident. The words, “in time to have prevented the accident,” as used in the instruction, are for the purpose of fixing the time when it became the duty of the city to make the repairs, and are but another way of telling the jury that it was the duty of the city to have made the repairs prior to the date of the accident, provided it had knowledge of the defect in time to have done so. While the language is somewhat ambiguous, yet we are unable to see in what way it could have misled the jury. The instruction correctly declared the law: *Baker v. Independence*, 106 Mo. App. 807, 81 S. W. 501; *Bonine v. Richmond*, 75 Mo. 437; *Yocum v. Trenton*, 20 Mo. App. 489; *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921; *Jordan v. Hannibal*, 87 Mo. 673; *Squires v. Chillicothe*, 89 Mo. 226, 1 S. W. 23; *Franke v. St. Louis*, 110 Mo. 516, 19 S. W. 938; *Maus v. Springfield*, 101 Mo. 613, 20 Am. St. Rep. 634, 14 S. W. 630; *Barr v. Kansas City*, 105 Mo. 550, 16 S. W. 483; *Atchison etc. R. R. Co. v. Kavanaugh*, 163 Mo. 54, 63 S. W. 374.

6. Defendant assails instruction numbered 2 given by the court in behalf of plaintiff because it permitted the jury to

take into consideration the amputation of plaintiff's leg, in fixing the amount of her damages. If the evidence shows that the leg was amputated because of the fall, and the jury finds that to ²⁰⁶ be a fact, then it was proper for the jury to consider that question in estimating the damages: *Brown v. Hannibal etc. R. R. Co.*, 66 Mo. 588; *Owens v. Kansas City etc. R. R. Co.*, 95 Mo. 169, 6 Am. St. Rep. 39, 8 S. W. 350.

But if the jury should find that the amputation was the result of the tuberculosis of the knee, then that fact should not be considered by the jury in measuring her damages: *Smith v. First Nat. Bank*, 99 Mass. 605, 97 Am. Dec. 59; *Searles v. Manhattan R. R. Co.*, 101 N. Y. 661, 5 N. E. 66.

7. The third instruction given for plaintiff is assailed by defendant because the petition alleges that the amputation of plaintiff's leg was caused by the fall received on the sidewalk, while the instruction permitted the jury to consider it as an aggravation of existing ailments, and cites *Watson on Damages*, ed. 1901, sec. 206; *Fuller v. Mayor of Jackson*, 92 Mich. 197, 52 N. W. 1057; *Wilkinson v. Detroit S. & S. Works*, 73 Mich. 405, 41 N. W. 490. Whatever may be the rule upon that subject in Michigan, clearly it is not the rule in this state. In this state both sick and well men and women have perfect rights to sue and recover damages for injuries received in the condition of health in which they are at the time of the injury. This is well established in the following cases: *Brown v. Hannibal etc. R. R.*, 66 Mo. 588; *Owens v. Kansas City etc. R. R. Co.*, 95 Mo. 169, 6 Am. St. Rep. 39, 8 S. W. 350; *West v. St. Louis S. R. R. Co.*, 187 Mo. 351, 86 S. W. 140; *Delaplain v. Kansas City*, 109 Mo. App. 107, 83 S. W. 71; *Elliott v. Kansas City*, 174 Mo. 554, 74 S. W. 617.

8. While we do not concur in the reasons assigned by the trial court for sustaining the motion for a new trial, yet we affirm the judgment because of the error of the court committed in the admission of the evidence of Dr. Jones.

Valliant, J., concurs.

Graves, J., concurs in result, but dissents as to paragraphs 2 and 3.

Lamm, J., concurs in result in separate opinion.

207 IN BANK.

Per CURIAM. The opinion written by Woodson, J., in division No. 1, is adopted as the opinion of the court in bank.

All concur, except Graves, J., who concurs in result, but dissents as to paragraphs 2 and 3; and Lamm, J., who concurs in result in separate opinion, in which Graves, J., concurs.

SEPARATE OPINION.

LAMM, J. I agree to the conclusion reached by my Brother Woodson in affirming the judgment, but I dissent from his conclusion in regard to the testimony of Doctor Fulton. The advice Fulton gave to the house surgeon, Doctor Thrush, about amputating the leg should have been excluded; but what he saw at the time he inspected plaintiff's knee and any conclusion he drew from that inspection was competent testimony—the relation of physician and patient not existing between him and Miss Smart, either by tacit or express agreement. From a standpoint of professional ethics there could be no indelicacy in Doctor Fulton's examining a diseased knee under the circumstances in the record; and if there was a violation of mere punctilio, it in nowise affected the competency or cogency of the offered proof.

I am, furthermore, of the opinion that when Miss Smart tendered to the jury the issue as to the condition of her knee both before and after the injury (which she did), and when she withdrew the veil of professional secrecy by introducing as a witness one out of a number of physicians who had examined her knee, and by his testimony made public the result of his investigation as to its condition, she waived her privilege of privacy and confidence as to any of her other physicians in relation to the same subject matter. A litigant should not be allowed to pick and choose in ²⁰⁸ binding and loosing—he may bind or he may loose. If he binds, well and good; but if he looses as to one of his physicians, the seal of secrecy is gone—the spell of its charm is broken as to all. May one cry “Secrecy! Secrecy! Professional confidence!” when there is no secrecy and no professional confidence? As well cry, “Peace! Peace!” when there is no peace (Jeremiah 6:14, q. v.). To hold so leaves a travesty on justice at the whimsical beck and call of a litigant. He may choose a serviceable and mellow one out of a number of physicians to fasten liability upon the defendant, and then, presto! change! exclude the testimony of those not so mellow and serviceable, to whom he has voluntarily given the same information and

the same means of getting at a conclusion on the matter already uncovered by professional testimony to the jury. There is no reason in such condition of things, and where reason ends the law ends. The right to secrecy in confidential and professional matters may be likened unto salt. But what if the salt has lost its savor, wherewith may aught be salted? To my mind the time has come for us to take a step in advance, and to construe the statute to mean that when a litigant breaks the seal of professional confidence and secrecy and waives it as to A, then by the same token it is broken and waived as to B, C and D, who bore the same relation to him as did A.

Graves, J., concurs in these views.

Physicians have no Right to Operate on a Patient, as a rule, without his consent. Hence, if a patient consenting to an operation on the right ear is placed under an anesthetic for that purpose, and the operating physician discovers and concludes that the left ear should be operated on instead of the right, and thereupon operates upon the left one, he becomes liable to the patient as for an assault, although the operation is skillfully performed: *Mohr v. Williams*, 95 Minn. 261, 111 Am. St. Rep. 462.

Where Surgeons Operate upon an Unconscious Man whom they are called to attend by third person, and who dies without regaining consciousness, the law implies a contract on his part, it has been held, to pay the reasonable value of their services: *Cotnam v. Wisdom*, 83 Ark. 601, 119 Am. St. Rep. 157.

On the Liability of a City for Dangerous Coal-holes in the Sidewalk, and also the liability of the person who constructs or maintains the same, see *French v. Boston Coal Co.*, 195 Mass. 334, 122 Am. St. Rep. 257, and cases cited in the cross-reference note thereto.

DRAKE v. BOARD OF EDUCATION.

[208 Mo. 540, 106 S. W. 650.]

LANDLORD AND TENANT—Leases—Renewals—Perpetuities.

A renewal of a lease for all time to come is a perpetuity, and against the policy of the law, and unless it appears from the covenant in the lease, by express terms or clearly by implication, that the lessee is entitled to have the lease renewed for all time to come, a court of equity will not decree specific performance of the covenant for that purpose. (p. 451.)

LANDLORD AND TENANT—Leases—Renewals.—A lease containing a general covenant to renew at its expiration with similar

covenants, terms, and conditions, contained in the original lease, is fully carried out by one renewal without the insertion of another covenant to renew. Otherwise a perpetuity is provided for. (p. 457.)

LANDLORD AND TENANT—Leases—Renewals.—An agreement for a second renewal of a lease will not be inferred from a general provision for a renewal of the lease with similar covenants, and in such case the lessee is entitled to but one renewal. (p. 459.)

J. G. Holliday and G. L. Neuhoff, for the appellants.

Judson & Green, for the respondents.

⁵⁴³ WOODSON, J. The facts of this case are agreed to, and, as they are substantially and tersely stated in brief of counsel for respondent, we will adopt their statement as the statement of the facts in the case, which is as follows:

“The controversy in this case was submitted under section 793 of the Revised Statutes of 1899, without formal pleadings as an agreed case without action, and involved the single question as to the construction of the right of renewal under a certain lease made by the respondent, the board of education of the city of St. Louis, of certain property in City Block 88 of the city of St. Louis, on November 13, 1878, for a term of twenty-five years, to the late Gerard B. Allen, under whose will the appellants are the testamentary trustees. The original term of twenty-five years having expired, and the right to a renewal reserved in the original lease having been perfected by proper notice by appellants, the respondent tendered a renewal lease for a further term of twenty-five years without any covenant of further renewal. Appellants refused to accept this renewal lease as a performance of the renewal covenant in the original lease, and therefore this proceeding is in effect for a specific performance of the covenant of renewal reserved in the original lease of November, 1878, and involves the construction of that covenant.

“The lease in question was drawn on one of the printed forms used by the respondent, which was made ⁵⁴⁴ to suit the particular case by cancellation of various parts and writing in the blank spaces of the printed form. The covenant of renewal as set forth in the agreed statement of facts is as follows:

“ ‘And it is covenanted and agreed, by and between the said parties, that at the end of the term hereby demised, this lease shall be renewable at the option of said parties of

the second part, their executors, administrators or assigns; the said party of the second part, their executors, administrators or assigns, giving to the party of the first part, in every instance, a notice in writing of their wish to renew the same, at least three months before the end of the term, and in case of failure to give such notice, the said parties of the second part shall be entitled to no further renewal of this lease or of the terms thereby created. And every renewal lease shall contain all the covenants, agreements, clauses and stipulations herein contained, with these exceptions only, that the covenants for renewal shall be in conformity with the foregoing provisions, and that the annual rents reserved on every renewal shall be six per centum upon the value of the demised premises, exclusive only of improvements placed thereon by said lessee or their legal representatives, if any, which value shall be estimated by two disinterested freeholders,' etc.

"Respondent conceded that under this covenant appellants were entitled to a renewal lease for twenty-five years, commencing November 7, 1903, but denied the right of appellants to have inserted in said renewal lease any clause whatever relating to a further renewal of the lease. Respondent, therefore, tendered to appellants a lease, being 'Exhibit C,' as filed with the agreed statement, and claims that the same was a full compliance with the covenant of renewal. Appellants refused to accept this, and demanded a lease with a covenant for one further renewal, and this ⁵⁴⁵ proceeding was brought for the adjustment of this difference. The circuit court held that the appellants were only entitled to the lease tendered, that is, to a renewal lease for them of twenty-five years with no covenant for further renewal, and entered judgment accordingly. Appeal was duly perfected."

Appellants present the following assignment of errors, to wit:

"1. The lower court erred in holding that appellants are entitled only to a new lease for twenty-five years commencing November 7, 1903, without further renewal. Said new lease should itself be renewable for at least one more like term, in accordance with the express provisions of the original lease.

"2. The lower court erred in giving no effect whatever to the following express words occurring right in the cove-

nant for renewal of the original lease here sued upon, specifying what sort of covenant of renewal (actually naming that covenant) shall go into the new lease, to wit: 'The covenant for renewal shall be in conformity with the foregoing provisions.' (The said 'foregoing provisions' here referred to being provisions relating to the sort of notice to be given in case of renewal.)''

1. In the consideration of this case it should be constantly borne in mind, as stated by this court in the case of *Differfer v. Board of Public Schools*, 120 Mo. 447, 25 S. W. 542, that a renewal of the lease for all time to come is to create a perpetuity, which is against the policy of the law and which it does not favor; and it is further stated that "unless it appears from the covenant in the lease, by express terms or clearly by implication, that plaintiffs are entitled to have the lease renewed for all time to come, a court of equity will not decree specific performance of the covenant for that purpose."

546 The respondent does not deny the right of the appellants to have one renewal of the lease, but does contend that they are not entitled to have inserted in that renewal a covenant for any additional renewal. This contention of the respondent is denied by appellants, and they insist that under the express provisions of the lease they are entitled to at least two, if not perpetual renewals—that is to say, they are entitled to the renewal conceded by respondents, and have the right to have inserted in the new lease a covenant for at least one other renewal.

Appellants base their claim to that right upon the following provisions contained in the original lease, to wit: "And it is covenanted and agreed by and between the said parties that at the end of the term hereby demised this lease shall be renewable at the option of said parties of the second part, their executors, etc. The said party of the second part, their executors, etc., giving to the party of the first part, in every instance, a notice in writing of their wish to renew the same, etc., and in case of failure to give such notice, the said parties of the second part shall be entitled to no further renewal of this lease or of the terms hereby created, And every renewed lease shall contain all the covenants, agreements, clauses and stipulations herein contained, with these exceptions only, that the covenants for renewal shall be in

conformity with the foregoing provisions," etc. From this it is argued by appellants that they would be entitled to one renewal by the use of the general words, "this lease shall be renewable," found in the first clause of the paragraph of the lease above quoted, even though no other language regarding renewals had been found therein.

And they further contend that by the insertion of the following additional covenant or agreement in the lease, to wit: "In every instance a notice, etc., and every renewed lease shall contain all the covenants, agreements, ⁵⁴⁷ clauses and stipulations herein contained, with these exceptions only, that the covenants for renewal shall be in conformity with the foregoing provisions," etc., just after the general covenant above mentioned, shows that it was in the minds of the parties, and that it was their intention and understanding, that more than one renewal was provided for.

This contention of appellants is presented with much force and plausibility, and the following authorities are cited in support thereof:

In the case of *Syms v. Mayor*, 105 N. Y. 153, 11 N. E. 369, the city of New York, on April 10, 1810, executed to Peter Lorillard a lease demising to him certain premises for a term of thirty years ending on the last day of May, 1840. The lease was executed by both parties, and in it the city agreed that at the expiration of the term it would demise the premises to him, his assigns, etc., "for and during the term of twenty-one years, thereafter, with a like covenant for future renewals of the lease as is contained in this present indenture." In 1839 Lorillard assigned the lease to John Syms, who thus became substituted in his place. In April, 1840, the city executed a lease of the same premises to John Syms for another term of twenty-one years, in which it covenanted that at the expiration of the lease, to wit, May 1, 1861, it would again demise the premises "in pursuance of this present lease for and during the term of twenty-one years thereafter, upon such rents as shall be agreed upon." On April 20, 1861, the city executed a third lease to John Syms for twenty-one years from May 1, 1861; that lease contained no covenant for renewal, and in it Syms covenanted that at the end of that term he would peaceably and quietly leave, surrender and yield up to the city or its successors or assigns all of the demised premises. Syms died in 1868, hav-

ing some years before erected a valuable building upon the premises. In 1880 the city sold the ⁵⁴⁸ premises to John B. Haskin. Thereafter, in October, 1880, the plaintiffs, as executors of Syms, commenced a suit, alleging in their complaint, among other things, the facts before stated, and prayed that the city be adjudged to reform the leases dated April, 1840, and April, 1861, by inserting therein a covenant for a future renewal of twenty-one years from May 1, 1882, and that the sale to Haskin be set aside, and the plaintiffs be given a renewal lease for twenty-one years from May 1, 1882. The verdict was for defendant. Upon those facts, Earl J., speaking for the court, said: "We are of the opinion that the verdict was properly directed. The lease executed in 1810 should not be so construed as to create a perpetuity. Its language is satisfied by holding that it gave the lessee the right to two renewals, and those renewals were subsequently given; and it must be assumed that the parties so understood the first lease. The two renewals signed by both parties gave that lease a practical construction, which should have great weight with any court called upon to ascertain its meaning and effect."

In the case of Carr v. Ellison, 20 Wend. 178, Ellison leased the premises to one Corwin for a term of twenty-one years from May 1, 1793, at a certain yearly rent. By the lease Corwin covenanted that on or before the first day of November, 1793, he would, at his own expense, erect on the premises a two-story frame house, and at the end of the term would surrender same to Ellison. It was agreed that the buildings to be erected by Corwin should at the end of the term be appraised, and Ellison covenanted that he would pay Corwin the appraised value, "or he, the said Thomas Ellison, his heirs or assigns, shall renew the lease unto the said William Corwin, his executors, administrators or assigns, for the term of twenty-one years more, for and under the same yearly rents, and under the same covenants as is hereinbefore granted." Corwin, and ⁵⁴⁹ afterward the defendants under him, entered and held the premises under the lease, and paid the stipulated rent down to the 1st of May, 1835, the end of the second term of twenty-one years, but it did not appear that the lease was in fact renewed at the end of the first term, in 1814. The defendants insisted that the lease had in effect been renewed in 1814 by the act of

the parties, with the same covenants as those contained in the original lease; and in April, 1835, they called on the plaintiff to appoint an appraiser and to pay the value of the buildings which the lessee had erected on the lot, or to renew the lease for another term of twenty-one years with the like covenants as those contained in the original lease. The plaintiff refused to do either, and after the expiration of the second term of twenty-one years, in May, 1835, brought suit for the possession of the premises. The judgment was for the plaintiff, and defendants sued out a writ of error. The supreme court, in passing upon the case, speaking through Bronson, J., said: "On the construction for which the plaintiffs in error contend, the lessor covenanted in case the value of the buildings was not paid for a perpetual renewal of the lease; in other words, he agreed to renew the covenant for a renewal, as well as the other covenants contained in the lease. The courts lean against such a construction of the contract as will lead to a perpetuity, and will not infer an agreement for a second renewal from a general provision for a renewal of the lease with similar covenants. The parties did not, I think, contemplate more than two terms of twenty-one years. . . . The good sense of the contract seems to be this: the lessee agreed to erect a frame house on the premises, and the lessor stipulated to pay him the value of the building at the end of the term, or to compensate him by a renewal of the lease 'for the term of twenty-one years more.'"

⁵⁵⁰ To the same effect are the following cases: *Moore v. Foley*, 6 Ves. Jr. 231; *Hare v. Burges*, 4 Kay & J. 45.

The respondent, however, contends that the rule announced in the foregoing cases is not applicable to the facts of this case, and is not the law of this state, and that under the authorities in this state the covenant of renewal in the lease in question is in legal effect the same as that contained in the lease construed in the case of *Diffenderfer v. Board of Public Schools*, 120 Mo. 447, 25 S. W. 542. In order that the covenants of the two leases may be easily and conveniently compared, we will place them in parallel columns and inclose with brackets the provisions found in the Allen lease, the one involved in the case at bar, and which are not contained in the *Diffenderfer* lease, which are as follows:

Diffenderfer Lease.

“And it is covenanted and agreed, by and between said parties, that at the end of the term hereby demised, this lease shall be renewable, at the option of the party of the second part, his executors, administrators or assigns, he or they giving to the party of the first part, in every instance, a notice in writing of his or their wish to renew the same, three months, at least, before the end of the term. And every renewed lease shall contain all the covenants, agreements, clauses and stipulations, with this exception ⁵⁵¹ only, that the annual rents to be reserved on every renewal shall be six per centum upon the value of the demised premises, exclusive of any improvements thereon placed, which value shall be estimated by the public assessor of the city of St. Louis, for the time being, at the commencement of the renewed term, and to be paid quarterly.”

The Allen Lease of 1878.

“And it is covenanted and agreed by and between said parties, that at the end of the term hereby demised this lease shall be renewable, at the option of said parties of the second part, their executors, administrators or assigns, said parties of the second part, their executors, administrators or assigns, giving the party of the first part, in every instance, notice in writing of their wish to renew the same, at least three months before the end of the term; [In case of failure to give such notice, the said parties of the second part shall be entitled to no further renewal of this lease or of the terms thereby created]. And every renewed lease shall contain all the covenants, agreements, clauses, and stipulations herein contained, with these exceptions only [that the covenants for renewal shall be in conformity with the foregoing provisions], and that the annual rents reserved on every renewal shall be six per cent. upon the value of the demised premises, exclusive only of improvements,” etc. [Then follow provisions for ascertainment of the value by the selection of freeholders, one by each party and they to select a third, if not agreeing.]

It will be observed by reading the Diffenderfer lease that the covenant of renewal provides that "this lease shall be renewable," and that "in every instance" a notice shall be given, "and that every renewed lease shall contain all the covenants, agreements, clauses and stipulations herein contained, with this exception only."

The Allen lease contains all the covenants just quoted from the Diffenderfer lease, and in addition contains the following provisions which are not found in that lease, to wit: "In case of failure to give such notice, ⁵⁵² the said parties of the second part shall be entitled to no further renewal of this lease or of the terms thereby created," and "that the covenants for renewal shall be in conformity with the foregoing provisions."

We have here pointed out the distinctions between the two leases, and we will now state the ruling of this court upon the latter, and then see if the same reasoning will apply to the covenant of renewal found in the Allen lease.

In disposing of the Diffenderfer case (120 Mo. 447, 25 S. W. 542), this court, speaking through Burgess, J., used this language: "All that is said in the covenant for a renewal of the lease for more than one term of fifty years, either by implication or otherwise, is as follows: 'And every renewed lease shall contain all the covenants, agreements, clauses and stipulations herein contained, with this exception only, that the annual rents to be reserved on every renewal shall be six per centum on the value of the demised premises,' etc. Do the words 'and every renewal' as used and when used in the lease clearly show that the lessors intended to covenant for a renewal of it for more than one term? In *Piggot v. Mason*, 1 Paige Ch. 412, it was held that the holder of an original lease was not entitled to a covenant for renewal in the new lease, as that would create a perpetuity. And a lease should not be so construed: *Syms v. Mayor*, 105 N. Y. 153, 11 N. E. 369; *Carr v. Ellison*, 20 Wend. 178; *Banker v. Braker*, 9 Abb. N. C. 414; *Rutgers v. Hunter*, 6 Johns. Ch. 215; *Whitlock v. Duffield*, Hoff. Ch. 110. So it has been said that a covenant which does not plainly imply or express a perpetual renewal, will not be construed to give this right: 1 Taylor on Landlord and Tenant, sec. 334. In *Carr v. Ellison*, 20 Wend. 178, it is held that a covenant to renew a lease under the same covenants contained in the original lease is satisfied by a renewal of the lease, omitting the covenant of

renewal. There being no clear words in the covenant for renewal ⁵⁵³ in this case, nor any words relative to a perpetual renewal, we are constrained to hold that the words, 'and every new lease shall contain all the covenants, agreements, claims and stipulations,' as used in the first clause, in the absence of more positive stipulation than the covenant of renewal, means only a second lease and not a perpetuity of leases: *Moore v. Foley*, 6 Ves. Jr. 231. Had it been otherwise intended, and the lease had been one of perpetuity at the pleasure of the lessees, it is not unreasonable to presume that some such provision would have been made in the lease."

And the supreme court of the United States, in the case of *Winslow v. Baltimore etc. R. R. Co.*, 188 U. S. 646, 23 Sup. Ct. Rep. 443, 47 L. ed. 635, in discussing this same question, uses this language: "It is quite plain that a lease containing a covenant to renew at its expiration with similar covenants, terms and conditions contained in the original lease is fully carried out by one renewal without the insertion of another covenant to renew. Otherwise a perpetuity is provided for."

Mr. Taylor in his valuable work on *Landlord and Tenant*, states the rule as follows: "Nor will a general covenant for renewal be considered to imply a perpetual renewal; the most a lessor is bound to give on such a covenant is a renewal for one term only. A covenant to renew a lease 'under the same covenants contained in the original lease' is satisfied by a renewal of the lease for another term, omitting the covenant to renew; for if the continued grant of successive leases and not a single renewal only had been intended, words, it was said, would naturally have been made use of indicating such intention. A different construction would virtually lead to a grant in perpetuity; and where no consideration appears for a grant of so extensive a nature, such cannot be a reasonable construction. . . . A covenant which does not plainly imply or express a perpetual renewal will not, as we have said, be construed ⁵⁵⁴ to give this right": 1 *Taylor on Landlord and Tenant*, 8th ed., secs. 333, 334.

The same rule is announced in *Jones on Landlord and Tenant*, sec. 343, and in 18 *Am. & Eng. Ency. of Law*, 2d ed., 687, and cases cited.

This is unquestionably the rule in this country, and it seems to us to be supported by the better reason and by the greater weight of authority; and we are, therefore, clearly

of the opinion that the conclusions reached by this court in the Diffenderfer case were correct. And if there are no covenants to be found in the Allen lease materially different from those contained in the former, then the same results should be reached in this case; but counsel for appellants insists that such covenants do exist in the Allen lease, and point out the two following clauses (which will hereafter be referred to as first and second) which he says are not to be found in the Diffenderfer lease, to wit:

1. "In case of failure to give such notice the said parties of the second part shall be entitled to no further renewal of this lease or of the terms hereby created."

2. "The covenants of renewal shall be in conformity with the foregoing provisions."

By reading the provisions in the Diffenderfer lease we find this language: "This lease shall be renewable at the option of the party of the second part, his executors, administrators or assigns, he or they giving to the party of the first part, in every instance, a notice in writing of his or their wish to renew the same, three months, at least, before the end of the term." While there is no express statement in the Diffenderfer lease to the effect that the failure to give the notice of renewal would bar all rights of renewal, as is stated in the Allen lease, yet the clause just quoted from the former, namely, "this lease shall be renewable, at the option of the party of the second part he or they giving to the party ⁵⁵⁵ of the first part a notice in writing of his or their wish to renew the same three months at least before the end of the term," have exactly the same meaning as the language contained in the first clause above quoted from the Allen case. While the wording of the two clauses is not the same, yet their meaning is clearly identical. The meaning of each is that if the notice is not given, as required, then the right of renewal is forever forfeited. The only difference in the two clauses is, the Allen lease in express terms provides for the forfeiture, while the other makes the same provision by clear and necessary implication. The legal effect of each is the same.

It is next contended by counsel for appellants that the language used in the second clause above quoted from the Allen lease is wholly different from any provision found in the Diffenderfer lease, and that it in express and specific

words provides for covenants of renewal to go into the new leases. Those words are as follows:

2. "The covenants for renewal shall be in conformity with the foregoing provisions."

The clause immediately preceding the words just quoted is in the following words: "And every renewal lease shall contain all the covenants, agreements, clauses and stipulations *herein contained*." These words clearly refer back to the previous general covenant of renewal, which is in the following language: "And it is covenanted and agreed by and between said parties that at the end of the term herein demised this lease shall be renewable at the option of said parties of the second part. Now, by reading the second clause before mentioned, in light of the above quotations, it seems clear that it refers back to the general covenant of renewal last above quoted, because there is not to be found in the entire lease any other covenant of renewal, and for that reason the words "herein contained," ⁵⁵⁶ above italicized, must of necessity refer to that general covenant; and this is made still clearer by reading in this connection the second clause before mentioned, which is as follows: "That the covenants for renewal shall be in conformity with the foregoing provisions." To what do the words "the foregoing provisions" refer? Clearly, to the general covenant of renewal before mentioned, because, as before stated, there is no other covenant of renewal contained in the Allen lease. The same general covenant of renewal is contained in the Diffenderfer lease, and is in the following words: "And it is covenanted and agreed by and between said parties that at the end of the term hereby demised, this lease shall be renewable, at the option of the party of the second part," etc.

So it is thus seen that the covenants of renewal contained in the two leases mentioned are identically the same in meaning. That being true, and we think there can be no doubt as to the correctness of that conclusion, then the construction placed upon the Diffenderfer lease by this court is equally applicable to the lease in question. In that case this court held that the lessee was entitled to but one renewal, and we think the same is true of the lessee in the case at bar, and we will not infer an agreement for a second renewal from a general provision for a renewal of the lease with similar covenants.

We are, therefore, of the opinion that the trial court correctly construed the lease, and for that reason the judgment is affirmed.

All concur.

COVENANTS FOR THE RENEWAL OF LEASES.

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I. Validity and Construction of Covenants.

a. Construction in General.—In construing provisions in a lease, relating to renewals, the usual rules for the interpretation of writings apply, and if there is any uncertainty the tenant is favored rather than the landlord, because the latter, having the power to stipulate in his own favor, has omitted to do so, and also on the principle that every man's grant is to be taken most strongly against himself: *Butt v. Maier Zobelien Brewery*, 6 Cal. App. 581, 92 Pac. 652; *Swank v. St. Paul City Ry. Co.*, 72 Minn. 380, 75 N. W. 594, *Kaufmann v. Liggett*, 209 Pa. 87, 103 Am. St. Rep. 988, 58 Atl. 129, 67 L. R. A. 353.

b. Definiteness of Covenant—General Promises.—Generally every contract relating to real estate must be definite in its terms in order to bind the parties so that a court of equity will enforce it by judgment for specific performance. But where the parties thereto have made their contract in writing and it will reasonably admit of two constructions, the court will prefer that which will uphold it rather than the one which will defeat it. Under this familiar rule, leases containing a general promise to renew have uniformly been

held to refer to the terms of the lease in which such language is used, so as to be, in effect, an agreement to renew upon the precise terms and conditions therein stated, except as to the condition to renew. That has universally been excepted because of the effect, otherwise, to make a perpetual lease. Such a result is not favored in the law, and hence cannot be accomplished by mere construction, but only by express and unmistakable language: *Kollock v. Scribner*, 98 Wis. 104, 73 N. W. 776.

A leading case on this subject is *Rutgers v. Hunter*, 6 Johns. Ch. 216, where the court held that a covenant to renew for another term carried with it, by implication, an agreement to renew on the same terms and conditions, as to all essential conditions of the lease. The chancellor declared, in substance, that the covenant was not void for uncertainty because of failure to specify the terms; that the words used implied the same terms as those contained in the first lease, except the provision which would tend to create an agreement for a perpetual lease; that such an extraordinary covenant as that must be supported by language clear and certain, and not deduced by construction from the mere general statement to "renew the lease." Supporting this doctrine are *Hughes v. Windpfennig*, 10 Ind. App. 122, 37 N. E. 432; *Cunningham v. Pattee*, 99 Mass. 248; *Raulet v. Cook*, 44 N. H. 512, 84 Am. Dec. 92; *Tracy v. Albany Exchange Co.*, 7 N. Y. 472, 57 Am. Dec. 538; *Western Transp. Co. v. Lansing*, 49 N. Y. 499; *McAdoo v. Callum*, 86 N. C. 419.

c. Terms of Renewal—Amount of Rent.—Adjudications may be found to the effect that covenants to renew must specify the terms and conditions of the renewal or fail for want of certainty, but that requisite is met and satisfied by the construction of the general promise to renew in connection with the lease to which it refers. When the agreement for a renewal contains language other than that appropriate to a general promise, so that by resort to the settled rules for construction the language of the covenant to renew and conditions of the renewal cannot be made certain, then such covenant fails for want of certainty: *Delashmutt v. Thomas*, 45 Md. 140; *Reed v. Campbell*, 43 N. J. Eq. 406, 4 Atl. 433; *Kollock v. Scribner*, 98 Wis. 104, 73 N. W. 776; *Howe v. Larkin*, 119 Fed. 1005.

A covenant for renewal which does not fix the amount of rent to be paid for the extension term, but merely provides that the lessee may have the "privilege of five years longer, he paying additional rent on revaluation now fixed at five hundred dollars," no provision being made as to how or when the revaluation should be determined, has been held too vague and indefinite to be valid: *Street v. Fay*, 230 Ill. 319, 120 Am. St. Rep. 304, 82 N. E. 648. And where a lease provides for a term of one year, "with privilege of longer," this phrase has been held too indefinite to entitle the lessee to retain the premises after the expiration of the year: *Howard v. Tomich*, 81 Miss. 703, 33 South. 493.

A simple covenant for renewal implies a renewal on the same terms of the original lease at the same rent: *Howard v. Tomicich*, 81 Miss. 703, 33 South. 493; *Holloway v. Schmidt*, 33 Misc. Rep. 747, 67 N. Y. Supp. 169; *Western N. Y. & P. Ry. Co. v. Riecke*, 81 N. Y. Supp. 1093, 83 App. Div. 576; *Hoff v. Royal Metal Furniture Co.*, 103 N. Y. Supp. 371, affirmed in 189 N. Y. 555, 82 N. E. 1128. Where a covenant for renewal provides that the lease shall be renewed if the parties can agree upon terms, or if the lessee is willing to give as much as any other responsible person will agree to give, the covenant is enforceable: *Arnot v. Alexander*, 44 Mo. 25, 100 Am. Dec. 252. And a covenant "to renew a lease at such rent and upon such terms as might be agreed upon between the parties," is valid, and implies a lease at the same rent and for the same term: *Rutgers v. Hunter*, 6 Johns. Ch. 215.

II. Number of Renewals.

a. **In General.**—A general covenant for the renewal of a lease is satisfied by a single renewal: *Diffenderfer v. St. Louis Public Schools*, 120 Mo. 447, 25 S. W. 542; *Mershon v. Williams*, 62 N. J. L. 779, 42 Atl. 778; *Hoff v. Royal Metal Furniture Co.*, 103 N. Y. Supp. 371, affirmed in 189 N. Y. 555, 82 N. E. 1128; *Kings v. Wilson*, 98 Va. 259, 35 S. E. 727; *Winslow v. Baltimore etc. R. R. Co.*, 188 U. S. 646, 23 Sup. Ct. Rep. 443, 47 L. ed. 635. Of course, if a lease expressly and clearly provides for more than one renewal, it will be given that effect: *Orphan Asylum Soc. v. Waterbury*, 8 Daly, 35; *Syms v. City of New York*, 105 N. Y. 153, 11 N. E. 369, where leases were construed to give the lessees the right to two renewals.

b. **Perpetual Renewals.**—Covenants for renewals have in some cases been considered to provide for perpetual renewals, and thus create a perpetuity: *Morrison v. Rossignol*, 5 Cal. 64; *Copper Min. Co. v. Beach*, 13 Beav. 478. But to have this effect the language of the lease must be clear and unequivocal; a lease should not be construed to create a perpetuity if this can be averted: See the principal case; *Diffenderfer v. Board of St. Louis Public Schools*, 120 Mo. 447, 25 S. W. 542. "In one point the authorities are harmonious, namely, that the law does not favor perpetual leases of the character claimed for this one, and the intention to create one must appear in clear and unequivocal language. It cannot be left to inference. Courts will, if possible, so construe the writing as to avoid a perpetuity by renewal": *Brush v. Beecher*, 110 Mich. 597, 64 Am. St. Rep. 373, 68 N. W. 420. "Courts will, whenever it is possible without doing violence to the plain meaning of words, so construe the language used as to avoid a perpetuity by renewal": *Tischner v. Rutledge*, 35 Wash. 285, 77 Pac. 388. If a perpetual covenant is entered into by a person having a limited interest, it does not bind the estate beyond that interest: *Muller v. Trafford*, [1901] 1 L. R. Ch. D. 54.

III. Persons by or Against Whom Renewal Available.

a. **Grantee of Reversion.**—Covenants to renew a lease run with the land and are enforceable against a grantee or assignee of the reversion: *Leppla v. Mackey*, 31 Minn. 75, 16 N. W. 470; *Piggott v. Mason*, 1 Paige, 412; *Hart v. Hart*, 22 Barb. 606. It has been argued, however, that the rule that covenants for renewal run with the land, and therefore are not within the rule of perpetuity, is a mere technical rule, resting upon authority and not on any rational principle: *Muller v. Trafford*, [1901] L. R. 1 Ch. D. 54.

b. **Grantee of Leasehold.**—The benefit of a covenant to renew a lease, or a provision in a lease granting an option to renew, is assignable, and may be enforced by an assignee of the term or of the lease, if the lease contains no stipulation to the contrary: *Robinson v. Perry*, 21 Ga. 183, 68 Am. Dec. 455; *Sutherland v. Goodnow*, 108 Ill. 528, 48 Am. Rep. 560; *Connor v. Withers*, 20 Ky. Law Rep. 1326, 49 S. W. 309; *Mossy v. Mead*, 2 La. 157; *McClintock v. Joyner*, 77 Miss. 698, 78 Am. St. Rep. 541, 27 South. 837; *Blackmore v. Boardman*, 28 Mo. 420; *Wilkinson v. Pettit*, 47 Barb. 230; *Downing v. Jones*, 11 Daly, 245. "These covenants to renew are not required to be in any technical form; and, when sufficiently definite, will be enforced as an incident to the lease, and, as such, conferring a right which constitutes a part of the tenant's interest in the land itself. This being true, in the absence of any restraining covenant, the right may be assigned as an incident of the lease and the benefit enforced by the assignee, and, being a covenant which runs with the land, it will also be enforced against the lessor or his assigns": *Barbee v. Greenberg*, 144 N. C. 430, 57 S. E. 125.

"There seems to be no doubt," to quote from *Blount v. Connolly*, 110 Mo. App. 603, 85 S. W. 605, "that the covenant for renewal of the lease was annexed both to the reversion and the leasehold, and ran with the land; therefore, it is binding on the defendant as owner of the fee, and enforceable by plaintiff as assignee of the original term. There is nothing in the lease instrument to signify an intention on the part of the original parties to confine the right to a renewal to the first lessees, and the decisions are uniform that, in the absence of such a restriction, the covenant for renewal runs to the assignees."

An assignee of a lease who elects to exercise an option for extension is liable for the unexpired portion of the extended term, although before its expiration he assigns the lease and abandons the premises: *Probst v. Rochester Steam Laundry Co.*, 171 N. Y. 584, 64 N. E. 504.

If a lease prohibits an assignment by the lessee without the consent of the lessor, and an assignment is attempted without such consent, the assignee cannot avail himself of a covenant in the original lease for a renewal: *Upton v. Hosmer*, 70 N. H. 493, 49 Atl. 96. This rule is subject to the modification that the lessor may waive his

right to rely on the prohibition against assignments or may become estopped to do so: *Warner v. Cochrane*, 128 Fed. 553, 63 C. C. A. 207.

c. **Subtenant or Sublessee.**—A lessee who sublets a portion of the premises with the privilege of renewal for a specified term in case he obtains from the original lessor an extension of his lease is bound by his covenant when he secures a new lease instead of an extension: *Hausauer v. Dahlman*, 45 N. Y. Supp. 1088, 18 App. Div. 475, affirmed in 163 N. Y. 567, 57 N. E. 1111. A sublessee may assign his right to a renewal: *Phelps v. Erhardt*, 5 N. Y. Supp. 540.

d. **Successor on Death of Lessee.**—One who succeeds to the rights of a lessee after his death may compel a renewal of the lease under a covenant therein that "the party of the second part have the privilege and option of a renewal of this lease upon giving" a specified notice: *Kolasky v. Michels*, 120 N. Y. 635, 24 N. E. 278.

e. **Persons Standing in Fiduciary Relation.**—If one who stands in a fiduciary relation to a tenant secures a renewal to himself, a court of equity will treat him as holding the new lease in trust for the original tenant, although there is no provision for a renewal in the original lease: *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541; *Phyfe v. Wardell*, 5 Paige, 268, 28 Am. Dec. 430; *McCourt v. Singers-Bigger*, 145 Fed. 103. "Those who are in possession of lands under a lease have an interest therein beyond the subsisting term, usually called the tenant's right of renewal. Between the landlord and tenant this interest cannot strictly be denominated a right or estate, but is merely a hope or expectation; there being, in the absence of contract, no way, legal or equitable, of compelling a renewal. But, as between third persons, the law recognizes this interest as a valuable property right, and the renewal as a reasonable expectancy of the tenants in possession. . . . It [the rule] is appropriately applied to a trustee of a corporation taking in his own name a renewal lease of the premises in possession of the corporation. Every consideration, legal or moral, requires that the trustee should protect the corporation and its property, and see that the stockholders suffer no loss from his default. . . . Between the trustee and the corporation the right of renewal of the lease is a property right, and if the lease is renewed in the name of the officer, it inures to the benefit of the corporation": *McCourt v. Singers-Bigger*, 145 Fed. 103.

f. **Joint Lessees.**—Where a lease is made to two or more tenants jointly, a covenant for renewal or a privilege for an additional term cannot be exercised by one of them alone; it is necessary that they all express the intention for an extension, which may be done jointly or independently: *Tweedie v. P. E. Olson Hardware etc. Co.*, 96 Minn. 238, 104 N. W. 895, 1089. Thus, where six persons become joint lessees of real estate for the term of five years, with the privilege of continuing the lease for five years more upon giving sixty days' notice prior to the end of the term, one of the lessees has no

power to extend the lease by giving the required notice without the concurrence of the other lessees: *Howell v. Behler*, 41 W. Va. 610, 24 S. E. 646.

IV. Execution of Renewal.

a. By Making New Lease.—A covenant for the renewal of a lease is an executory contract which does not bind the lessee until he has exercised his privilege by some affirmative act: *Andrews v. Marshall Creamery Co.*, 118 Iowa, 595, 96 Am. St. Rep. 412, 92 N. W. 706, 60 L. R. A. 399. Some courts seem to take the view that a general promise to renew a lease is, at the option of the lessee, extended by force of the covenant itself, and in effect becomes a lease for the additional term: *Raulet v. Cook*, 44 N. H. 512, 84 Am. Dec. 92. But, properly speaking, a covenant for renewal is not a present demise which of itself will continue the lease for the period of renewal, but calls for a new lease: *Hunter v. Silvers*, 15 Ill. 174; *Sutherland v. Goodnow*, 108 Ill. 528, 48 Am. Rep. 560; *Swank v. St. Paul etc. Ry. Co.*, 61 Minn. 423, 63 N. W. 1088; *Schwank v. St. Paul etc. Ry. Co.*, 72 Minn. 380, 75 N. W. 594; *Steen v. Scheel*, 46 Neb. 252, 64 N. W. 957; *Orton v. Novnan*, 27 Wis. 272. Said the supreme court of Wisconsin, in *Kollock v. Scribner*, 98 Wis. 104, 73 N. W. 776: "It is not deemed necessary to discuss, as an original proposition, the question of whether the general promise to renew a lease calls for a new one, or whether, at the option of the lessee, it is extended by the force of the covenant itself and becomes, in effect, a lease for the additional term. The latter construction was given in *Raulet v. Cook*, 44 N. H. 512, 84 Am. Dec. 92, and it has been cited with approval by many courts and text-writers. On the contrary, there is much respectable authority to the effect that the words "renew" and "extend" should be construed in accordance with their ordinary meaning. Obviously, one means to prolong, or to lengthen out; the other, to make over, to re-establish or to rebuild; and those courts and writers that have construed them accordingly certainly have the best of the argument, if the judicial construction is to follow the true definitions of the words": *Kollock v. Scribner*, 98 Wis. 104, 73 N. W. 776.

In case a lease contains an agreement for an additional term at the election of the lessee, there is a present demise to take effect on the expiration of the first term, and no subsequent agreement or second lease is necessary when the option is exercised: *Stone v. St. Louis Stamping Co.*, 155 Mass. 267, 29 N. E. 623; *De Friest v. Bradley*, 192 Mass. 346, 78 N. E. 467; *Darling v. Hoban*, 53 Mich. 599, 19 N. W. 545. In *Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185, 44 Atl. 612, a lease to the defendant for a term of three years contained this clause: "With the privilege, at the end of said term, of re-leasing for a term of ten years, or any part thereof, at the same rental." Upon the last day of the original term the tenant gave to

the landlord the following written notice: "In accordance with the option contained in our lease of the Willoughby Block, we desire to notify you that we will re-lease the said block for the space of three months from the expiration of the lease." It was held that the clause quoted from the lease should be construed as a present demise to take effect in the near future at the option of the lessee, and that the notice given by the tenant to the landlord, accompanied by a continuation of possession, was sufficient, without other act, to continue the tenancy under the lease for the period named in the notice. And under a lease which provides that "the lessees shall have the privilege of renewal for the further period of two years at an annual rent of eighteen hundred dollars," provided three months' notice is given, the lessees should be regarded as in for the additional term, upon giving the requisite notice and paying the rent, although a new lease is not executed: *Ferguson v. Jackson*, 180 Mass. 557, 62 N. E. 965.

b. By Indorsement on Original Lease.—The extension or renewal of a lease may be accomplished by an indorsement on the back of the original document: *Wood v. Edison Electric I. Co.*, 184 Mass. 523, 69 N. E. 364; *Cram v. Dresser*, 2 Sand. 120; *Witman v. Reading*, 191 Pa. 134, 43 Atl. 140. This indorsement has been upheld when made by arbitrators: *Brand v. Frumveller*, 32 Mich. 215; or by the attorney in fact of the lessor: *Pittsburg Mfg. Co. v. Fidelity Title etc. Co.*, 207 Pa. 223, 56 Atl. 436.

c. By Parol Agreement.—The renewal or extension of a lease may rest in parol: *Johnson v. Foreman*, 40 Ill. App. 456; *Whalen v. Leisy Brewing Co.*, 106 Iowa, 548, 76 N. W. 842; *Mossy v. Mead*, 2 La. 157; *Caley v. Thornquist*, 89 Minn. 348, 94 N. W. 1084. But when a written extension or renewal is made it controls the oral negotiations leading up to it: *De Friest v. Bradley*, 192 Mass. 346, 78 N. E. 467; and merges and extinguishes prior oral agreements on the subject: *Stuebben v. Granger*, 63 Mich. 306, 29 N. W. 716.

d. Covenants in Renewal Lease.—Under a general covenant to renew a lease, the renewed lease need not contain a covenant for renewal; a covenant of renewal upon the same terms of the original lease is satisfied by a renewal of the lease, omitting the covenant to renew. Otherwise a perpetual renewal would be demandable: *Carr v. Ellison*, 20 Wend. 178; *Piggot v. Mason*, 1 Paige, 412; *Rutgers v. Hunter*, 6 Johns. Ch. 215; *Muhlenbrinck v. Pooler*, 40 Hun, 526. However, if a lease covenants for renewals, it is not necessary, in order to entitle the lessee to the subsequent renewals, that each renewal should contain the covenant: *Gomez v. Gomez*, 81 Hun, 566, 31 N. Y. Supp. 206.

V. Remedies of Lessee on Breach of Covenant.

a. In General.—When a lessor refuses to renew the lease in accordance with his covenant for renewal, the lessee may elect whether

he will take damages at law or have specific performance in equity: *Arnot v. Alexander*, 44 Mo. 25, 100 Am. Dec. 252; *Carr v. Ellison*, 20 Wend. 178.

b. Specific Performance.—The right of a lessee to enforce a specific performance of covenants for renewal has been recognized in a number of cases. It undoubtedly exists when the lessor refuses to comply with his contract, which is clear and definite in its terms, unless there has been fraud, laches or other considerations rendering the remedy by specific performance inequitable: *Monihan v. Wake-lin*, 6 Ariz. 225, 56 Pac. 735; *Blakeney v. Bagott*, 3 Bligh N. S. 237, 1 Dowl. N. S., 405, 4 Eng. Reprint, 1326; *Crawford v. Kastner*, 26 Hun, 440; *London v. Mitford*, 14 Ves. Jr. 42, 9 R. R. 234, 33 Eng. Reprint, 437; *Sadlier v. Biggs*, 4 H. L. Cas. 435, 10 Eng. Reprint, 531; *Mortimer v. Orchard*, 2 Ves. Jr. 242, 30 Eng. Reprint, 615; *Walker v. Jeffreys*, 1 Hare, 341, 11 L. J. Ch. 209, 6 Jur. 336, 66 Eng. Reprint, 1064. The fact that the lessor is not mentally competent to make a contract when the time for a renewal arrives has been held no defense to an action for specific performance: *Wurster v. Armfield*, 73 N. Y. Supp. 609, 67 App. Div. 158. A breach of the lessee's covenant not to assign, however, is a defense to the action: *Squire v. Learned*, 196 Mass. 134, 81 N. E. 880.

c. Action for Damages.—But the lessee is not limited to the remedy by specific performance. He may, if he chooses, bring an action for damages against the lessor if the latter declines to renew the lease, as he has covenanted to do: *Laroussini v. Werlein*, 48 La. Ann. 13, 18 South. 704; *McClintock v. Joyner*, 77 Miss. 678, 78 Am. St. Rep. 541, 27 South. 837; *Garnhart v. Finney*, 40 Mo. 449, 93 Am. Dec. 303; *Walcott v. McNew* (Tex. Civ. App.), 62 S. W. 815. The measure of damages in such a case ordinarily is the difference between the rent agreed to be paid and the actual rental value of the premises at the time of the breach: *North Chicago St. R. R. Co. v. Le Grand Co.*, 95 Ill. App. 435; *Walcott v. McNew* (Tex. Civ. App.), 62 S. W. 815. When the lessees have occupied the premises for the entire term for which they are entitled to a renewal, they cannot recover damages because of the landlord's refusal to execute a new lease: *Hegan Mantel Co. v. Cook's Admr.*, 22 Ky. Law Rep. 427, 57 S. W. 929.

STATE v. REYNOLDS.

[209 Mo. 161, 107 S. W. 48.]

RECEIVERS—Property in Custodia Legis.—A receiver is an officer of the court which appoints him, and whatever he does under the order of the court regarding the property involved is the act of the court, and such property is in custodia legis. (p. 474.)

RECEIVERS—Removal and Reappointment—Property in Custodia Legis.—If property is once in the possession of a receiver, and thus in the possession of the court appointing him, the legal custody thereof is not disturbed or changed by an order of the court removing him and appointing another as receiver in his stead. (p. 474.)

RECEIVERS—Removal—Appeal.—The granting of an appeal from an order appointing a receiver in the place of one removed and the approval of an appeal bond does not remove the receiver last appointed, nor warrant the court in granting an order against such receiver to turn over the property and money in his hands, and he must still be allowed to retain possession, notwithstanding the appeal. (pp. 475, 476.)

RECEIVERS—Power to Remove.—A court of equity has power to remove or discharge a receiver whom it has appointed at any stage of the litigation, and to substitute another in his stead. (p. 478.)

RECEIVERS—Conflict of Jurisdiction.—When a court of competent jurisdiction has appointed a receiver, who is in the possession of and administering the property under its orders, another court of co-ordinate jurisdiction has no power to entertain a bill to administer the same property and to take it from the possession of the former receiver and to appoint its own receiver. (p. 479.)

RECEIVERS—Conflict of Jurisdiction.—If the court first appointing a receiver has jurisdiction, its receiver will not be dispossessed of the property at the suit of a receiver subsequently appointed by a court of co-ordinate jurisdiction, regardless of whether the original appointment was or was not erroneous. (p. 479.)

PROHIBITION.—The Scope and Purpose of the Writ of prohibition is to keep inferior courts within the limits of their own jurisdiction, and to prevent them from encroaching upon the jurisdiction of other tribunals. (p. 480.)

COURTS—Conflict of Jurisdiction.—Whenever a court of competent authority takes jurisdiction of a case, that fact excludes the jurisdiction of all other courts over the same case, as well as all the incidents thereto, excepting only such courts as are given appellate and supervising control over them. (p. 480.)

PROHIBITION—Conflict of Jurisdiction.—A writ of prohibition will lie to prevent one court from intermeddling or entertaining a suit, the subject matter of which is pending and in process of litigation in another court of co-ordinate jurisdiction, with jurisdiction both of the subject matter and of the parties. (p. 485.)

T. C. Hennings and R. F. Walker, for the relators.

C. D. Hall, for the respondent.

¹⁶⁷ WOODSON, J. This is an original proceeding instituted in this court, seeking to prohibit the respondent, as judge of the circuit court of the city of St. Louis, from taking and further exercising jurisdiction over the parties to, and the subject matter involved in, the case of Louis F. Algrem et al. v. William B. Sullivan et al., pending in the circuit court of said city.

The facts in the case are not disputed, and are substantially as follows, as disclosed by the petition for the preliminary writ and the return thereto of the respondent, to wit:

At the May term, 1905, of the circuit court of St. Louis county, Missouri, one Herman H. Wehrs filed a petition in said court against William B. Sullivan, doing business as the Home Co-operative Company, asking an injunction and the appointment of a receiver for the assets of said William B. Sullivan, doing business as aforesaid. A receiver, Francis A. Tillman, was appointed, gave bond, took charge of the property of said company, and begun to administer and settle its business. At the September term, 1905, the said circuit court entered a final judgment in said cause, making the injunction permanent and confirming the appointment of the receiver, Tillman.

At the subsequent term of said circuit court an order was entered of record requiring said William B. Sullivan and the contract-holders and creditors of said Home Co-operative Company for which Tillman had been appointed receiver to appear before the court on April 7, 1906, and show cause why the judgment or decree ¹⁶⁸ in said cause making the injunction permanent and confirming the appointing of Tillman as receiver of said company should not be vacated and set aside. On April 7, 1906, the order to show cause was continued until April 11, 1906; on this day one William L. Watkins, Supervisor of Building and Loan Associations of the State of Missouri, filed what he termed an interplea, asking the court to vacate and set aside the judgment or decree heretofore rendered in this cause, to remove Tillman as receiver and to appoint him, Watkins, as receiver, under the alleged authority of a statute of Missouri, approved April 21, 1903: Laws 1903, pp. 110-113.

The court at a subsequent term (April 21, 1906) made an order setting aside and vacating its judgment and decree entered at a former term confirming the appointment of said

Tillman as receiver, removed the latter, and entered an interlocutory order appointing William L. Watkins, as Supervisor of Building and Loan Associations, receiver of said Home Co-operative Company. An order was entered requiring said Tillman to turn over all the assets of said company to Watkins, which was done, and Watkins, as supervisor and receiver, took charge of the assets and representatives of value of said company. William B. Sullivan thereupon filed a motion to set aside the interlocutory order appointing said Watkins, as supervisor, receiver of said Home Co-operative Company, which was by the court overruled, exceptions were saved thereto and an affidavit for appeal to the supreme court filed, which was by the trial court denied. Said Sullivan thereupon applied for and was granted a writ of mandamus on said trial judge, requiring him to grant an appeal from his refusal to vacate and set aside the interlocutory order appointing said Watkins, as supervisor, receiver of said Home Co-operative Company. For his return to said writ of mandamus the trial judge ¹⁶⁹ granted said appeal and the same was perfected and is now pending and undetermined in this court. Upon the granting of this appeal William B. Sullivan, the appellant, entered into a bond in the sum of twenty thousand dollars which was approved by the trial court, and the assets of said company ordered to be turned over to him or to his attorney, Thos. C. Hennings, which was not done, but said Watkins continued in possession of said assets, still has possession of same, and has not delivered or surrendered said assets or any part of same to said William B. Sullivan or his attorney.

Subsequently, at the April term, 1907, of the circuit court of the city of St. Louis, in which Hon. Matt G. Reynolds was presiding as judge, Louis F. Algrem et al. filed a petition in said circuit court against William B. Sullivan, doing business as the Home Co-operative Company, and William L. Watkins as receiver of the said Home Co-operative Company, and asked in said petition, among other things, that the court appoint a receiver for the said Home Co-operative Company, alleging that they, the plaintiffs, were contract-holders and interested in the distribution of its assets. The nature and purpose of this proceeding in the circuit court of the city of St. Louis was to require William B. Sullivan, as the Home Co-operative Company nominally, and William L. Watkins actually, as receiver, to render an accounting to

said circuit court of the assets of said Home Co-operative Company then in his possession as such receiver, and to have said circuit court appoint a receiver for said assets and to restrain and enjoin said Sullivan and said Watkins, as receiver, from transferring or in any way controlling or disposing of said assets, and that said circuit court assume, through its own receiver, the custody, control and final distribution of the assets of said company. The said petition by Algrem et al. in the circuit court of the city of St. Louis also set ¹⁷⁰ forth the fact that a receiver had theretofore been appointed for the assets of the said Home Co-operative Company in the circuit court of St. Louis county, and that an appeal had been taken in said case to the supreme court, where same was then pending and undetermined.

The said circuit court of the city of St. Louis, in which respondent was then and there presiding as judge, upon the filing of said petition, issued therein a restraining order restraining and enjoining William B. Sullivan and William L. Watkins, as receiver, and their servants and agents, from disposing of or transferring any of the assets of said Home Co-operative Company until the further orders of the court, and further ordered that said Sullivan and said Watkins, as receiver, be and appear before said court on May 6, 1907, and show cause why a receiver should not be appointed for said Home Co-operative Company and why a temporary injunction should not be granted against said defendants restraining and enjoining them from disposing of or transferring the assets of the said Home Co-operative Company. On the said sixth day of May, 1907, the said circuit court permitted said plaintiffs to file an amended petition in said cause, setting forth the same cause of action, asking the appointment of a receiver for said assets, and such other relief as had been asked in said original petition, but in addition thereto setting forth the forms of contract used by said Home Co-operative Company when same was engaged in business, and adding the names of two defendants who are not alleged to hold or control any of said assets. Thereafter, on the said sixth day of May, 1907, the said Sullivan and Watkins, through their counsel, made return to the restraining order issued by and the petition filed in said circuit court of the city of St. Louis, in which they allege as grounds why such ¹⁷¹ restraining order should be dissolved, and said accounting, injunction and the appointment of a receiver and

other relief prayed for in said petition should be denied, the following among other things: That another court of competent and concurrent jurisdiction than the one before which this proceeding is brought, to wit, the circuit court of St. Louis county, has heretofore, in a proceeding commenced before it, taken possession of the same property of the said Home Co-operative Company sought to be adjudicated in this proceeding, and has appointed William L. Watkins, Supervisor of Building and Loan Associations of the State of Missouri, and one of the defendants herein, receiver for said assets, and that he has taken possession and now has the custody of the same, and an appeal has been perfected from the motion refusing to vacate the interlocutory order appointing said William L. Watkins receiver to the supreme court, where this entire matter is now pending and undetermined, and that the circuit court of the city of St. Louis has no jurisdiction or authority to hear or determine any of the matters or things for which relief is prayed in the petition herein; that the assets of the said Home Co-operative Company are now wholly under the control and subject to the rulings, orders, judgments and decrees of other courts of competent, concurrent and appellate jurisdiction, to wit, the circuit court of St. Louis county, and the supreme court of Missouri, and that the circuit court of the city of St. Louis has no jurisdiction or authority to hear or determine any matter in any manner affecting the custody or control of said assets, and that the control and authority in this matter by other courts of co-ordinate and appellate jurisdiction are fully set forth and disclosed in the said petition of Louis F. Algrem et al.

On the ninth day of May, 1907, upon a hearing upon said return to the restraining order by the said circuit ¹⁷² court, the Hon. Matt. G. Reynolds, presiding therein as judge, no action was taken by the court, whereupon the defendant, William B. Sullivan, filed a motion in said circuit court asking the court to dismiss said suit and alleging the same grounds therein that had been set forth in defendant's return to the restraining order and answer to the petition; that the said circuit court made no ruling or order of record upon said motion to dismiss said cause, but continued to assume jurisdiction in said proceeding, and on the same day ordered summons to be issued in said cause for the two additional defendants named in plaintiffs' amended petition.

Defendant William B. Sullivan, through his counsel, thereupon made application to Hon. L. B. Valliant, one of the judges of this court, for a preliminary writ of prohibition, and upon an inspection of the petition submitted by defendant William B. Sullivan, a preliminary order was made by the Hon. L. B. Valliant, and the Hon. Matt. G. Reynolds, judge of the circuit court of the city of St. Louis, was prohibited from further acting in said proceeding, and required to show cause to the supreme court on May 29, 1907, why he was assuming jurisdiction and exercising authority in the matter of the appointment of a receiver for said Home Co-operative Company, and in the other matters in which relief is prayed in the petition of Louis F. Algrem et al. Upon the filing of a return to said preliminary order by said respondent, the Hon. Matt. G. Reynolds, the relator W. B. Sullivan filed a motion for a judgment on the pleadings, and the preliminary order was by the supreme court continued until the October term, 1907.

1. The contention of relator is that, when the circuit court of St. Louis county assumed jurisdiction of the case of *Wehrs v. Sullivan et al.*, and appointed Tillman receiver, who, as such, took charge of the assets ¹⁷³ of the company, no other court of concurrent jurisdiction had the authority to oust it of its jurisdiction over the cause or to interfere with the assets of the company in any manner, for the reason that they were in custodia legis. They also contend that this result is not changed by the fact that the circuit court of St. Louis county subsequently removed the receiver, Tillman, and appointed another in his stead, nor by the fact that the latter proceeding was questioned by Sullivan, which resulted in an appeal of that case to this court.

The record in this case discloses that the case of *Wehrs v. Sullivan et al.* was a proceeding in the nature of a proceeding in rem, instituted in the circuit court of St. Louis county, having for its object and purpose the winding up of the affairs of the Home Co-operative Company and the distribution of the assets thereof among its creditors, as provided by law. That said court had jurisdiction of the parties and the subject matter of said cause is not questioned by respondent. In due form and in conformity with the law of the land, said court enjoined Sullivan and the company from further prosecuting the business and appointed a receiver to take charge of the assets of the company, and

ordered him to hold and administer them under the orders and direction of the court. In pursuance to this order the receiver duly qualified and entered upon the discharge of his duties, as such, and reduced to possession the assets of the company. That possession was the same as the possession of the court, for the reason that the receiver is an arm or officer of the court which appointed him, and whatever he does under the order of the court regarding the property involved is the act of the court: *High on Receivers*, 3d ed., sec. 134; *Ex parte Haley*, 99 Mo. 150, 12 S. W. 667; *Colburn v. Yantis*, 176 Mo. 670, 75 S. W. 653; *Robinson v. Atlantic & G. W. R. R. Co.*, 66 Pa. 160; *Skinner v. Maxwell*, 68 N. C. 400; ¹⁷⁴ *De Visser v. Blackstone*, 6 Blatchf. 235, Fed. Cas. No. 3840; *Mays v. Rose*, Freem. Ch. (Miss.) 703; *Day v. Postal Telegraph Co.*, 66 Md. 354, 7 Atl. 608; *Angel v. Smith*, 9 Ves. Ch. 335; *In re Butler's Estate*, 13 Ir. Ch. 456.

Clearly, under the facts of this case and according to the law enunciated by the above authorities, the assets of the Home Co-operative Company were in custodia legis on April 11, 1906, the day on which Watkins, the Supervisor of Building and Loan Associations, filed his bill in the nature of an interplea, asking the court to vacate and set aside the judgment and decree theretofore rendered appointing Tillman receiver, and asking that he be appointed receiver under the Act of 1903, pages 110-113.

The legal custody of the property was not disturbed or changed by the order of the court made at a subsequent term removing Tillman as such receiver and appointing Watkins in his stead: *Very v. Watkins*, 23 How. (U. S.) 469, 16 L. ed. 522; *Shields v. Coleman*, 157 U. S. 168, 15 Sup. Ct. Rep. 570, 39 L. ed. 660. That order of the court was but the removal of one receiver and the appointment of another in his stead, which the court had a perfect legal right to do: *High on Receivers*, 3d ed., sec. 821.

Thus far there seems to be no special difference between the relators and the respondent, but the point of their legal divergence begins where the circuit court of St. Louis county granted an appeal from its order refusing to set aside its order appointing Watkins, Supervisor of Building and Loan Associations, receiver of the Home Co-operative Company, and ordering him to turn the assets of the company back to Sullivan. The respondent contends that the legal effect of that order was to ipso facto release said property and assets

from the custody and control of the St. Louis county circuit court, and thereby subjected them to seizure and liable to be taken in custody by a receiver to be appointed by the circuit court of the city of St. Louis ¹⁷⁵ in the case of *Algrem et al. v. Sullivan*, which has jurisdiction of that class of cases to which the one at bar belongs.

This contention of respondent is denied by relators, and they assign two reasons why it is not tenable:

1. That the granting of the appeal from the order refusing to set aside the appointment of Watkins did not remove him as receiver of the assets of said company.

2. That the granting of the appeal from said order and approving the appeal bond after the lapse of the term at which final decree was rendered did not warrant that court in making the order to turn the assets of the company over to Sullivan.

We will briefly discuss those two points in the order presented.

As to the first, the return shows that Sullivan filed a motion to set aside and vacate the order appointing Watkins receiver of the assets of the Home Co-operative Company, which was by the court overruled, from which order of refusal Sullivan appealed to this court. Instead of this order having the effect of removing Watkins from the receivership of the Home Co-operative Company, it states expressly in so many words that the court refused to remove Watkins and it was from that order Sullivan appealed. If the order removed Watkins, then what was the sense in Sullivan's appeal from the order? He would be asking this court to do for him that which the court below has already done for him. So, it is thus seen that Watkins is still receiver of those assets, and whether rightfully or wrongfully is wholly immaterial in this case, but that phase of the case will receive due consideration when we reach that question on the appeal.

And as to the second point suggested, it seems to ¹⁷⁶ be settled that the granting of the appeal and approving the appeal bond by the court did not warrant the court in ordering the receiver to turn the assets of the company back to Sullivan. In discussing this question Mr. Hugh says: "After the title to property has become vested in a receiver, by virtue of the order appointing him, it cannot be divested merely upon the order of the court made in a proceeding to which he was not a party. And where, pending litigation, property is in

the hands of a receiver who is vested with the usual powers of such officers, and the defendants to the litigation pray an appeal from the final decree of the court below, the effect of the appeal and giving bond thereon is not such as to warrant the court in granting an order against the receiver to turn over the property and money in his hands, and he will still be allowed to retain possession, notwithstanding the appeal": High on Receivers, 3d ed., sec. 161; Schenk v. Peay, 1 Dill. 267; Fed. Cas. No. 12,451.

While the rule above stated may be some broader than the law as declared in the case of *State v. Hirzel*, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961; but, however that may be, that law is applicable when the appeal is not taken until after the term of the court has expired at which the final decree was rendered; then, a fortiori, it should apply where the order is only substituting one receiver for another, and especially where the final decree of the court is not questioned by the appeal.

If the circuit court of St. Louis county had made in express terms an order at a subsequent term setting aside the final decree granting the injunction and ordering the receiver appointed, it would have been absolutely void and of no effect, because that court had no authority to make such order after the expiration of the term at which the decree was made. And there is nothing in the *Hirzel* case (137 Mo. 435, 37 S. W. 921, 38 S. W. 961), which indicated ¹⁷⁷ anything to the contrary: *State v. Walls*, 113 Mo. 42, 20 S. W. 883; *Appo v. People*, 20 N. Y. 531.

In the former case the judge of the court which tried the case, after overruling the motion for a new trial, died, but before signing the bill of exceptions. His successor in office attempted at a subsequent term of the court to set aside the judgment and grant a new trial. In that case this court held that prohibition would lie to prevent the successor in office from setting aside the judgment previously entered for want of jurisdiction in the court to make the order. The decision was not based upon the ground that the matter involved had been adjudicated and could not on that account be again litigated, but was based squarely upon the ground that the court had no jurisdiction to make the order.

The same proposition was involved in the *Appo* case, *supra*, and it was there contended that when the inferior court or tribunal has jurisdiction of the action or of the subject mat-

ter before it, any error in the exercise of that jurisdiction can neither be corrected nor prevented by a writ of prohibition. In the discussion of that proposition the court of appeal of New York said: "It is true that the most frequent occasions for the use of the writ are where a subordinate tribunal assumes to entertain some cause or proceeding over which it has no control. But the necessity for the writ is the same where, in a matter of which such tribunal has jurisdiction, it goes beyond its legitimate powers; and the authorities show that the writ is equally applicable to such a case. . . . These cases prove that the writ lies to prevent the exercise of any unauthorized power, in a case or proceeding of which the subordinate tribunal has jurisdiction, no less than when the entire cause is without its jurisdiction. The broad remedial nature of ¹⁷⁸ this writ is shown by the brief statement of a case by Fitzherbert. In stating the various cases in which the writ will lie, he says: 'And if a man be sued in the spiritual court, and the judges there will not grant unto the defendant the copy of the libel, then he shall have a prohibition directed unto them for a surcease,' etc., until they have delivered the copy of the libel, according to the statute made Anno, 2 H., 5 (F. N. B., title "Prohibition"). This shows that the writ was never governed by any narrow technical rules, but was resorted to as a convenient mode of exercising a wholesome control over inferior tribunals. The scope of this remedy ought not, I think, to be abridged, as it is far better to prevent the exercise of an unauthorized power than to be driven to the necessity of correcting the error after it is committed. I have no hesitation, therefore, in holding that this was a proper case for the use of the writ": *Appo v. People*, 20 N. Y. 531.

And the same conclusions have been reached by this court in the following cases: *Morris v. Lenox*, 8 Mo. 252; *St. Louis etc. R. R. v. Wear*, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341; *State v. Scarritt*, 128 Mo. 331, 30 S. W. 1026; *High on Extraordinary Legal Remedies*, sec. 789; *Spelling on Extraordinary Legal Remedies*, sec. 1741.

Should it later turn out that Tillman was improperly removed, and that Watkins was improperly appointed, then the custody of the property would still be, in contemplation of law, in Tillman; and should it appear that Tillman was properly removed and that Watkins was improperly appointed in his stead, the property would still be in custodia

legis, and the court could appoint someone else to take charge of and administer it under the directions of the court.

“The subject of the removal or discharge of receivers, although to a considerable degree regarded as ¹⁷⁹ a matter of practice and to be discussed as such, is, nevertheless, deemed of sufficient importance to merit separate treatment. The power of a court of equity to remove or discharge a receiver whom it has appointed may be regarded as well settled, and it may be exercised at any stage of the litigation. Indeed, it would seem to be a necessary adjunct of the power of appointment, and to be exercised as an incident to or consequence of that power; the authority to call such officer into being necessarily implying the authority to terminate his functions when their exercise is no longer necessary, or to remove the incumbent for an abuse of those functions, or for other cause”: High on Receivers, 3d ed., sec. 820; *In re Colvin's Estate*, 3 Md. Ch. 278; *Siney v. Stage Co.*, 28 How. Pr. 481; *First Nat. Bank v. Barnum Wire & Iron Works*, 58 Mich. 315, 55 Am. Rep. 660, 24 N. W. 543, 25 N. W. 202.

And it is equally well settled that the court in its sound discretion may remove the incumbent and substitute another in his stead: High on Receivers, 3d ed., sec. 822; *Siney v. Stage Co.*, 28 How. Pr. 481; *Milwaukee & M. R. R. Co. v. Soutter*, 154 U. S. 540, 14 Sup. Ct. Rep. 1158, 17 L. ed. 604; *Crawford v. Ross*, 39 Ga. 44.

2. Having thus shown and decided that the property and assets of the Home Co-operative Company are still in gremio legis, it now devolves upon us to determine whether or not the circuit court of the city of St. Louis has the authority and jurisdiction to restrain and enjoin the receiver appointed by the circuit court of St. Louis county from interfering with the property of the company and from performing other functions as such, and to appoint another receiver to take charge of and administer the same assets under its own orders and directions.

¹⁸⁰ This is no novel question to the jurisprudence of this state and country.

Mr. High, in his excellent work on Receivers, in the discussion of this question says: “Indeed, when a court of competent jurisdiction has appointed a receiver, who is in possession of and administering the property under its orders, another court of co-ordinate jurisdiction will not entertain a bill to administer the same property, and to take it from the

possession of the former receiver, and to appoint its own receiver. In such a case the parties aggrieved should seek relief in the court which is already in possession of the property through its receiver. So the prior jurisdiction of a court of equity powers over the subject matter of the appointment of a receiver, and the pendency of a motion for an injunction and a receiver in such court, exclude the interference of that court in a subsequent suit for the same relief. And the appointment of a receiver in the suit thus subsequently begun will be held inoperative as against the appointment made in the former cause. So if the court first appointing a receiver has jurisdiction, its receiver will not be dispossessed of the property at the suit of a receiver subsequently appointed by a court of co-ordinate jurisdiction; and this is true, regardless of whether the original appointment was or was not erroneous. And a receiver being an officer of court, and being bound to account to the court appointing him for all funds which he receives in his official capacity, he cannot be compelled by an order of another court to pay over money in his hands as receiver in satisfaction of an execution issued upon a judgment of such other court, since such a procedure would necessarily have the effect of producing a conflict of jurisdiction, and would prevent the receiver from compliance with the obligations of his bond given to the court ¹⁸¹ appointing him": *High on Receivers*, 3d ed., sec. 48.

This seems to be the universal holding of the state and the United States courts upon that subject: *Young v. Montgomery & E. R. Co.*, 2 Woods, 606; Fed. Cas. No. 18,166; *Young v. Rollins*, 85 N. C. 485; *Bonner v. Hearne*, 75 Tex. 242, 12 S. W. 38; *Nelson v. Conner*, 6 Rob. (La.) 339; *Metzner v. Graham*, 57 Mo. 404; *Heath v. Missouri etc. R. R. Co.*, 83 Mo. 617; *Colburn v. Yantis*, 176 Mo. 670, 75 S. W. 653; *Mishawaka Mfg. Co. v. Powell*, 98 Mo. App. 530, 72 S. W. 723; *Keegan v. King*, 96 Fed. 758; *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. Rep. 1007, 44 L. ed. 1183; *Union Bank v. Kansas City Bank*, 136 U. S. 223, 10 Sup. Ct. Rep. 1013, 34 L. ed. 341; *Quincy M. etc. R. R. Co. v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. Rep. 787, 36 L. ed. 632.

The difficulty with which the courts meet is not what is the law upon the question, but what is the proper remedy to be applied to such cases when they arise. All the authorities

sustain the proposition that when a court of equity acquires jurisdiction of a cause, and appoints a receiver to take charge of the property involved, then no other court of co-ordinate jurisdiction has any power or authority to interfere or meddle with the property in the hands of the receiver, but must leave the court appointing the receiver untrammelled in its administration of the same, as the law directs. But the question now presented is, In what way or manner is that interference to be prohibited where such court persists in encroachments upon the jurisdiction of the other? The law upon this subject lacks much of being uniform in this country. Some of the courts hold that the remedy is by appeal or writ of error; others by injunction or prohibition against the parties prosecuting the suit; while still others hold that prohibition against the court is the proper remedy.

It would serve no good or useful purpose to review the great number of adjudications upon this question, ¹⁸² giving the various reasons assigned why one remedy, rather than another, should be resorted to. Especially is this true when the facts of each case largely determine the kind of remedy to be applied thereto.

And since this is a proceeding by prohibition, we will content ourselves with an investigation of the law upon that subject, and then determine whether or not the permanent writ should issue herein.

It would be well to bear in mind that the legitimate scope and purpose of the writ of prohibition is to keep inferior courts within the limits of their own jurisdiction, and to prevent them from encroaching upon the jurisdiction of other tribunals: High on Extraordinary Legal Remedies, 3d ed., sec. 782.

The authorities heretofore cited, both state and federal, establish beyond question that courts of co-ordinate authority have no power or jurisdiction to encroach upon or intermeddle with the power and authority of each other after one has taken jurisdiction of a case. Whenever the jurisdiction of a court of competent authority takes jurisdiction of a case, that fact must of necessity and in the very nature of things exclude the jurisdiction of all other courts over the same case, as well as all the incidents thereto, excepting only such courts as are given appellate and supervising control over them. The reason for this rule seems to be that when such a court takes jurisdiction of a particular case, with all the incidents

thereto, there remains nothing of it to which the jurisdiction of another court can attach—no case, no parties, no subject matter is left exposed to the authority of the latter court.

The mere fact that the law of the state confers upon the circuit court of the city of St. Louis jurisdiction of that class of cases to which the case at bar belongs in no manner militates against the rule of law above stated, for the reason that it was never the intention ¹⁸³ of the lawmakers to authorize that court or other courts to assume authority over particular cases, pending in a court of co-ordinate jurisdiction at the time it or they are asked to move in the matter.

As each cause of action arises, and when suit is brought thereon in a court of competent jurisdiction, it is thereby segregated, as it were, from the general class to which it belonged, and is thereby withdrawn from the authority and jurisdiction of all other courts of co-ordinate jurisdiction.

This is the plain meaning of the law, and is as much a part of it as if written in the statute prescribing the jurisdiction of such courts, because it has been written that “a thing which is in the intention of the makers of a statute is as much within the statute as if it were within the letter”: *Riddick v. Walsh*, 15 Mo. 519; *In the Matter of Bominio's Estate*, 83 Mo. 433; *Humes v. Missouri Pac. R. R. Co.*, 82 Mo. 221, 52 Am. Rep. 369.

This question came before the supreme court of Michigan upon the following facts: “The relator, in an action instituted by him in the superior court of Detroit, recovered against Scripps a considerable judgment. The superior court is a court of jurisdiction in matters of law and equity co-ordinate with that of the circuit court of this state, and limited only territorially. After the recovery a motion was made by the defendant for a new trial, which was argued in the superior court and denied. The defendant then removed the case to this court by writ of error, and at the last October term the judgment of the superior court was affirmed. At the present term a motion was made and argued for a rehearing, which was denied. The purpose of these proceedings in this court was, of course, to obtain a new trial. While this was the position of the case, the suit was instituted in the Wayne circuit court. The bill alleges misconduct in the jury in the principal suit, and asks to have the judgment ¹⁸⁴ canceled because of it. Though not in terms praying for a new trial,

the bill manifestly has that for its purpose, and is as much a bill for a new trial as if that had been the relief expressly prayed." After stating the facts as above that great jurist and lawwriter, Chief Justice Cooley, said: "From this statement of facts it will be very evident the circuit judge has made a mistake in assuming jurisdiction of the case and making orders in it. The matter is not one which, under the circumstances, can come under his cognizance; other courts have control of the controversy with all its incidents, and have ample competency to do in respect to it whatever may remain to be done. It is a familiar principle that when a court of competent jurisdiction has become possessed of a case, its authority continues, subject only to the appellate authority, until the matter is finally and completely disposed of; and no court of co-ordinate authority is at liberty to interfere with its action. The principle is essential to the proper and orderly administration of the laws; and while its observation might be required on the grounds of judicial comity and courtesy, it does not rest upon such considerations exclusively, but is enforced to prevent unseemly, expensive and dangerous conflicts of jurisdiction and of process. If interference may come from one side, it may from the other also, and what is begun may be reciprocated indefinitely. The country has witnessed some such conflicts in which federal and state courts of co-ordinate powers have unguardedly or unadvisedly undertaken to hamper or restrain each other's action; and the mischiefs of which such cases are suggestive are quite as likely to arise when courts existing as part of the same system intrude with their process upon each other's authority": *Macleane v. Wayne* Circuit Judge, 52 Mich. 257, 18 N. W. 396. The peremptory writ of prohibition was issued in that case.

¹⁸⁵ The same question came before this court in the case of *State v. Ross*, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534. In that case the question under consideration was squarely made and quite extensively discussed, fully showing the reasons why the writ should go, but did not order the writ to issue upon the grounds here presented. That opinion was based upon the fact that there was no suit pending in the common pleas court at the time the petition was filed therein asking for the appointment of a receiver; and for that reason this court held that that court had no power or jurisdiction to appoint a receiver, and thereby obviated the necessity

of passing directly upon the question as to whether or not prohibition was the proper remedy in this class of cases. But the reasoning of the court is equally applicable to the facts of this case. The following extracts from that opinion will show the views of this court regarding the proper remedy in such cases:

“The relator contends that the common pleas court never acquired jurisdiction to appoint a receiver of said railway company’s property, for two reasons: First, because there was not, at the time the judge of said court assumed the authority to make such appointment, nor since has been, an action pending in said court in which a receiver could be appointed; and, second, because at the time said judge assumed authority to make such appointment, a receiver had already been legally appointed in a cause pending in the circuit court of Stoddard county, a court of competent jurisdiction, to make such appointment. . . . The writ of prohibition is a familiar mode of the exercise of this power, and is an appropriate one to restrain the exercise of jurisdiction by a subordinate court over a subject matter when it has none, and is loudly called for when such jurisdiction is asserted against a court that has jurisdiction and is asserting it, and when the officers of each, acting under its orders, are liable at any ¹⁸⁶ moment to come into physical conflict over the possession of the subject matter in controversy”: Pages 455, 464.

It is wholly immaterial whether the common pleas court had no jurisdiction because no suit was pending at the time the receiver was asked for or because the Stoddard circuit court had previously acquired jurisdiction of the case; either or both of those facts would have prevented the jurisdiction of the common pleas court from attaching to the case, or to the subject matter thereof; and in both cases prohibition was the proper remedy.

A kindred case to the one under discussion and identical in principle came before this court in *State v. Wear*, 129 Mo. 619, 31 S. W. 608. In that case the regular elected and qualified judge of the court was disqualified from trying the case, and he called in Judge Riley, a judge from another circuit, to try same. The judge from the other circuit responded to the request and assumed jurisdiction of the same. Subsequently, the regular judge appeared in court and attempted to repossess himself of the jurisdiction. A rule was

issued from this court requiring Judge Wear to show cause why a writ of prohibition should not issue. In discussing that question this court in substance said: That when the judge of the other circuit responds to try the cause in which the regular judge is disqualified, jurisdiction of the former attaches from the time of his appearance and continues until the final determination of the cause. It then issued a peremptory writ of prohibition against Judge Wear, preventing him from interfering with the former in the exercise of his duties as such judge.

In the case just mentioned, when Judge Wear became disqualified to try the cause and called in Judge Riley to try it, and when he appeared in court in response to that call, those acts amounted to a change ¹⁸⁷ of venue of the cause from one judge to the other, which completely divested the former of all jurisdiction over the matter and invested the latter with full powers to act in the premises. It was the lack of power in Judge Wear to proceed with the cause, and the jurisdiction of Judge Riley over the same which caused this court to interfere by way of prohibition.

The same would have been true on principle had the change been from the court instead of from the judge, and the cause had been sent to another circuit. In such case the court granting the change would have lost all jurisdiction over the case, and the one to which it was sent would have become possessed of that jurisdiction as fully and completely as the former had before the change was granted. Had this state of facts existed, and had the former court attempted to re-assume jurisdiction of the cause, we presume it will not be contended that the writ would have been improperly issued against such court. And it would be justified upon the same grounds it was granted against the judge in the Wear case, namely, because the former court would have been shorn of all authority over the cause, and it would have been completely transferred to and vested in the latter by the change of venue. And that would have been true notwithstanding the facts that both courts were courts of general jurisdiction, and each having jurisdiction over the class of cases to which the one there involved belonged.

If the foregoing reasoning is logical, and the conclusions reached are sound, which, it seems to us, cannot upon principle or authority be questioned, then by what semblance of reason or authority can it be contended that the jurisdic-

tion of the circuit court of St. Louis county over the case of Wehrs v. Sullivan et al., which is complete as to the parties and the subject matter thereof, can be interfered with or acquired by ¹⁸⁸ the circuit court of the city of St. Louis? The jurisdiction of the parties and the subject matter of the cause was as complete and perfect in the St. Louis county circuit court as the jurisdiction of Judge Riley was over the matters in the Wear case (129 Mo. 619, 31 S. W. 608), or the jurisdiction of the court (in the supposed case) to which a cause had been sent by change of venue. It, therefore, seems clear to us that if the jurisdiction of a court over a cause is divested by a change of venue and invested in another court of co-ordinate jurisdiction, and that fact deprives the former of all authority to act thereafter in the premises, and that prohibition will lie to prevent it from so acting, then by parity of reasoning it seems that a similar court with like authority could not of its own motion, nor upon petition filed therein, acquire jurisdiction over a cause of action already pending in another court possessing like powers and jurisdiction.

In other words, the same reasons laid down by the authorities for holding that a court so divested of jurisdiction over a cause has no authority to retake jurisdiction thereof sustain the contention of the relators, that a court which has not taken jurisdiction of a particular case cannot acquire jurisdiction to try or otherwise intermeddle with that case if pending in another court of co-ordinate jurisdiction at the time it attempted to so take jurisdiction thereof; and this is true even though it had jurisdiction over the class of cases to which that one belonged.

It is the possession of jurisdiction of the court over the particular case in litigation that segregates and takes it from the general class of cases to which it belongs which excludes the jurisdiction of another court of co-ordinate jurisdiction from attaching to the same cause; and the reason for this is apparent, because it no longer belonged to the class of cases over which the latter court has jurisdiction at the time the ¹⁸⁹ second suit was filed therein; it had become extinct or ceased to exist as a cause of action so far as the latter court was concerned, and had become merged, as it were, into an action pending in another court.

The authorities herein cited and the conclusions before reached are in no manner in conflict with the law as enun-

ciated in the case of *State v. Withrow*, 108 Mo. 1, 18 S. W. 41. The facts of that case were these: John M. Glover had been appointed by the probate court of the city of St. Louis administrator of the partnership estate of Glover & Shepley. On April 24, 1889, he was moved from that office and John R. Shepley was appointed in his stead. On October 3, 1889, Glover filed a final account of his administration in the probate court. This was done after requests by Shepley, but no motion was filed by Shepley in the probate court, nor was Glover cited to appear. Shepley filed exceptions to the account on January 21, 1890, and Glover filed another amended account to which Shepley also filed exceptions. Shepley thereafter tried to get the probate court to pass on the exceptions, but Judge Woerner declined to do so on the ground that Glover was not before him and he had no jurisdiction over the account unless the statutory method was followed, or Glover would appear and submit himself to the jurisdiction of the court. During the year 1889 and ever since Glover was living in Colorado. At the June term, 1890, of the circuit court, Shepley brought suit on the bond of Glover, alleging as breaches: First, that Glover had failed to account as required by law; second, that he had failed to settle with his successor; third, that he had failed to pay over and deliver to his successor the sum of eighty-six thousand dollars in his hands. The defendants in said action filed an answer in which they set up; first, a plea to the jurisdiction of the circuit court on said bond; second, a plea that another cause of action was pending in the probate court between the ¹⁰⁰ same parties and involved the same issue. A trial was had on both pleas and both were adjudged bad. The circuit court then proceeded to try the cause on the merits when the provisional writ of prohibition was issued for the judge thereof to show cause why he should not be prohibited from trying the case.

In that case the probate court had original and exclusive jurisdiction to hear and determine the exceptions filed therein to the account of Glover, while the circuit court had original jurisdiction of an action against him and his securities for a breach of his administrator's bond. The courts were not courts of co-ordinate jurisdiction, not even as to the matters pending therein. And this court, speaking through Gantt, P. J., in that cause, said: "Now when we say 'two courts of concurrent jurisdiction,' we must concede that both courts

have jurisdiction of the same matter. For the purposes of this case, it is sufficient to determine that the circuit court of St. Louis had jurisdiction of the action against relators; if it did, then prohibition will not lie, and the fact that it may erroneously decide some of the questions before it will not alter the case": State v. Withrow, 108 Mo. 1, 18 S. W. 41. It is thus seen that the express reason assigned by Judge Gantt for refusing the writ was that the circuit court had jurisdiction of the subject matter of the cause therein pending, to wit, the breaches of the conditions of the administrator's bond. While there may be some statements in that opinion if considered abstractly and not in connection with the facts of that case which might lend color to the respondent's contention in this case, yet when applied to the facts of that case every vestige of it fades away and leaves no semblance of authority for their position.

3. There is no race between the creditors mentioned in the suit pending in the circuit court of St. ¹⁹¹ Louis county and those named in the case instituted in the circuit court of the city of St. Louis for the possession of the property in question. The receiver of whichever court is adjudged to be the rightful one will hold and administer the assets of the company for the benefit of all its creditors alike. This is academic in its nature, and it, therefore, needs no citation of authorities in support of it.

If the condition of things that exists in this matter is permitted or tolerated, there would be an inevitable conflict between the two courts and the officers of each in the service and execution of their respective orders and processes. This would not only interfere with the orderly and speedy administration of the law, but might lead to physical conflicts between those officers in their efforts to obey those orders and judgments. The result would lead to confusion, chaos and anarchy within the very temples of justice, and sanctioned by the highest tribunal of the state. Such a condition should not be tolerated.

We are, therefore, clearly of the opinion that the circuit court of the city of St. Louis has no jurisdiction in the premises, and that the peremptory writ of prohibition should issue against that court prohibiting it from proceeding further in the cause. It is so ordered.

All concur.

Property in the Possession of a Receiver is in custodia legis, and cannot be interfered with without leave of court: *Pelletier v. Greenville Lumber Co.*, 123 N. C. 596, 68 Am. St. Rep. 837; *Green v. Coast Line R. R. Co.*, 97 Ga. 15, 54 Am. St. Rep. 379; *Wilderberger v. Hartford Fire Ins. Co.*, 72 Miss. 338, 48 Am. St. Rep. 558. And it is contempt of court for third persons to attempt to deprive him of possession, whether by force or by suit: *Walling v. Miller*, 108 N. Y. 173, 2 Am. St. Rep. 400; *Sexcomb v. Catlin*, 128 Ill. 556, 15 Am. St. Rep. 147. The possession of a receiver as the possession of the court or law is discussed in the note to *American etc. Bank v. McGettigan*, 71 Am. St. Rep. 355.

The Writ of Prohibition is the subject of a note to *State v. Superior Court*, 111 Am. St. Rep. 929.

HUBBARD v. SWOFFORD BROTHERS DRYGOODS COMPANY.

[209 Mo. 495, 108 S. W. 15.]

DEED BY AGENT.—If one holding a power of attorney to sell the real estate of his principal executes a deed purporting to be made by him as agent for such principal and the latter's wife, and signed by such agent as attorney for his principal, the deed is that of the latter, and not that of the agent or attorney. (p. 490.)

DEEDS—Seal—Presumption.—If no seal appears in the record of a deed, but the closing clause thereof declares that it is under the seal of the grantor as he is therein described, and the acknowledgment is that it was duly executed, it must be presumed that the deed was sealed. (p. 491.)

DEED BY AGENT—Seal.—The seal attached to a deed executed by an agent under a power of attorney is the seal of his principal, though the name of the latter is not written, and only the name of the agent as attorney for the grantor appears. (p. 491.)

DEEDS—Acknowledgment.—If a certified copy of a deed shows that the acknowledgment thereto was taken before the mayor of "Kansas, in the county aforesaid," the court will take judicial notice that the city of Kansas was meant. (p. 492.)

DEEDS—Acknowledgment—Official Seal—Omission in Copy.—If a deed recites that it was given under the official seal of the officer taking the acknowledgment, it will be presumed that the omission of the (L. S.) in the certified copy was the mistake or oversight of the recorder making the copy. (p. 492.)

ADVERSE POSSESSION—Remaindermen.—If adverse possession commences to run against a grantor during his lifetime, it runs on against his heirs and devisees after his death. (p. 493.)

ADVERSE POSSESSION—Inclosed Premises—Occupancy.—The fact that a dwelling-house on inclosed premises is unoccupied for a short time does not break the continuity of an adverse possession. (pp. 493, 494.)

English & English, for the appellants.

E. Robinson and Ellis, Cook & Ellis, for the respondent.

⁴⁹⁹ VALLIANT, P. J. Plaintiffs sue in ejectment for the possession of certain real estate in Kansas City. The trial resulted in a verdict for the plaintiffs which the court on defendant's motion set aside, and granted a new trial. From that order the plaintiffs have appealed.

Chester Hubbard, the father of the plaintiffs, was the common source of title. He lived in Kansas City from 1853 to 1857 when he moved to Iowa. While he lived in Kansas City he owned certain land in that city which he platted into city blocks and lots called Hubbard's Addition. The lot in controversy in this suit was in that addition. He died in 1861 in Iowa, leaving a will by which he devised all his estate, real and personal (without specifying any particular property), to his wife for life, remainder to his children. The widow died in 1899. The plaintiffs in this suit are the children ⁵⁰⁰ of the testator and claim this land as remaindermen under that will.

The defendant claims title as follows:

September 16, 1856, Chester Hubbard and his wife executed a power of attorney to John W. Summers who, the evidence shows, was a justice of the peace in Kansas City, conferring on him plenary power to sell any or all real estate belonging to them in Jackson county. That document was duly acknowledged and was recorded October 16, 1856.

December 2, 1856, Summers executed a deed conveying the lot in suit to George B. Wheeler for two hundred and twenty-five dollars in cash. The main controversy in this suit turns on the effect of that deed. It is as follows:

"This indenture, made and entered into this second day of December, in the year of our Lord one thousand eight hundred and fifty-six, by and between J. W. Summers, as agent for Chester Hubbard and Mary Hubbard, his wife, of the county of Jackson, and State of Missouri, of the first part, and George B. Wheeler of the county and state aforesaid of the second part.

"Witnesseth: That the said party of the first part for and in consideration of the sum of two hundred and twenty-five dollars to me in hand paid, the receipt whereof is hereby acknowledged, have given, granted, bargained and sold, and by these presents do give, grant, bargain and sell, alien, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, a certain tract or parcel of land, lying and being in the county of Jackson, and State

aforesaid; namely, a certain lot, piece or parcel of ground known in said Hubbard's Addition to the City of Kansas, as lot number twenty-seven (27), in block number six (6), said lot being sixty feet on Mary street and one hundred and forty-two feet from said Mary street to an alley, and being sixty feet on said alley.

"To have and to hold the said tract, piece or parcel ⁵⁰¹ of land with all the appurtenances thereto belonging or in any wise appertaining to the only proper use, benefit and behoof of him, the said party of the second part, and to his heirs and assigns forever; and the said party of the first part, for his heirs, executors and administrators, covenant and agree to and with said party of the second part, his heirs and assigns, the said tract, piece or parcel of land and bargained premises and every part and parcel thereof, unto him, the said party of the second part, and his heirs and assigns, against all manner of claims they will warrant and forever defend the same by these presents.

"In testimony whereof the said J. W. Summers, as agent for Chester Hubbard and Mary Hubbard, his wife, of the first part, has hereunto set his hand and seal this day and year above written.

J. W. SUMMERS,

"Atty. for Chester Hubbard."

Plaintiffs urge several objections to this deed, the first of which is that it does not purport to be the deed of Hubbard and wife but the personal deed of Summers.

One would have to yield his common-sense interpretation of this deed to a very narrow technical interpretation of it in order to reach the conclusion that it was intended otherwise than as the deed of Hubbard and wife by their attorney in fact. When it was offered in evidence one of the objections interposed was that it was the deed of Summers and not that of Hubbard and wife, and it was said that the words "agent and attorney for Chester Hubbard and Mary Hubbard, his wife," were "merely descriptive" of Summers. Words of description are sometimes used to identify a person whose mere name in the connection used might be mistaken to refer to some other person of the same name, for example, Charles Carroll of Carrollton, but can any such purpose be imagined in this instance? ⁵⁰² Besides, Summers was conveying land that it is admitted belonged to Hubbard. As agent of Hubbard he was selling Hubbard's land. How did Summers understand his act, how did Wheeler understand it, how would

any man of common sense, learned or unlearned, understand it? Summers was endeavoring, as agent for Hubbard, to convey to Wheeler Hubbard's land; that was the purpose they both had in view and the executing of the deed by the one and the accepting of it by the other shows that they both understood that it accomplished that purpose. We must construe the deed according to the evident intention, and so construing it we hold that it is a deed from Hubbard and wife to Wheeler: *Martin v. Almond*, 25 Mo. 313; *Pease v. Pilot Knob Iron Co.*, 49 Mo. 124; *Owen v. Switzer*, 51 Mo. 322; *Turner v. Timberlake*, 53 Mo. 371; *McClure v. Herring*, 70 Mo. 18, 35 Am. Rep. 404.

This deed was recorded December 24, 1856. The evidence of it was a certified copy, the defendant having first made proof that the original was not in its power. Plaintiffs now offer the further objection that the deed is not sealed with Hubbard's seal. No seal appears in the copy, although in the closing clause of the deed it declares that it is under the seal of the grantor as he is therein described, and the acknowledgment is that it was duly executed. Under those conditions the law presumes that the deed was sealed: *Hammond v. Gordon*, 93 Mo. 223, 6 S. W. 93; *McCoy v. Cassidy*, 96 Mo. 429, 9 S. W. 926; *Macey v. Stark*, 116 Mo. 481, 21 S. W. 1088; *Mitchner v. Holmes*, 117 Mo. 185, 22 S. W. 1070.

But appellant insists that it is not sufficient even if it appeared that Summers had attached his seal, because the deed to be effectual should carry the impress of Hubbard's seal. That brings us back to the question of whose deed this was. It was inartificially drawn, but, as we have seen, Summers was not purporting to act in his individual capacity, it was only in the ⁵⁰³ capacity of agent for his principals, and all that he did was intended to be the act of his principals; under the power of attorney he had authority to attach their seals to the deed and when, not as himself, but as agent for them, he attached a seal while proclaiming he was acting for them, it was their seal.

This deed, in connection with that power of attorney, might be viewed from another standpoint, and it would be equally effective to carry the title to the land, that is, viewing Summers as the donee of a power to sell and execute a deed of conveyance, if he had made the deed referring to the power and indicating that as in execution of it the deed was made in his own name as grantor it would have been a valid ex-

ecution of the power. But we are rather inclined to the opinion that Summers was intending to act simply as agent, and that his hand that signed and sealed the deed was the hand not of Mr. Summers, but the hand of Hubbard's agent and therefore Hubbard's hand.

It is further objected that the certified copy shows that the acknowledgment was before the mayor of "Kansas in the county aforesaid," whereas it is said there was no city named "Kansas" in that county. We know, however, that there was at that time in Jackson county a city whose official name was "The City of Kansas," and no one not desiring to be mistaken could be mistaken in the municipality referred to.

Lastly, it is objected that the certified copy does not indicate that the seal of the city of Kansas was attached to the mayor's certificate of acknowledgment. The acknowledgment concludes with: "Given under my hand and official seal the date above written. M. J. Payne, Mayor."

Since the deed recites that it bears the mayor's official seal, it will be presumed that the omission of the (L. S.) in the certified copy was the mistake or oversight of the recorder making the copy.

⁵⁰⁴ We hold that this instrument was valid as the deed of Chester Hubbard and passed his title to the grantee Wheeler therein named.

Following this deed defendant produced in evidence a succession of deeds making a regular chain bringing the Wheeler title down to the defendant.

As what is above said disposes of the plaintiffs' claim, it is perhaps unnecessary to follow the defendant's evidence any further, but as the cause is to be retried, we will consider the other questions.

The evidence showed that when Wheeler bought the lot it was vacant; he sold to one Bailey in 1857, and Bailey sold to one Trefren in 1859. When Trefren bought it he built a three-story brick residence on it and inclosed it with a fence, and lived there with his family until the fall of 1863, when he moved to St. Louis. When he went to St. Louis he rented the premises to one Sears, who occupied it as tenant of Trefren—just how long the evidence does not show. The title passed through mesne conveyances from Trefren to one King in January, 1864; thence by successive conveyances down to the defendant. Mention is here made of the conveyance to King because he in his testimony stated that the

house was not occupied at the time he bought it, but that he put a man in it and it was not vacant again while he owned it. That testimony is relied on by plaintiffs to show that the adverse possession which began in 1859 was not continuous. Whilst the time during which the house was not occupied is not definitely stated, yet sufficient is stated to show that it was not a long period. Trefren, who built the house, lived in it until the fall of 1863; when he left he rented it to Sears, who occupied it as his tenant, and King bought it in January, 1864. So that at the most there was a space of only about three months between the time Trefren moved to St. Louis and the time King purchased, and within that time Sears occupied the house—just how ⁵⁰⁵ long is not shown. And even during that period, as the evidence shows, there was a close fence around the premises, and doubtless the house was closed and locked, although that was not shown. Except for that brief period the testimony showed that the property had been in the open, continuous and adverse possession of the persons under whom the defendant claims from 1859 to the date of the trial.

As Hubbard did not die until 1861 this possession began in his lifetime; therefore the statute of limitations began to run then, and did not cease to run because of his death. If the possession had not begun until after the death of Hubbard, then the statute of limitations would not have begun to run against the plaintiffs, who claim as remaindermen, until the falling in of the life estate in 1899, but having begun in his lifetime, it ran on against his heirs and devisees. That the house was unoccupied for a short while did not break the continuity of the adverse possession. (See the cases cited on this point in respondent's brief.)

The defendant's evidence made out a clear title by adverse possession.

There is one other point in defendant's case which we will notice, though perhaps it is unnecessary.

Mr. King testified that he bought from Hubbard the other lots in Hubbard's Addition, and while he was negotiating for them Hubbard told him that he had sold this lot to Wheeler. Defendant contends that, because King afterward bought the lot from one deriving title from Wheeler, Hubbard's devisees are estopped from denying the Wheeler title.

Assuming that what Hubbard said to King on that occasion would have the effect to estop the plaintiffs from disputing

the title of Wheeler, there may be some question as to whether King was a competent witness to prove the fact. Suppose King was still holding the Wheeler title he acquired and was in possession of the ⁵⁰⁶ property under it, would he in his own behalf against the heirs or devisees of Hubbard, be a competent witness under section 4652 of the Revised Statutes of 1899, to prove a conversation between himself and the man who has since died that would in effect defeat a title that it is claimed the man now dead owned at the date of his death, or prevent its passing to his heirs or devisees, and if he could not in his own behalf, could he "in favor of any party to the action claiming under him"?

We will not enter upon an investigation of that question because it was not raised in the trial court and has not been referred to in the briefs on either side; therefore, it is not necessary to decide it. We mention it, however, because we consider it a question not free from difficulty.

The trial court was right in setting aside the verdict for the plaintiff and granting a new trial.

The judgment is affirmed.

All concur.

When a Person Signs His Own Name to an Instrument and adds thereto the word "agent," the obligation, prima facie, is his personal one, in the absence of an apparent intention to the contrary in the body of the instrument. The word "agent" is regarded as merely descriptive of the maker: *Burkhalter v. Perry*, 127 Ga. 438, 119 Am. St. Rep. 343; *Peterson v. Homan*, 44 Minn. 166, 20 Am. St. Rep. 564; *Hobson v. Hassett*, 76 Cal. 203, 9 Am. St. Rep. 193.

A Deed Executed by One in His Own Name, but showing that he acted as attorney for another, is valid if he possessed the requisite authority: *Rogers v. Frost*, 14 Tex. 267; and it has been affirmed that a deed signed by "A. B., Executor," and signed by him in the same form, shows that it was made in his representative capacity: *Babcock v. Collins*, 60 Minn. 73, 61 N. W. 1020.

HOLMES v. KANSAS CITY.

[209 Mo. 513, 108 S. W. 9.]

ESTATES BY ENTIRETIES—Condemnation—Right of Wife.—

If a husband and wife have an estate by the entirety in land, she has such an interest in the property as must be paid for prior to its seizure and use for a public purpose. (p. 502.)

ESTATES BY ENTIRETIES—Condemnation—Right of Wife—

Injunction.—If husband and wife have an estate by entirety in land which is sought to be condemned for a public purpose, service upon the husband alone in the condemnation proceeding and his appearance therein and the payment of the damages assessed to him alone do not make her a party, nor bind her interests in the property, nor prevent her from maintaining a suit by injunction to protect it from seizure. (p. 502.)

ESTATE BY ENTIRETIES—Right of Wife to Sue.—

If husband and wife have an estate by the entirety in land, she has such an interest in the property that, without joining her husband, she may sue for the possession thereof as against all persons except him. (p. 504.)

ESTATES BY ENTIRETIES—Condemnation—Rights of Wife

not Made a Party—Intervention.—If a city, in proceeding to condemn property for a public use belonging to husband and wife as tenants by the entirety, proceeds to assess the amount of the damages, and then by a separate suit by interpleader, to which the wife is not made a party, brings the money into court, asking it to determine whether the husband or a third party, or both, are entitled to such damages, and the court determines that the husband is entitled to the whole fund, and no money is paid into court for the benefit of the wife, the city has no right to take the property nor to interfere with her possession, and she is entitled to an injunction to prevent it. (p. 506.)

EMINENT DOMAIN—Damages, to Whom must be Paid.—

A constitutional requirement that the compensation for property taken for public use "must be paid to the owner or into court for his use," before the condemning party can take possession, is not met by a conditional deposit of money in court, nor by deposit in court of the damages assessed for the use of the parties other than the owner, nor by paying them into court for the special purpose of having the court determine which of two parties are entitled thereto, leaving out of the determination the owner or one of the owners. (p. 508.)

Johnson & Lucas, for the appellant.

E. C. Meservey and W. A. Knotts, for the respondents.

⁵¹⁵ GRAVES, J. In 1886 the plaintiff and her husband, Daniel B. Holmes, acquired title to a tract or ⁵¹⁶ parcel of land or lot in Kansas City, Missouri, the particular description of which will serve no good purpose here. The deed to

them, and which was of record, is such as created an estate by the entirety, and from that time on they continued as tenants by the entirety. On this tract or parcel of land was a brick dwelling-house and other improvements. In February, 1901, the defendant, the city of Kansas City, being desirous of opening up what is called Admiral Boulevard, and for that purpose, to acquire a portion of this and other tracts of land in said city, after passing in October, 1900, the necessary ordinance, instituted its condemnation proceeding in the circuit court of Jackson county, under the charter provisions of said city relative thereto. The said city filed a certified copy of said ordinance, together with a plat of the property to be taken or damaged by the city in constructing this boulevard. This plat gave the names of the owners of the property, and as to this tract or parcel, which is known throughout this proceeding as tract 79, the names of Daniel B. Holmes and the Jarvis-Conklin Mortgage Trust Company and Samuel M. Jarvis, Trustee, were named as owners. The name of Lyda M. Holmes did not appear upon this plat. In that proceeding the court record, omitting therefrom the ordinance mentioned therein, is as follows:

“In the matter of the condemnation of land for the opening and establishing a boulevard in the North Park District in Kansas City, Missouri, under ordinance of Kansas City, Missouri, No. 15,550, entitled, ‘An ordinance to open and establish a boulevard along Seventh street, Sixth street and Other Lands in the North Park District in Kansas City, Jackson county, Missouri,’ approved on October 9th, A. D. 1900.

“Now, on this, the sixteenth day of February, A. D. 1901, in this, the circuit court of Jackson county, Missouri, at Kansas City, Division No. 2, comes Kansas ⁵¹⁷ City, Missouri, by its counselor, R. B. Middlebrook, and by Delbert J. Haff, attorney and counselor of the Board of Park Commissioners, has caused to be filed in this court a certified copy of an ordinance of said city, No. 15,550, approved by the mayor of said city on the 9th day of October, A. D. 1900, and entitled, ‘An ordinance to Open and Establish a Boulevard along Seventh Street, Sixth Street and Other Lands in the North Park District in Kansas City, Jackson county, Missouri,’ and has caused also to be filed a statement by plat prepared by the city engineer of said city, as provided by law, containing a correct description of the several lots or

parcels of private property to be taken or damaged, and containing also the names of the owners, so far as known, or such lots or parcels of land or any estate or interest therein, who were such at the time of taking effect of said ordinances, and the court being fully advised in the premises doth make the following order herein, to wit:

“To all persons whom it may concern.

“Whereas, a certified copy of ordinance of Kansas City, Missouri, No. 15,550, and entitled, ‘An Ordinance to Open and Establish a Boulevard along Seventh Street, Sixth street, and Other Lands in the North Park District in Kansas City, Jackson County, Missouri,’ has been by the Board of Park Commissioners of said city caused to be filed in the circuit court of Jackson county, Missouri, at Kansas City, the general object and nature of which ordinance is to open and establish a boulevard in the North Park District of Kansas City, Missouri, fully set out and described in said ordinance, and to take and damage certain private property for said purposes, describing the private property so to be taken or damaged, and prescribing the limits within which private property shall be deemed benefited by the proposed improvements and be assessed and charged to pay compensation therefor, ⁵¹⁸ which said ordinance is specifically as follows, to wit:

• • • •

“And said Board of Park Commissioners had caused to be filed also a statement by plat prepared by the city engineer of said city as provided by law, containing a correct description of the several lots or parcels of private property to be taken or damaged, and containing also the names of the owners, so far as known, of such lots or parcels of land, or of any estate or interest therein, who were such at the time of taking effect of said ordinance:

“Now, therefore, all and each of you who may be concerned in said proceedings are hereby notified that the twenty-third day of March, A. D. 1901, is the day, and the courtroom of Division No. 2 of the circuit court of Jackson county, Missouri, at Kansas City, at the county courthouse in Kansas City, Missouri, is the place hereby appointed and fixed for the empanneling of the jury to ascertain the compensation for the property to be taken or damaged under said ordinance, and the amount of benefits, if any, to be assessed against the property within the benefit district, and to make

assessments to pay for the property to be taken and damaged, and for the ascertainment of the compensation to be paid for the property to be taken or damaged, and the amount of the benefits to be assessed to pay therefor.

“And the court further orders that the parties owning or having an interest in the real estate proposed to be taken or damaged by said ordinance be served within said city with a copy of this order, either by delivering to each of said owners or parties interested at any time before the said day fixed herein for the hearing as aforesaid, a copy of this order, or by leaving such copy at the usual place of abode with some member of their respective families over the age of fifteen years, and in case of corporations, by delivering⁵¹⁹ such copy to the president, secretary or some managing officer, or to any agent of such corporations, in charge of any office or place of business of such corporations, as by the charter of said city provided.

“And the court further orders that this order be published in each issue of the Kansas City Mail, the newspaper doing the city printing for Kansas City, Missouri, for four successive weeks, the last insertion to be not more than one week prior to the day fixed for said hearing.”

The plat mentioned in said order and filed with the certified copy of the ordinance, as above stated, had thereon the following certificate:

“I hereby certify that this statement by map contains a correct description of the several lots or parcels of private property to be taken or damaged as provided by ordinance of the mayor and common council of Kansas City, Missouri, No. 15,550, approved October 9th, A. D. 1900, and contains also the names of the owners so far as known, of such lots or parcels of lands to be taken or damaged, or of any estate or interest therein, who were such at the date of the taking effect of said ordinance providing for the taking and damaging of said private property.

“ROBERT W. WADDELL,
“City Engineer.

“Office of Board of Park Commissioners,
“Kansas City, Missouri.

“I hereby certify that the annexed map was delivered by the city engineer of Kansas City, Missouri, to the Board of Park Commissioners of said city this 7th of January, 1901.

“Witness my hand and the seal of said board the day and date last aforesaid.

GEO. E. KESSLER,

“Secretary.

520 “(Seal of Board of Park Commissioners of Kansas City, Mo.)

“Filed Feb. 16, 1901.

“H. M. STONESTREET, Clerk.

“D. H. McCLANAHAN, D. C.”

The return made by the officer serving this order showed service upon Daniel B. Holmes, but not upon Lyda M. Holmes. It also showed no service as to the Trust Company or its trustee, but as to them a non est was made.

This condemnation proceeding was proceeding No. 2619 in the circuit court of Jackson county. Daniel B. Holmes filed a claim for damages in this proceeding, claiming ownership of the property.

A condemnation jury was appointed, and on October 21st returned their verdict and assessment of damages, which as to tract No. 79 was two thousand seven hundred and thirty-seven dollars and fifty cents.

January 18, 1902, the court entered judgment on the verdict returned by said jury, approving said report and verdict in every particular. November 29, 1902, the court entered judgment, finding that all the tracts and parcels of land had been paid for, and decreed title in Kansas City for the public use aforesaid.

On November 1, 1902, Kansas City, as plaintiff, filed another suit, being case No. 9895, which was in the nature of a bill of interpleader, against Edward R. Heald, Daniel B. Holmes, Samuel M. Jarvis, the Jarvis-Conklin Mortgage Trust Company, and a number of other parties, but Lyda M. Holmes was not a party to this proceeding. In this case, the city sought to have all parties brought into court and have them interplead and establish their respective claims to the several sums of damages awarded in the condemnation suit, first above described.

On November 17th, the city for the first time paid into court the sum of two thousand seven hundred and thirty-seven dollars and fifty cents, awarded as damages in the condemnation suit, and this payment was made ⁵²¹ in the interpleader suit, case No. 9895, as appears by the clerk's memoranda on the files

in case No. 2619, which memoranda is in this language: "Nov. 17, 1902. Rec'd of city in case 9895, the sum of \$2,737.50, on tract 79." Tract No. 79 was also known to the pleadings in the interpleader suit.

In this interpleader suit, Lyda M. Holmes was not served and did nothing therein. Daniel B. Holmes files his interplea claiming the whole fund thus paid into court. The mortgage company and its trustee filed its answer disclaiming any interest in the said fund of two thousand seven hundred and thirty-seven dollars and fifty cents, thus paid in with the bill of interpleader. The court thereupon decreed that said Daniel B. Holmes was entitled to the fund and the same was paid to him March 30, 1903. Shortly thereafter, Michael Ross, under a contract of purchase from the city, entered said premises and began to remove the house therefrom which he claimed to have purchased from the city, and thereupon Lyda M. Holmes, the plaintiff herein, instituted the case at bar, which is an injunction suit, wherein she alleges her interest in the property hereinabove stated; that she was and had been for some time in possession thereof, renting the same; that she had never been paid for her interest in said property, and asks relief as follows:

"Wherefore, plaintiff prays the court that the defendants and each of them, their agents, attorneys, representatives, servants and employés, be forever perpetually enjoined and restrained from tearing down or removing said brick dwelling-house, or any part thereof, from said tract of land; from in any manner whatever interfering with or disturbing the earth or soil of said tract of land, or any of the improvements thereon, and from making any public use whatever of said tract of land as a boulevard or otherwise, and for such other and further relief as the plaintiff in equity ⁵²² and good conscience may be entitled to, and for costs of suit," etc.

Defendant, by answer, pleads the condemnation proceeding and the interpleader proceeding aforesaid; the claim of the money made by Daniel B. Holmes; the judgments in each of said proceedings; the payment of the money to Daniel B. Holmes, and further avers that Daniel B. Holmes was personally served in the condemnation proceeding, and that his wife was told by him of such proceeding and the nature thereof. Upon the trial of this cause it was admitted, subject to relevancy and competency, as follows:

“It is admitted that prior to the trial of the case in condemnation and during the pendency of that action, plaintiff, Mrs. Holmes, was informed by her husband of the fact that he had been served with a copy of the order of the court of the pendency of the action for the taking of this property among other property for the purpose of the establishing of a boulevard.”

By its judgment upon the trial of the cause, the court dismissed plaintiff's bill and entered judgment against her for costs. Motion for a new trial was filed, but overruled, and plaintiff appealed. The respective contentions of the parties will be noticed in the course of the opinion.

The contentions in this case may be summarized thus: Plaintiff claims that she had an interest in tract No. 79, and that it cannot be taken for the public use indicated without just compensation. She further claims that she has never been compensated in any way, or in either of the two proceedings mentioned above. She claims that, inasmuch as she was a known owner residing in Kansas City, and the court having made an order for personal services as to such owners in the condemnation proceeding, and no such service was had upon her, she was not a party to that proceeding, and in no way bound thereby. She further ⁵²³ contends that even if she was, in contemplation of law, a party to the condemnation proceeding, yet as no payment of damages was made to her, and no money deposited in court in that proceeding for her as the assessed damages on tract 79, she is in no way bound by the decree in that case, and would not be bound thereby by the payment into court, in another proceeding to which she was not a party, of the sum assessed as damages in the condemnation proceeding. Her contention is thus double in character, and proceeding in reverse order, as the more natural course, where the determination of the latter contention may determine the case, we will take up the latter contention first.

1. That Mrs. Holmes has not been compensated for her interest in this property stands out in bold relief on the record before us. In fact, it is not contended that she has been paid a cent. Nor do we take it that it is seriously contended that she had or has no such interest as entitles her to compensation under the constitutional provision requiring compensation for private property when taken for public use. If such were contended, the contention would not be well

founded. The city's contention is that the money was paid into court for her benefit, and that question we discuss later. That Mrs. Holmes had an interest such as to bring her within the constitutional guaranty, we think is well settled. The deed to the property made Mr. and Mrs. Holmes tenants by the entirety. The grantees are thus named in the deed conveying the title to them: "And Daniel B. Holmes and Lyda M. Holmes, his wife, of the county of Jackson, state of Missouri, parties of the second part"; and the granting clause is, "Do, by these presents, grant, bargain and sell, convey and confirm, unto the said parties of the second part, their heirs and assigns," etc. So that there is no question that there was created an estate by the entirety. Such an estate gave to Mrs. Holmes an interest ⁵²⁴ in the property which must be paid for prior to its seizure and use for a public purpose.

The case of *Grosser v. City of Rochester*, 60 Hun, 379, 15 N. Y. Supp. 62, is exactly in point. This was an injunction by the wife to enjoin the city from constructing a sewer across property held by herself and husband as tenants by the entirety. The husband had been made a party to the condemnation proceeding, but the wife had not. The money had been paid into court in the condemnation proceeding for the benefit of the husband. The city let a contract for the construction of the sewer and the work was progressing when the suit was brought. Both the city and the contractor were made parties defendant. In that case, the court said:

"We agree with the learned referee, and for the reasons well stated by him in his opinion, that service of notice upon the husband and his appearance in the proceeding did not make the wife a party thereto nor bind her interest in the property, and, therefore, that as against her the city acquired no right in the premises; but we cannot agree with him that she had no rights in the premises which were liable to be injuriously affected by the building of the sewer under the proceedings actually had.

"It is true that under the doctrine of *Bertles v. Nunan*, during the joint lives of the husband and wife, the husband has the right to the exclusive benefit, use, possession and control of the land and may take all the profits thereof; and may mortgage or convey an estate to continue during the joint lives; but he may not make any disposition of the land that would prejudice the right of the wife in case she should

survive him: *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361; *Coleman v. Bresnaham*, 54 Hun, 619, 8 N. Y. Supp. 158. The husband, therefore, might have granted the right of way during the joint lives, with provisions against a permanent injury to the freehold; and whatever he might grant, the city might acquire ⁵²⁵ from him by condemnation proceedings to which he alone was made a party. But this is not what has been done in this case. Here the city has proceeded against the husband as the sole owner of the title to acquire a perpetual easement in the land, which includes the right for all time to maintain the sewer and to enter upon the property to repair and renew it. All these rights the city has already acquired on the face of the record, and its counsel is contending here that it has in fact acquired them against the plaintiff by the proceeding against her husband. The learned referee, while holding the contrary, suggests, in substance, that it will be time for her to contest the claim of the city when her title shall become absolute by survivorship. But suppose the sewer is built and put to its proper use of draining a large and populous section of the city, and then her husband dies: How shall she proceed to assert and enforce her rights? If the city decline to recognize them, shall she tear up or cut off the sewer, or, as the referee suggests, restrain the city from its use—and in either case with how much more of inconvenience and expense than if she had taken her remedy when those rights were only threatened with invasion? Or suppose the husband dies when the work is only fairly under way, with her lot divided by an excavation and the earth or rock which has been thrown out of it: Her title has now become sole and absolute and the city has no right to proceed a step further with the work. But they have paid for the damage so far done in the award made by the husband, and if the plaintiff stop the work where it is, she may restore the lot to its proper condition at her own expense.

“It seems very clear that the plaintiff has rights by virtue of her joint tenancy which are liable to be seriously impaired by the action which the defendants are about to take.

“We think the learned referee erred in the latter ⁵²⁶ of his conclusions above mentioned, and that the plaintiff, upon the facts appearing by the record, was entitled to the restraining process of the court to prevent the prosecution of the work

on the plaintiff's property until they have acquired the right as against her."

The action by the city in the case at bar appropriates a part of the tract of land and damages the remainder, as found by the verdict and judgment. The inheritance itself is stricken at, and in part destroyed and in another part damaged. It has always been held that in a case wherein the inheritance itself is involved the wife must join in the action. In 2 Washburn on Real Property, third edition, page 305, it is put thus: "They are not properly joint tenants of such lands, since, though there is a right of survivorship, neither can convey so as to defeat this right in the other. Each takes an entirety of the estate. . . . As the husband is entitled to the entire rents of the wife's lands, except as hereinbefore stated, it follows that he alone can sue for an injury to the estate which affects these. But if the injury affect the inheritance, the action must be in their joint names, and it will survive to her if she outlives him."

This joinder of parties is obviated by our statute pertaining to married women: *Baines v. Bullock*, 129 Mo. 117, 31 S. W. 342. But the point we are now making is that the wife had a substantial and recognized interest in the inheritance, and could maintain an action when injury was done thereto.

Such is her interest that she, without joining her husband, can sue for the possession thereof as against all persons except the husband: *Bains v. Bullock*, 129 Mo. 117, 31 S. W. 342. In that case, we said:

"But it is urged that, as the estate is invested in the husband and wife by the entirety, the statute giving the wife a right of action does not authorize her to sue alone for the violation of the joint rights of herself and ⁵²⁷ husband. But an estate of this character is not a joint or common estate. The conveyance vests in the husband and wife each the entire estate, not a joint interest. Each is entitled to possession as against every person except the other. It is true the estate is entire and cannot, by partition or otherwise, be segregated while the marital relation exists, so as to give each grantee either an undivided interest in the land, or a right in severalty to a particular part of it: *Russell v. Russell*, 122 Mo. 235, 43 Am. St. Rep. 581, 26 S. W. 677. But it is also true that the grant vests in such grantee the entire estate. The statute abolishes the legal unity between husband and

wife, which gave rise to the estates by the entirety, but the estate itself has not been abolished: Rev. Stats. 1899, sec. 8844.

“The marital control by the husband over the real estate of the wife is removed, and she is given the power to sue ‘at law or in equity with or without her husband being joined with her as a party.’ The right to sue in her own name seems to be unlimited. That she has the right to sue in ejectment to recover possession of her land has been decided: *Arnold v. Willis*, 128 Mo. 145, 30 S. W. 517.

“Under the deeds to herself and husband, then, plaintiff holds the entire estate in the lands claimed. Defendants do not claim under the husband, nor does it appear that the possessory rights of the husband will, in any manner, be affected by the suit of the wife or any judgment she may recover. Plaintiff, therefore, as against defendants, is entitled to the possession and has a right of action therefor.”

And such is her interest that “divorce of the wife from the husband results in vesting in the wife her moiety”: 21 Cyc. 1201, and cases cited. We have held in this state that the divorce of the wife from the husband gave her absolute title to her moiety, and that an action in partition would lie: *Russell v. Russell*, 122 Mo. 235, 43 Am. St. Rep. 581, 26 S. W. 677.

⁵²⁸ So that we have no hesitancy in saying that Mrs. Holmes had such an interest in the property as demanded at the hands of the city just compensation before the property or any part thereof could be taken for a public purpose. That she received no such compensation is an admitted fact. Was there such compensation deposited in court for her benefit, and is she thereby debarred of this action? To this question we proceed next.

2. Under this point we assume, without conceding or discussing the question, that Mrs. Holmes was by the general order of publication, although not personally served, made a party to the condemnation proceeding. Conceding for the sake of the argument that she was, have her rights been affected thereby? We think not, and for several reasons. The constitutional provision pertaining to the subject reads thus: “Private property shall not be taken or damaged for public use without just compensation, and until the same shall be paid to the owner, or into court for the owner, the property

shall not be disturbed or the proprietary rights of the owner therein vested."

The city charter, article 10, section 28, has this provision: "The city shall not be entitled to the possession of any lot or parcel of property taken under the provisions of this article until full payment of the compensation therefor, as determined, be made or paid into court for the use of the persons in whose favor such judgment may have been rendered, or who may be lawfully entitled to the same."

We take it that this charter provision is not broader than the constitution. It could not be and yet stand as valid. It must be borne in mind that not a dollar of the damages allowed in the condemnation proceeding was ever paid into court in that case. The city evidently had in mind (a very natural inference when the names of the owners of tract No. 79 as appeared from the plat filed with and made a part of the pleadings in ⁵²⁹ the condemnation case are remembered) that there was a question as to whether this allowance should be paid to Daniel B. Holmes or the Jarvis-Conklin Mortgage Trust Company. Evidently in doubt upon that question, the city did not pay into court the amount of the allowance, two thousand seven hundred and thirty-seven dollars and fifty cents. The city in effect abandons that case, and files suit No. 9895, a bill of interpleader, and in this suit, for the first time, brings the money into court, and asks that the said Daniel B. Holmes and Jarvis-Conklin Mortgage Trust Company be required to interplead and show their respective rights to that fund. This fund thus deposited in court was one deposited under the terms of this suit, as a fund belonging either to Daniel B. Holmes or the Mortgage Trust Company, or both, but not as a fund for the benefit of Mrs. Holmes, for she was not named in the proceeding or made a party thereto. Had the city been paying into court a fund, in which it recognized that Mrs. Holmes had an interest, by its bill of interpleader, it would have so stated, and Mrs. Holmes would have been made a party defendant therein, and required to set forth her claim to the fund. This suit was a separate action, and one in which Mrs. Holmes could not have been brought into court except by personal service, she being a resident of Jackson county. Mr. Holmes had a substantial interest in the property taken, and the city thought that the mortgage trust company might have a substantial interest, so that it brings into court two thousand seven hun-

dred and thirty-seven dollars and fifty cents, and by its bill of interpleader in effect says: "I have and hold this sum of money, which either belongs to Daniel B. Holmes, or the Jarvis-Conklin Mortgage Trust Company. This money, with this bill I bring into court, and ask the court to require these parties to settle their respective claims thereto." Such a payment into court is not a payment into court of any money for the benefit or use of Mrs. Holmes. On the other hand, it is made ⁵³⁰ by the bill of interpleader and the parties thereto a specific payment into court for the use and benefit of Daniel B. Holmes or the mortgage trust company, or both. Had the money been paid into court in the condemnation case, a different question might have been presented, not necessary here to discuss.

In this case, the city by its act of paying the money on a bill of interpleader, and in that bill naming the parties who might be entitled thereto, but leaving out and excluding Mrs. Holmes from the list, has made a deposit which was not for her use or benefit, but for the use or benefit of others, specifically named in the bill. By failing to mention Mrs. Holmes in its bill of interpleader, the city negatives the idea that any money, at any time, has ever been paid into court for the use of Mrs. Holmes.

In *St. Louis etc. R. R. v. Fowler*, 113 Mo. 458, 20 S. W. 1069, it is said: "Section 21 of article 2 of the constitution is emphatic. . . . The compensation . . . must be paid to the owner or into court for him, before the condemning company can take possession. To use the language of the constitution, 'and until the same [the compensation] shall be paid to the owner or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested.' This constitutional provision contemplates that the compensation shall be paid before the property can be disturbed. It is not satisfied with a mere deposit by way of security, not to be withdrawn until the final disposition of the case. It says nothing about a deposit by way of security. If the owner will not accept the money, it can be paid into court for him, not there to remain as a security for the final award, but for his immediate use. He has the right to withdraw and use the money. . . . The right to have the amount of the award placed at the disposal of the property owner before his property is disturbed is a constitutional right,

of which ⁵³¹ he cannot be deprived by any act of the legislature."

And we will add here that the constitutional mandate is not only not met by a conditional deposit of money, but it is likewise not met by the deposit in court of the damages assessed for the use of parties other than the owner. Nor is it met by paying into court for the special purpose of having the court determine which of two parties is entitled thereto, leaving out of the determination the owner or one of the owners, as in this case.

From this point of view it therefore appears that no money has been paid Mrs. Holmes, and no deposit made for her use or benefit. Under such circumstances the city has no right to harm her inheritance in the property in dispute, and in such case, injunction is the proper remedy. These conclusions obviate the discussion of the other interesting question, as to whether or not she was a party to and bound by the condemnation proceeding. In our judgment when the constitution says that the owner must be paid, or the money deposited into court for the owner, the term "into court" means in the condemnation proceedings. But it is not necessary to go that far in this case, because the city has qualified its payment into court, by naming the parties in the bill of interpleader, for whose use and benefit the money was brought into court, and Mrs. Holmes was not one of these. Leaving her name out of the bill of interpleader negatives the idea that the payment therewith tendered was for her benefit.

It therefore follows that this cause should be reversed and remanded, with directions to the trial court to enter judgment permanently enjoining defendants, as by the plaintiff prayed, and it is accordingly so ordered.

All concur.

⁵³² ON MOTION TO MODIFY JUDGMENT.

GRAVES, J. Plaintiff files motion to modify our original judgment in this case. The original suit was purely one asking for injunctive relief. In that suit, among other questions, the question of plaintiff's right and interest in the property involved was in issue, as well as the further question as to whether or not she had been compensated for it. The trial court dismissed her bill and pending the appeal, it appears from the motion to modify the judgment, that the city

of Kansas City appropriated her property. We say her property, for such was the adjudication of this court, which is final, not only in this action, but in all others wherein it could be pleaded as *res adjudicata*. So, also, with regard to the question of compensation to plaintiff. By our judgment, the judgment of the lower court was reversed and remanded with directions to enter up a judgment making the temporary injunction permanent. By the present motion we are asked to so modify the directions given in that judgment "as to permit said appellant and plaintiff to file a supplemental petition in said circuit court setting up such damages as she claims to have sustained, as aforesaid, and authorizing said circuit court to inquire into said claim for damages and to award to appellant and plaintiff such damages as upon such inquiry the said circuit court may find that she has sustained, as aforesaid."

We hardly think this the proper practice. If *pendente lite* the city bodily appropriated the plaintiff's property, wrongfully, as would appear from our opinion, then plaintiff has her full and adequate remedy to recover damages for the same. She has the same rights as she would have had in case that, without the injunction suit, the city had wrongfully appropriated the property. We are of the opinion that, inasmuch as the question of damages was not a matter before this court, we should not modify our judgment, so as to ⁵³³ cover matters not here. Plaintiff, as above stated, has her adequate legal remedy, and in addition has many questions of her case adjudicated. The better practice is to leave her to the legal action.

For these reasons the motion to modify the judgment will be overruled.

All concur.

Tenancies by the Sureties are discussed in the note to *Dew v. Hardenbergh*, 18 Am. Dec. 377. A judgment against a husband is not a lien on land held by him and his wife as tenants by the entirety: *Jordan v. Reynolds*, 105 Md. 288, 121 Am. St. Rep. 578. That land so held by them cannot be sold on execution to satisfy a judgment against him alone, see *Mercer v. Coomler*, 32 Ind. App. 533, 102 Am. St. Rep. 252; and that a mechanic's lien cannot be created against the property under a building contract signed by him alone, see *Bauer v. Long*, 147 Mich. 351, 118 Am. St. Rep. 552. Neither husband nor wife can so destroy the character of an estate held by them as tenants by entirety as to prevent the survivor from becoming the sole owner: *Frost v. Frost*, 200 Mo. 474, 118 Am. St. Rep. 689. He has the right to use the estate during coverture, but he

cannot alienate it: *Phelps v. Simons*, 159 Mass. 415, 38 Am. St. Rep. 430. Hence, she has no right to a share of the crops growing on the land: *Morrill v. Morrill*, 138 Mich. 112, 110 Am. St. Rep. 306. See, also, *Bynum v. Wicker*, 141 N. C. 95, 115 Am. St. Rep. 675. As to the effect of divorce on the tenancy, see *Alles v. Lyon*, 216 Pa. 604, 116 Am. St. Rep. 791, and cases cited in the cross-reference note thereto.

PERRY v. STRAWBRIDGE.

[209 Mo. 621, 108 S. W. 641.]

INHERITANCE—Murder of Intestate.—A Husband Who Murders His Wife cannot inherit any part of her estate in which he has a mere expectancy. (p. 513.)

INHERITANCE THROUGH MURDER.—A mere prospective legal heir or devisee in a will cannot make that certain which is uncertain by the murder of the person from whom he or she expects to inherit, and by such act he or she cuts off all right to the inheritance. (p. 514.)

INHERITANCE—Husband—Curtesy.—A husband is entitled to inherit from his childless wife, although he has no curtesy in her estate. (p. 514.)

COMMON LAW—Effect of Adoption of.—If a state adopts the common law by statute, it thereby takes the body of all of the common law, and such becomes the law of the state, except as repealed, changed, or modified by statute. (p. 516.)

INHERITANCE THROUGH CRIME.—No one can acquire property through his own crime, nor can he nor those claiming under him take property by inheritance or will from an ancestor or benefactor whom he has murdered. (p. 517.)

INHERITANCE—Murder of Wife.—The common-law right of a man to succeed to the property of his wife upon her death does not operate in favor of a man who murders his wife, nor in favor of those claiming under him. (p. 518.)

INHERITANCE THROUGH CRIME.—The rule that a common-law right of succession to property does not operate in favor of one who willfully takes the life of his ancestor or intestate, applies against any person claiming through or under the slayer, and does not contravene a constitutional provision that a conviction of crime shall not work a forfeiture of the estate. (p. 519.)

STATUTORY CONSTRUCTION—Common Law.—Whether a statute affirms a rule of the common law upon the same subject, or whether it supplements it, supersedes it, or displaces it, the legislative enactment must be construed with reference to the common law, and the latter must be allowed to stand unaltered as far as is consistent with a reasonable interpretation of the new law. (p. 520.)

STATUTORY CONSTRUCTION—Common Law.—Statutes in derogation of the common law are to be strictly construed, especially if the statute is in derogation of common right and common decency as well. (pp. 520, 521.)

INHERITANCE THROUGH CRIME—Husband and Wife.—The word "widower," in a statute providing that "when a wife

shall die without any child or other descendants in being capable of inheriting, her widower shall be entitled to one-half of the real and personal estate belonging to the wife at the time of her death," means one who has been reduced to the state of a widower by the ordinary and usual vicissitudes of life, and not one who by his criminal and murderous act has himself created that condition, and by such act he deprives himself of the right to acquire any estate in the property of his wife to which his heirs could succeed upon his death. (p. 526.)

INHERITANCE OF ESTATE THROUGH MURDER—Forfeiture of Estate.—The rule that a man who murders his wife, or those claiming under him, cannot inherit any part of her estate is not in violation of a constitutional provision that no conviction can work corruption of blood or forfeiture of estate. (pp. 527, 528.)

Reed, Yates, Mastin & Harvey, for the appellants.

B. T. Hardin, C. Taylor, Barnett & Barnett and B. Barnett, for the respondents.

GRAVES, J. The petition is one for the partition of real estate in Jackson county, Missouri, formerly owned by Lillie Maud Evans, now deceased. Whilst a petition in partition, it admits that two defendants, Callie Evans and Zora Evans, claim an interest in the property, but avers that they have no interest. Two defendants, Mrs. P. W. Strawbridge and Mrs. J. A. Thompson, file answers, which in averments practically correspond with the petition of the plaintiff and likewise ask for partition. The defendants, Callie Evans and Zora Evans, by their separate answer, each aver that they are the children of George Evans, who was the husband of Lillie Maud Evans, and that the said Lillie Maud Evans died before their father and without children, by which fact their father inherited an undivided one-half interest in the property, which passed to them upon his subsequent death. These defendants prayed the court to ascertain and determine the title. Other defendants merely had undisputed mortgage rights. The case was tried upon the following agreed statement of facts:

"It is hereby agreed by the parties hereto, that upon the trial of this cause the following facts shall be taken as true: That on May 26, 1902, one Henry Wollman was the absolute owner in fee simple of the land in the West Kansas Addition, number one, in plaintiff's petition described; that on said day Lillie Maud Evans became the owner of said property by virtue of a full warranty deed from the said Henry Wollman; that on June 4, 1902, one James Clark Whittier was the absolute owner in fee simple of the land in Hyde

Park in plaintiff's petition described, ⁶²⁷ and that on said last-named date Lilly Maud Evans became the owner of said property by virtue of a full warranty deed from said James Clark Whittier and wife; that George Evans and the said Lilly Maud Evans were lawfully married on the twelfth day of October, 1898; that no child was ever born of said union; that on August 15, 1903, said Lilly Maud Evans was the owner of the above-described land by virtue of the facts above set forth, and on said day was the lawful wife of the said George Evans; that on said August 15, 1903, the said Lilly Maud Evans died by the hand of her husband, the said George Evans, and that about three hours thereafter the said George Evans died by his own hand, all in Kansas City, Jackson county, Missouri; that the said Lilly Maud Evans died without any child or other lineal descendant in being capable of inheriting; that at the time last aforesaid, the land in Hyde Park in plaintiff's petition described was encumbered by a deed of trust given by the said Lilly Maud Evans and her said husband to Benjamin F. Wollman, trustee for Henry Wollman, on September 19, 1902, to secure one principal note for \$1,500, due three years after date, and six interest notes for \$45 each; that at said time the land in the West Kansas Addition, number one, in plaintiff's petition described, was encumbered by a deed of trust given by the said Lilly Maud Evans and her said husband to Benjamin F. Wollman, trustee for Henry Wollman, on June 18, 1902, to secure three principal notes payable — years from date, two of said notes being for \$1,000 each, and the remaining one for \$2,000, together with twelve interest notes for \$30 each and six for \$60 each.

“It is hereby further agreed that the said Lilly Maud Evans was killed by the said George Evans without lawful provocation or excuse; that the said Lilly Maud Evans left surviving her, as her only next of kin, two sisters, Mrs. P. W. Strawbridge and Mrs. J. ⁶²⁸ A. Thompson, and her mother, Caroline Perry, who are the only legal heirs except as to such rights of inheritance, if any, as might under the circumstances aforesaid, or as may be shown on the trial in addition thereto, have accrued to her husband, the said George Evans; that the said George Evans left surviving him, as his sole heirs at law, two children by a former wife, Callie Evans and Zora Lee Evans; that Edie Evans is the legal guardian of the person and estate of the said Zora Lee Evans, a minor.”

The court ascertained and decreed title and ascertained the rights and interests of the mortgagee. This decree vested an undivided one-sixth interest in the plaintiff and an undivided one-sixth interest in each of the defendants, Mrs. Strawbridge and Mrs. Thompson. It also vested an undivided one-fourth interest in each of the defendants, Callie and Zora Evans.

After unsuccessful motions for new trial and in arrest of judgment, the defendants, Mrs. Strawbridge and Mrs. Thompson, and the plaintiff appealed.

The only question is as to what construction shall be placed upon section 2938 of the Revised Statutes of 1899, in a case involving the admitted facts herein disclosed.

This is an exceedingly interesting case. The question for determination, bluntly stated, is, Can a husband who murders his wife inherit the one-half part of her estate under section 2938 of the Revised Statutes of 1899? To this state it is a new question, and, with a few exceptions, a new one in all the states. But few courts of last resort have been called upon to pass upon the question as to what effect the criminal act of a prospective legal heir will have upon his or her rights, under positive statutes governing descents and distributions. Of those which have passed upon it, we frankly confess that the holdings of a majority thereof are against the views which we entertain and will hereafter express. We are not satisfied with the reasoning ⁶²⁹ of those cases, and have been unable to reach the conclusion that a mere prospective legal heir, or devisee in a will, can make certain that which was uncertain, by his own felonious act, in the cold-blooded murder of the party from whom he or she expects to inherit. We do not believe that these courts have fully applied and used the canons of statutory construction which we have the right to use, and ought to use, to avoid a result so repugnant to common right and common decency. The construction as has been given such statutes bruises and wounds the finer sensibilities of every man. In the case at bar, the murdered woman, younger in years, might have outlived the prospective heir. The property involved in this very suit might have been used by her for her own comforts even though she had died first. Being hers, it might have been sold and the proceeds disposed of by gift or otherwise. Can it be said that one, by high-handed murder, can not only make himself an

heir in fact, when he had but a mere expectancy before, but further shall enjoy the fruits of his own crime? To us this seems abhorrent to all reason, and reason is the better element of the law. With these preliminary remarks, we will now dispose of the several contentions involved here, as well as assign our reasons for the views we entertain upon the main proposition.

1. It is suggested in one of the briefs for respondents that the appellants have failed to file a sufficient abstract of the record, and we take it for that reason they would have us affirm the judgment. We have examined the record carefully and conclude that it is sufficient to meet the requirements of the law and the rules of the court. It is also urged that there is no separate assignment of errors in the brief as required by rule 15 of this court, and for that reason there is a failure to comply with the rules. The same question was before us and fully discussed in *Collier v. Catherine Lead Co.*, 208 Mo. 246, 106 S. W. 971, where we held contrary to the contention of respondents here. This leaves for our consideration only the merits of the case.

2. It is earnestly pressed by counsel that under section 2938 of the Revised Statutes of 1889, the husband cannot take unless he would have been entitled to curtesy. They contend that sections 2938 and 2939 are companion sections, and inasmuch as we have held under the latter that the wife cannot take unless she was entitled to dower, we should hold that the husband cannot take unless he was entitled to curtesy. We have no doubt said that these are companion sections, and in a way they are, and we have also said that the purpose of the act of 1895, now section 2938, was to equalize the rights of husband and wife in their respective estates, but it does not follow from this that the husband must have a curtesy estate before he can take under section 2938, *supra*. Prior to the act of 1895, if a childless wife died leaving an estate, however large, the husband not being entitled to curtesy, got nothing. But if a childless husband died prior to this time, the wife got one-half absolutely, subject only to the debts. It is true that by section 2938 she was given a dower interest, but by section 2941 she is given the right to elect as to how she will take. To our mind the act of 1895 was for the very purpose of making provision for a husband in the event he was not entitled to curtesy: *Ferguson Estate*

v. Gentry, 206 Mo. 203, 104 S. W. 108; Ferguson v. Gentry, 206 Mo. 189, 104 S. W. 104, and cases therein cited.

This contention of appellants is not sustained.

3. Of our present statute of descents and distributions, the first five sections, 2908 to 2913 inclusive, had their origin in the territorial laws of 1807. Sections 2913, 2915, 2916, 2917 and 2918 had their origin in the act of 1822. Section 2914 had its origin in 1855, ⁶³¹ and the remaining two sections, 2919 and 2920, had their origin in acts of 1864-65. Our dower section 2933 originated with the act of 1807, *supra*, and section 2941, giving the widow of a childless husband one-half of the property, first came to light in 1835.

The section of our statute, Revised Statutes of 1899, section 4151, which adopted the common law in Missouri, was first enacted January 18, 1816. Of the act of 1807, adopted prior to the adoption of the common law, Leonard, J., in the case of Cutter v. Waddingham, 22 Mo. 206, said: "The act of 1807 was the first American law of descents introduced here; it superseded the Spanish law of succession, and was a complete scheme, which provided for the whole subject and left nothing to be supplied by any other code. It was the work of men familiar with the common law and strangers to the Roman law, and was no doubt adopted by our territorial lawgivers from the written laws of the older states of the Union, and not constructed here with any special reference to the existing law of this country."

These original laws of descents and even our present statutes were borrowed largely from the common law. They are with some modifications expressive of the common law. In other words, the general scope of our laws of descent and distribution is along the line of the common law, and this is true in most of the American states.

Bingham, in the preface to his work, "The Laws of Descent," says: "The laws of descent were an organic part of the feudal system; and, so far as the general principle of succession is involved, have come down to us unchanged. Important alterations have been made in the order and lines of succession. The course of descent has also been subjected to be entirely defeated by the alienation of the ancestor while alive, and by his testamentary alienation to take effect at and ⁶³² after his death. His estate has also been made liable to the payment of his debts, and the fulfillment of his personal obligations, after the succession of the heir. Otherwise,

the heir succeeds the ancestor in the ownership of the estate, precisely as he did under the feudal law, in all the states of this country; that is, his right of succession is based upon the same principle, which regulated succession under purely feudal organizations": See, also, 14 Cyc. 24.

In Missouri we began to modify in favor of the wife by the act of 1835, when we gave her half when the husband died childless. Later we have the several married woman's acts, giving to her peculiar rights in both personal and real property. The husband up to 1895 had been holding his common-law rights, shorn down, by the acts aforesaid, when for the first time, by the act of 1895 aforesaid, the wife dying childless, he was made an heir to one-half of her estate absolutely. We have in ways changed the lines of descent, both as to the husband and other heirs at law, and have changed the quantum of the estate which descends to each, but with it all, our laws are yet expressive of the common law in the matter of descent and distribution in a large degree.

When we took unto ourselves the common law, as we did in 1816, and in later reiterations of that statute, we took the body of all the common law, which could be made applicable under our constitutions, state and federal, and such is the law of the state except where repealed, changed or modified by statute.

In the case of *Box v. Lanier*, 112 Tenn. 393, 79 S. W. 1042; 64 L. R. A. 458, the supreme court of Tennessee said: "It has been well said that there are certain general and fundamental maxims of the common law which control laws as well as contracts. Among these are: 'No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his ⁶³³ own iniquity, or to acquire property by his own crime. These maxims are adopted by public policy, and have their foundation in universal law administered in all civilized countries.' These maxims embodied in the common law, and constituting an essential part of its warp and woof, are found announced both in text-books and in reported cases. Without their recognition and enforcement by the courts, their judgments would excite the indignation of all right-thinking people. The first of these maxims is applied in order to prevent one from taking the benefit of his own fraud. Why should not the last be enforced so as to forbid a party receiving the fruits of his own crime?"

And Earl, J., for the New York court of last resort, in *Riggs v. Palmer*, 115 N. Y. 506, 12 Am. St. Rep. 819, 22 N. E. 188, 5 L. R. A. 340 said: "Besides, all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes." Further on in the same opinion he says: "These maxims, without any statute giving them force or operation, frequently control the effect and nullify the language of wills. A will procured by fraud and deception, like any other instrument, may be decreed void and set aside, and so a particular portion of a will may be excluded from probate or held inoperative if induced by the fraud or undue influence of the person in whose favor it is: *Allen v. McPherson*, 1 H. L. Cas. 181; *Harrison's Appeal*, 48 Conn. 202. So a will may contain provisions which are immoral, irreligious or against public policy, and they will be held void.

"Here there was no certainty that this murderer ⁶³⁴ would survive the testator, or that the testator would not change his will, and there was no certainty that he would get this property if nature was allowed to take its course. He, therefore, murdered the testator expressly to vest himself with an estate. Under such circumstances, what law, human or divine, will allow him to take the estate and enjoy the fruits of his crime? The will spoke and became operative at the death of the testator. He caused that death and thus by his crime made it speak and have operation. Shall it speak and operate in his favor? If he had met the testator and taken his property by force, he would have had no title to it. Shall he acquire title by murdering him? If he had gone to the testator's house and by force compelled him, or by fraud or undue influence had induced him to will him his property, the law would not allow him to hold it. But can he give effect and operation to a will by murder, and yet take the property? To answer these questions in the affirmative, it seems to me, would be a reproach to the jurisprudence of our state, and an offense against public policy.

“Under the civil law evolved from the general principles of natural law and justice by many generations of jurists, philosophers and statesmen, one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered: Domat, pt. 2, b. 1, tit. 1, par. 3; Code Napoleon, par. 727; Mackeldey's Roman Law, 530, 550. In the Civil Code of Lower Canada the provisions on the subject in the Code Napoleon have been substantially copied. But so far as I can find, in no country where the common law prevails had it been deemed important to enact a law to provide for such a case. Our revisers and lawmakers were familiar with the civil law, and they did not deem it important to incorporate into our statutes its provisions upon this subject. This is not a casus ⁶³⁵ omissus. It was evidently supposed that the maxims of the common law were sufficient to regulate such a case, and that a specific enactment for that purpose was not needed.”

These maxims of the common law are expressly made a part of our laws by the statute of this state, first adopted in 1816, as we have hereinabove indicated. They are a part of the law of the state by force of section 4151 of the Revised Statutes of 1899, unless they have been repealed, changed, modified or wiped out by statute law. Have we by statute either expressly or impliedly changed or modified the maxims discussed in the Tennessee and New York cases, *supra*? Has the common law in this respect been repealed, changed or modified? We think not. If not, they are a part of our law. If not, then this statute must be read in connection therewith, and when so read the father of appellees acquired no interest in the estate in controversy and appellees have none. “Statutes in derogation of the common law are to be strictly construed, unless, as in some states, there is a statutory provision to the contrary”: 8 Cyc. 376, and cases cited.

The common-law rule is tersely stated in section 665 of Wharton on Homicide, third edition, thus: “To permit a person who commits a murder, or any person claiming under him, to benefit by his criminal act would be contrary to public policy. And no devisee can take under the will of a testator whose death has been caused by the criminal and felonious act of the devisee himself. And in applying this rule, no distinction can be made between a death caused by murder and one caused by manslaughter. Nor does the common-law right of succession by descent operate in favor of one who willfully

takes the life of his ancestor for the purpose of succeeding to his property rights. And the common-law right of a man to succeed to the ⁶³⁶ property of his wife upon her death does not operate in favor of one who murders his wife. And the rule that the common-law doctrine of succession to property does not operate in favor of one who willfully takes the life of his ancestor should apply against any person claiming through or under the slayer. Nor does a rule of law that a common-law right of succession to property does not operate in favor of one who willfully takes the life of his ancestor contravene a constitutional provision that a conviction of crime shall not work a forfeiture of the estate."

To our mind our statute of descents and distributions is so largely expressive of the common law that we must consider these maxims and the whole body of the applicable common-law doctrines; that we must read them together as parts and parcels of the same system, and when so read there can be but one answer to the query suggested by the facts of this case.

For these considerations alone we think this case should be reversed, but we take up next a discussion of this statute.

4. But leaving out of consideration the conclusions above reached, i. e., that our statutes of descents and distributions, and the live parts of the common law, constitute one system of laws in this state upon that subject, and that the statutory law must be construed with reference to that live portion of the common law, and going to this statute itself, how shall we construe it? Must we give a construction abhorrent to reason, or should we give it a construction in harmony with the reason and spirit of the law? Shall we stick in the bark and adhere to the strict letter of the law, or shall we say that whilst the case may fall within the letter of the law, yet it does not fall within the spirit or reason, or within the reasonable legislative intent? The courts in this state and elsewhere have not been remiss in finding rules of construction for statutes in ⁶³⁷ character such as the one before us. The statute we are called upon to construe reads: "When a wife shall die without any child or other descendants in being capable of inheriting, her widower shall be entitled to one-half of the real and personal estate belonging to the wife at the time of her death, absolutely, subject to the payment of the wife's debts."

Statutes should be read in the light of the common law, and this statute should be read in that light. Chancellor Kent

(1 Kent's Commentaries, 14th ed., p. 464), says: "Statutes are likewise to be construed in reference to the principles of the common law; for it must not be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. This has been the language of the courts in every age; and when we consider the constant, vehement and exalted eulogy which the ancient sages bestowed upon the common law as the perfection of reason, and the best birthright and noblest inheritance of the subject, we cannot be surprised at the great sanction given to this rule of construction."

In Black on Interpretation of Laws, page 233, it is said: "No statute enters a field which was before entirely unoccupied. It either affirms, modifies or repeals some portion of the previously existing law. In order, therefore, to form a correct estimate of its scope and effect, it is necessary to have a thorough understanding of the laws, both common and statutory, which heretofore were applicable to the same subject. Whether the statute affirms the rule of the common law upon the same subject, or whether it supplements it, supersedes it, or displaces it, the legislative enactment must be construed with reference to the common law; for in this way alone is it possible to reach a just appreciation of its purpose and effect. Again, the common law must be allowed to stand unaltered as far as ⁶³⁸ is consistent with a reasonable interpretation of the new law."

Our statutes of descents and distributions, as we have seen, both affirm and modify the common law, but nowhere specifically mention that rule or doctrine of the common law which precluded the murderer from inheriting from his victim. This latter is not so inconsistent with the statute as to call upon us to say that such portion of the common law, previously existing, was repealed or changed by the act of 1895.

Our own court adheres to the same rule in *Johnson v. Fluetsch*, 176 Mo. 452, 72 S. W. 1005, where we said: "Statutes are read and construed in the light of the common law. Rules of interpretation and construction are derived from the common law, and since that law constitutes the foundation and primarily the body and soul of our jurisprudence, every statutory enactment is construed by its light and with reference to its cognate principles: *Sutherland on Statutory Construction*, sec. 289."

And statutes in derogation of the common law are to be strictly construed: See *Brown v. Dressler*, 125 Mo. 589, 29 S. W. 13; *State v. Clinton*, 67 Mo. 380, 29 Am. Rep. 506; *Judson v. Smith*, 104 Mo. 67, 15 S. W. 956; *Rozelle v. Harmon*, 103 Mo. 339, 15 S. W. 432, 12 L. R. A. 187. And this is especially true where the statute is in derogation of common right and common decency, as well as the common law. The construction contended for by the appellees is one which shocks both common right and common decency, and no court should be inclined to other than a construction which would make the statute comport with reason and the fundamental maxims of the law.

It is true, strictly speaking, that the old idea of equitable construction of statutes is no longer recognized by the courts, but in speaking upon this point Mr. Black, in his most excellent treatise entitled *Interpretation of Laws*, truthfully says: "But nevertheless many ⁶³⁹ of the cases which were decided on what was called the 'equity of the statute' would now be decided in precisely the same way, though not avowedly on that principle. This is because there was a just and reasonable idea at the base of the principle in question, and this, so far as it is applicable to modern conditions, has survived. This idea was that a given case should not be taken to be within a statute, though apparently covered by its comprehensive terms, unless it is within the spirit and reason of the law." The same learned author at page 48 lays down this rule: "A statute should be considered with reference to its spirit and reason; and the courts have power to declare that a case which falls within the letter of a statute is not governed by the statute, because it is not within the spirit and reason of the law and the plain intention of the legislature." This rule finds support in case after case as we read them in the books.

The case of *Sams v. Sams' Admr.*, 85 Ky. 396, 3 S. W. 593, is one of such cases. The facts were that Leroy Sams was lawfully married to a woman by whom he had four children. During the life of the first wife he was having illicit relations with another woman by whom he had two children. These were born one eight and the other ten years prior to the death of his wife. Upon the death of his wife he married the mother of these two children, who also had five others which had been born out of wedlock. Sams recognized these two as his children. In that state the statute provided: "If

a man having had a child by a woman shall afterward marry her, such child, or its descendants, if recognized by him before or after marriage, shall be deemed legitimate." Counsel in that case contended as do able counsel in this case. They said the statute makes no exception and the courts are powerless to make it, but Pryor, C. J., followed that rule of statutory construction ⁶⁴⁰ which should be followed in all such cases. In an able opinion he says:

"It is insisted by counsel for the appellants that the meaning and intention of the statute is so plain that but one interpretation can be given it; and although the children were begotten by the intestate when he was the lawful husband of another, his adulterous practices with an unchaste woman, and unfaithfulness to his own wife and children, cannot be considered in determining the rights of those who were not participants in the wrong, and whose rights the statute was enacted to protect.

"If the case before us, or that class of cases where the husband has violated his marriage vows and become the father of children by an adulterous sexual connection with another woman during the marital relation, had been the subject of legislative thought, it can scarcely be supposed that any law would have been enacted by which the children of the adulterous intercourse would be made legitimate, that they might inherit with the children of the lawful wife equal parts of his estate. Such a statute, if so construed, would only invite the husband to desert his wife, and the woman of easy virtue to encourage the violation of his marriage vows, that she might some day become his lawful wife and her children the rightful heirs of his estate. The motive to supplant the love of a true woman by the lewd practices of degraded women would be found in such a statute, and the law, instead of securing to the innocent offspring an interest in the estate of the father, and encouraging the latter to make reparation for the wrong committed by marrying the mother, would invite the commission of great moral wrong, and hold out an inducement to the guilty parties to remove those who stood in the way of legitimizing their children by the consummation of the contract of marriage. . . . It is a well-settled rule of construction, ⁶⁴¹ that the letter of a statute will not be followed when it leads to an absurd conclusion; but, on the contrary, the reason for the enactment must enter into its interpretation, so as to determine what was intended to be accomplished by it."

If the courts can invoke this rule of construction to disparage and condemn adultery and its attendant evils, can't we invoke it to prevent the legal creation of an heir, and an estate for such heir, by murderous hands? Our statute is no more explicit in terms than the Kentucky statute. The language of the one is as broad as the other.

The supreme court of the United States has likewise dealt with the same rule of statutory construction in the case of *Church of the Holy Trinity v. United States*, 143 U. S. 457, 12 Sup. Ct. Rep. 511, 36 L. ed. 226. This case construes the federal act of February 26, 1885, which was, "To prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States," etc. The first section reads:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia."

Plaintiff in error was a corporation and had made ⁶⁴² a contract with an alien residing in England, one E. Walpole Warren, to come to New York and serve it in the capacity of a minister of the Gospel. There were exceptions in other portions of the act, but ministers were not excluded in these exceptions, so that the statute is, if anything, more absolute than is the statute under review here. It shows that the legislative mind in fact considered exceptions, whilst our statute does not so show. Mr. Justice Brewer, who wrote the opinion says:

"It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on one side with compensation on the other. Not only are the general words 'labor' and 'service' both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind'; and,

further, as noticed by the circuit judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or the absurd results which follow from giving such broad meaning to the words, ⁶⁴³ makes it unreasonable to believe that the legislator intended to include the particular act."

To like effect are *Lau Ow Bew v. United States*, 144 U. S. 47, 12 Sup. Ct. Rep. 517, 36 L. ed. 340; *Rodgers v. United States*, 152 Fed. 346; *Henry v. Tilson*, 17 Vt. 479; *Ryegate v. Wardsboro*, 30 Vt. 746; *Ingraham v. Speed*, 30 Miss. 410; *Jackson v. Collins*, 3 Cow. 89; *People v. Utica Ins. Co.*, 15 Johns. 358, 8 Am. Dec. 243; *Ex parte Ellis*, 11 Cal. 222; *Osgood v. Breed*, 12 Mass. 525; *United States v. Kirby*, 74 U. S. 482, 19 L. ed. 278; *Hanger v. Abbott*, 73 U. S. 532, 18 L. ed. 939; *Braun v. Sauerwein*, 77 U. S. 218, 19 L. ed. 895. See, also, the numerous cases, both ancient and recent, discussed in *Black on Interpretation of Laws*, under his rule No. 29, pages 48 to 55, inclusive.

Nor has this rule of statutory construction failed of ample recognition by the courts of this state. Our dower statute, section 2933 of the Revised Statutes of 1889, provides that the widow has her dower in all lands of which her husband was seised during the marriage unless she has relinquished such dower "in the manner prescribed by law." This manner was by deed. Yet we have held under this statute that a deed to a railroad right of way signed by the husband alone, or condemnation proceedings against the husband alone, would prevent an action for dower by the widow: *Venable v. Wabash W. R. R. Co.*, 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68; *Chouteau v. Missouri Pac. R. R. Co.*, 122 Mo. 375, 22 S. W.

458, 30 S. W. 299. This statute does not say, "endowed in all lands except such as has been conveyed or condemned for public purposes." Yet we have so construed the statute.

Our statute of frauds, section 3418 of the Revised Statutes of 1899, reads: "No action shall be brought . . . upon any contract made for the sale of lands . . . or any lease thereof . . . unless the agreement upon which the action shall be brought . . . shall be in writing and signed by the party to be charged therewith." Yet, under the maxims of the common law, how many cases have we exempted from the strict ~~644~~ letter of the law. Both bench and bar are so familiar with the case law under this section that citation thereof would be superfluous.

Again, in the very recent case of *Keeney v. McVoy*, 206 Mo. 42, 103 S. W. 946, a case with many more obstacles and difficulties, the identical rule of construction which we have announced by this court in bank which decision puts the present case at rest—peacefully, justly and righteously. The question there was the right of the widow to elect to take a child's part. Mrs. McVoy was the widow of Brice McVoy. At the death of Brice McVoy he had no child living, and of course his widow had no "child or children by such husband living." They did have a grandchild, the child of a deceased daughter, which daughter had departed life prior to the death of Brice McVoy. The statute we were then called upon to construe reads: "When the husband shall die, leaving a child or children or other descendants, the widow, if she has a child or children by such husband living, may, in lieu of dower of the one-third part of all lands whereof her husband died or shall die seised of an estate of inheritance, to hold and enjoy during her natural life, elect to be endowed absolutely in a share of such lands equal to the share of a child of such deceased husband. The provisions of this section shall be subject to the payment of her husband's debts": Rev. St. 1899, sec. 2944.

Lamm, J., after reviewing all the Missouri cases involving constructions of the character we have before us now, as well as many outside cases, concludes an exhaustive and elegant opinion in this language: "Other cases to like effect might be cited. The dower act but supplements the descents and distributions act. They must be taken and construed together. Cases illuminating the one throw light on the other, and based on the reasoning aforesaid, and in the light of the foregoing

authorities, we have no difficulty or ⁶⁴⁵ hesitation in construing the word 'children' in section 2944, supra, to include grandchildren. Any other construction would lead to absurd and unjust results and be obviously without the legislative intent."

In *Verdin v. St. Louis*, 131 Mo. 26, 33 S. W. 480; 36 S. W. 52, this court in bank announced in explicit terms its approval of the rule of construction we have adopted in the case at bar. The language of that case is: "This view is sanctioned by abundant authorities which hold that the letter of a statute may be enlarged or restrained, according to the true intent of the framers of the law: *Whitney v. Whitney*, 14 Mass. 88; *State v. Emerson*, 39 Mo. 80; *State v. King*, 44 Mo. 283; *Riddick v. Walsh*, 15 Mo. 519. In such cases, the reason of the law prevails over its letter, and general terms are so limited in their application as not to lead to injustice, oppression, or an absurd consequence, the presumption being indulged that the legislature intended no such anomalous results: *United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278; *People v. McRoberts*, 62 Ill. 38; *Fusz v. Spaunhorst*, 67 Mo. 256; *Sutherland on Statutory Construction*, p. 288.

In fact, the pathway of judicial literature from the earliest period down to the present is literally strewn with cases, which like beacon lights have guided the hand of justice in preventing unjust, unrighteous, absurd, unreasonable and abhorrent results from the use of general words and expressions in statutes. To cite and quote more would be but to become tedious. We have gone thus far on account of the newness of the particular question of this case. Under these authorities we should not and will not hold that "widower," as used in section 2938, supra, means one who has created a condition by murderous hands and heart. This case is without the statute. "Widower" as there used means one who has been reduced to that condition by the ordinary and usual vicissitudes of life, and not ⁶⁴⁶ one who, by felonious act, has himself created that condition.

5. Nor do we think that this construction violates section 13, article 2 of our Bill of Rights. That section says: "That no person can be attainted of treason or felony by the General Assembly; that no conviction can work corruption of blood or forfeiture of estate."

Suppose the legislature had put in section 2938 the exception which appellees say the court cannot read into the sec-

tion, i. e., "her widower, except he be such by his own felonious act, shall be entitled," etc., then according to counsel's present contention the statute would be violative of the Bill of Rights. In other words, we are damned if we do and likewise damned if we don't.

In the case of *Box v. Lanier*, 112 Tenn. 393, 78 S. W. 1042, 64 L. R. A. 458 the court said: "The provision in question is that 'no conviction shall work corruption of blood or forfeiture of estate.' This provision has no connection whatever with the devolution of property, but it is intended in its last clause to prevent a forfeiture of an estate of a criminal on account of his offense; but we hold that, under the facts found in this record, the surviving husband never acquired an estate in this property, and therefore there was nothing upon which this constitutional provision could operate."

We concur in these tersely expressed views. This construction of the existing statute, or even an express statute, as they have in Iowa, prohibiting a murderer from inheriting from his victim does not violate our constitutional provision. There is no forfeiture of an estate which he has, but it is simply preventing him from acquiring property in an unauthorized and unlawful way, i. e., by murder. It takes nothing from him, but simply says you cannot acquire property in this way. Nor does such a statute prevent his heirs ⁶⁴⁷ from inheriting through him property rightfully his at the time of his demise. The state cannot by law take a criminal's property, but it can say to every individual citizen, "You cannot acquire property by designated unlawful means." Such statutes violate no constitutional provisions, either state or federal.

As we stated in the outset, our views are not in harmony with a majority of the adjudicated cases. We were convinced of the righteousness of the views expressed by the courts of New York and Tennessee, and the first opinion by Cobb, C. J., in a Nebraska case, which was later decided to the contrary by Ryan, commissioner. In opposition to these cases are cases from Pennsylvania, Ohio, North Carolina, Iowa and Kansas.

A discussion of the opinions in these cases would serve no good purpose. To our mind the reason is against them, and they have not given full weight to the rule of statutory construction so often and so recently recognized and enforced by this court. Nor do they give that weight to the maxims of the common law which in our humble judgment should be

given in determining a case involving this particular question.

From these views it follows that the judgment herein should be reversed and this cause remanded to the circuit court with directions to enter a judgment and decree vesting the property in dispute in the plaintiff, and the defendants Mrs. P. W. Strawbridge and Mrs. J. A. Thompson, subject to the mortgage rights of the defendant Wollman, and which said judgment and decree should further adjudge and decree that defendants Callie Evans and Zora Evans have no title or interest in said property. Cause reversed and remanded with the directions aforesaid.

All concur.

The Right of Inheritance is a civil right, and the legislature may make the deprivation thereof a part of the penalty to be imposed for the commission of a crime: *Estate of Donnelly*, 125 Cal. 417, 73 Am. St. Rep. 62. But it is doubtful whether courts have authority, in the absence of a statute, to exclude an heir from his inheritance, on the ground that he feloniously caused the death of the person from whom he claims succession: *McAllister v. Fair*, 72 Kan. 533, 115 Am. St. Rep. 233; *Estate of Carpenter*, 170 Pa. 203, 50 Am. St. Rep. 765. Yet in New York it has been decided, in the absence of express statutory authority, that one who murders the testator in order to make a will operative cannot take thereunder: *Riggs v. Palmer*, 115 N. Y. 506, 12 Am. St. Rep. 819. It has recently been held that the property of one who has been executed for crime is subject to the same law of descent and devise as property generally: *Collins v. Metropolitan Life Ins. Co.*, 232 Ill. 37, 122 Am. St. Rep. 54.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

**COMMERCIAL WOOD AND CEMENT COMPANY v.
NORTHAMPTON CEMENT COMPANY.**

[190 N. Y. 1, 82 N. E. 730.]

CORPORATIONS—Authority of Executive Committee.—The executive committee of the board of directors of a manufacturing corporation, authorized by the by-laws to exercise the powers of the board when it is not in session, has no authority, a few hours before a meeting of the board, which has been called for that day, to execute a contract appointing a sole selling agent of the output of the corporation for a term of years. The calling of the meeting suspended the power of the committee to act in governmental matters; and the directors at such meeting having repudiated the contract, and the persons entering into it being chargeable with notice of the want of authority in the committee, no action for a breach of the contract can be maintained. (p. 532.)

A. L. Kellogg and A. C. Pette, for the appellant.

H. S. Graves and C. S. Yawger, for the respondent.

³ GRAY, J. The plaintiff and the defendant are corporations, organized under the laws of the state of Delaware, and having offices for the conduct of their business in the city of New York. The business of the defendant is the manufacture and sale of cement and that of the plaintiff the marketing and selling of that material. A contract was executed by their presidents, whereby the agreement of the defendant was that the plaintiff should be its sole selling agent for the entire output of its cement for a term of years, and this action was brought by the plaintiff to recover damages for the breach of the contract. The defense interposed to the action was, in brief and so far as material to be

stated, that the contract was executed by the direction of the defendant's executive committee and that that committee was without power to make it. Upon the trial of the action, the court dismissed the complaint upon the ground that the contract was an unusual and extraordinary one, which the executive committee was not authorized to make. The appellate division affirmed the judgment in favor of the defendant, with some difference of opinion as to the grounds. One of the grounds assigned was the same, substantially, as that taken by the trial court, and another ground was that the contract was invalid, for the lack of any consideration in the existence of mutual obligations of the contracting parties.

I think that the executive committee of the defendant's board of directors was without authority, under the circumstances, to obligate the defendant by this contract. By section 9 of the general corporation law of the state of Delaware it is provided that "the business of every corporation . . . shall be managed by a board of not less than three directors. . . . The board of directors may, by resolution, * . . . designate two or more of their number to constitute an executive committee, who, to the extent provided in said resolution, or in the by-laws of said company, shall have and exercise the powers of the board of directors in the management of the business and affairs of the company," etc. A by-law of the defendant provided that the directors "shall have the general charge of the management of the company's property, and the regulation and government of its affairs" and, further, provided for the selection by them of an executive committee of five members, who should "have authority to exercise any powers of the board when the board is not in session, . . . subject at all times to the orders of the directors." The term of office of the directors was one year. At the time when the meeting of the executive committee was held, at which this contract was entered into on behalf of the defendant, a meeting of the board of directors had already been called by the secretary for the afternoon of the same day. The session of the board was held within two hours after this contract had been executed by the direction of the executive committee, and, a copy of the contract having been transmitted to them, the directors passed a resolution notifying the plaintiff that the "proposed contract" was under consideration, and that it was to take

no action under it until the board of directors had acted thereon. A copy of the resolution was sent the same day to the plaintiff. At a subsequent date the board of directors, by formal resolution, disapproved of, and rejected, the contract, of which action the plaintiff was notified.

Under the circumstances, it is very clear that the executive committee acted not only improperly, but unauthorizedly. For corporate purposes, the calling of a meeting of the board of directors suspended the power of the executive committee meanwhile to act in governmental matters. The authority conferred by the by-laws upon the executive committee was to exercise the powers of the board when it was not in session; but, within the spirit and intendment of the by-laws, a session of the board had been so far moved, if not initiated, by the ⁵ previous calling of a meeting, as to preclude such exercise by the committee meanwhile in the administration of the company's affairs. By the law of its organization, as well as by the by-laws adopted for the management of its business, the directors were given the general and responsible charge of the management of the company's property and business. In delegating authority to those of their number who had been selected to form an executive committee, it was intended, and plainly implied, that such subordinate agency of the board of directors should not exercise any powers of government when the board itself was about to sit for that purpose. The committee was made by the by-law "at all times subject to the orders of the directors," and to undertake the execution of a contract, involving the conduct of the corporate business and affecting its property, after the session of the directors had been called, was in violation of the by-law. The plaintiff, in dealing with the executive committee of the defendant, was chargeable with a knowledge of the law and of the extent of the authority conferred upon that agency of the board. In thus entering into a contract with the defendant, the plaintiff was put upon its inquiry as to the scope of the powers of the executive committee to bind the corporation thereby. It was bound to know that the committee was always subject to the orders of the board and that the field for executive action was only free to it when the directors had not themselves appropriated it. It would be an extraordinary proposition to maintain, as it seems to me, that a committee, appointed to exercise the powers of the board, when it was not in ses-

sion, could conclude the corporation by action taken in anticipation of the actual convening of the directors under the notice of the secretary. That would be a vicious assumption, or usurpation, of power. The officers of the plaintiff took the chance, if failing to inform themselves of the right of the executive committee to act, of the validity of such a contract, or of its being adopted by the board, and being notified the same day that the board would pass upon the proposed contract, it is difficult to perceive a plausible basis for plaintiff's cause of action.

• I think that the executive committee of the defendant had no power to execute any such contract, and that the plaintiff was chargeable with knowledge of its lack of authority. I think that it could be shown that the contract itself was of that unusual nature, in the obligations sought to be imposed upon the defendant and in the provision for its continuance over a period of five years, without the possibility of terminating it within that time, as to render its execution something in excess of the implied power of the committee. But, if I am right in the views which I have already expressed, it is not necessary to consider that feature of the case.

For the reasons which I have given, I think that the judgment appealed from should be affirmed, with costs.

Cullen, C. J., O'Brien, Vann, Werner, Willard, Bartlett and Chase, JJ., concur.

Judgment affirmed.

The Officers of a Corporation, from the highest to the lowest, are only its agents; and their acts and contracts are binding upon it only when made within the scope of their authority, express or implied: *Rumbough v. Southern Imp. Co.*, 112 N. C. 751, 34 Am. St. Rep. 528; *Cobb v. Glenn Boom etc. Co.*, 57 W. Va. 49, 110 Am. St. Rep. 734; *Trephagen v. South Omaha*, 69 Neb. 577, 111 Am. St. Rep. 570.

MATTER OF SNYDER.

[190 N. Y. 66, 82 N. E. 742.]

ATTORNEYS—Right of Client to Settle Litigation.—A clause in a contract of retainer between an attorney and client prohibiting the latter from making a settlement of the litigation without the consent of the former is void as against public policy. (p. 538.)

ATTORNEYS—Compensation upon Settlement of Litigation.—A clause in a contract of retainer fixing the attorney's fee at a percentage of the money recovered, so closely connected with another clause void because forbidding the client to settle the litigation as to be part of a single plan, falls when the client repudiates the latter clause, and the attorney may then recover for his services according to the real value, independently of the original provision for compensation. (p. 539.)

Roger Foster, for the appellants.

George P. Breckenridge, for the respondent.

68 HISCOCK, J. The appellants, who are practicing attorneys, made a written agreement with the respondent for the prosecution by them in his behalf of litigation against various parties under a plan of contingent compensation. Said agreement, amongst other things, originally provided that the attorneys should receive for their services one-third of the proceeds of said litigation or the proceeds of the sale of certain stock, and nothing else; also that neither party to the agreement should "settle any of said litigations without the consent of each of the other parties." Subsequently this agreement was modified so as to provide that the compensation should be one-half instead of one-third.

Various actions and proceedings were instituted under this retainer, and, as claimed by the appellants, services of much value were rendered to the client.

After a time Snyder entered into negotiations with the parties whom he was prosecuting for a settlement of the litigation, and not only without the consent of his attorneys, 69 but in spite of their protest, made an agreement for such settlement for the sum of seven thousand five hundred dollars. Still later a motion was made by the party with whom Snyder had made his agreement for an order settling and discontinuing the litigation for the sum agreed upon and to which motion both Snyder and the appellants were made parties. Notwithstanding the opposition of the latter and

after the consideration of quite voluminous affidavits presented by the attorneys and the client respectively in opposition to and in support of the settlement, an order was made granting the motion upon payment into court of the sum of seven thousand five hundred dollars "to respond to the lien of the plaintiff's attorneys."

Some time later a motion having been made by the client to withdraw one-half of this sum in accordance with the terms of the agreement between him and his attorneys, the court directed a reference to ascertain the value of the services which the attorneys had rendered in order that the amount of their claims and lien upon the fund might be determined before Snyder withdrew any money. This was done on the theory that Snyder, by making a settlement in violation of the wishes of his attorneys, had so broken his contract that the latter were no longer limited to the terms of their agreement for their compensation, but were entitled to recover from the fund for the value of their services on the basis of quantum meruit. As already indicated, the appellate division took the view that this order was improper, holding that the attorneys were limited, so far as their lien upon the fund in court was concerned, to the compensation fixed by the original agreement, and relegated for any further relief to an action against their client for breach of contract.

We think that the disposition made by the learned justice at special term was correct, and that it was error to reverse the order then made and substitute the one from which this appeal is now taken.

Some propositions involved in the appeal seem quite clear. The attorneys had a lien upon the moneys paid into court for ⁷⁰ the amount or value of their services, whatever it might be. This was secured to them by section 66 of the code, and in addition the order allowing the settlement of the litigation and directing the payment of the proceeds into court expressly provided that the latter should "respond to the lien of the plaintiff's attorneys" without any limitation upon the amount for which the said lien should be allowed.

If the clause prohibiting a settlement without the consent of the attorneys is valid, the client has prevented them from carrying out their contract, and they are entitled to treat it as terminated, and recover the actual value of services

rendered before the breach without reference to the terms of the original contract.

If the clause prohibiting the settlement without the consent of the attorneys is void as against public policy, so that it may be repudiated by the client, but yet is so connected with the clause prescribing the percentage of recovery which the attorneys were to receive as compensation that the latter clause falls with it, then again the attorneys must be entitled to recover the value of the services rendered by them upon the basis of actual worth.

While the adoption of either view, therefore, would render necessary an appraisal of the value of appellants' services it is proper to determine which one shall prevail, assuming that the latter one is permissible, and in this determination the first fundamental question will be as to the validity of the clause prohibiting a settlement.

It has been decided so often and so fully that attorneys may undertake litigation for a compensation contingent upon their successful efforts that it is unnecessary to refer to the decisions upon that point. But this court, so far as I am aware, has never yet decided the naked proposition now urged upon us, that an attorney, in furtherance of his contract for a contingent compensation, may reserve a veto power upon the right of his client to make in good faith an honest settlement of his claim, and I think it would be unwise and opposed to sound public policy to so decide now.

⁷¹ In the first place, a decision upholding such a contract would confer upon one person occupying a position of trust toward another unusual power over the latter in the control and management of his own property, for we must not forget that the attorney has only a lien upon the client's cause of action, which still remains the property of the latter. It is not too much to assume that such power would at times be the source of abuse as between the two parties.

But more important than any such personal and private considerations is the one of public concern that such contracts would prove added obstacles to that quieting of disputes and to that adjustment and settlement of litigation which always has been, and always should be, favored by the acts of legislatures, the decisions of courts and the expressions of public opinion. For, in my judgment, there is no need of long argument to demonstrate that such contracts would prove such obstacles. We have before us in this very litigation an illus-

tration of the manner in which they would be utilized if so permitted to prevent settlements, even when the attorney and client were involved in no other differences than those of an honest opinion about the amount which ought to be realized from the litigation. And if this result would have happened where reputable attorneys were prosecuting what we are entitled to assume was legitimate litigation with due regard for the rights of their client, it requires no long vision to see how frequently the power would be used by reckless or unscrupulous attorneys to prolong litigation for the sole purpose of forcing a defendant or client, or both, to pay additional tribute in order to secure that settlement and peace which they desired and public policy commended.

It is urged that this power is necessary for the protection of attorneys. Courts are not unmindful of the fact that the system of contingent compensation has the merit of affording to certain classes of persons the opportunity to procure that prosecution of their claims which otherwise would be beyond their means, and that the attorney should be protected from any dishonest attempt to deprive him of his compensation. ⁷² On the other hand, no one having had an opportunity for observation can well close his eyes to the fact that this same system many times promotes litigation which is so unjustifiable that it does not even rise to the level of being speculative, and which being carried forward by unlawful and forbidden methods leads sometimes to the enforcement of unjust recoveries from unfortunate defendants, sometimes to the exaction of unconscionable compensation from ignorant or helpless clients, and always to stirring up discord and lawsuits. In view of the relief which courts render against settlements made with the dishonest purpose of cheating attorneys of their just compensation, it does not often happen that a reputable attorney undertaking legitimate litigation for a contingent compensation is deprived of his just dues, and there seems to be no substantial necessity for approving a form of contract which would enable unworthy members of the profession to increase existing evils through a power to manipulate and nullify any disposition upon the part of their clients to settle their differences.

While, as stated, the courts of our own state do not appear to have passed upon this precise question, whatever has been said upon this general subject of the right of a client to settle

litigation without interference by his attorney confirms the view now being presented.

In *Lee v. Vacuum Oil Co.*, 126 N. Y. 579, 27 N. E. 1018, the attorneys for the plaintiff had an agreement for a contingent compensation with a clause providing that no settlement should be made without their consent. After recovery of judgment a settlement was made without the consent of the attorneys, and subsequently a motion was made on behalf of them and of the client herself to vacate the settlement upon the ground of fraud. The question presented, therefore, arose between the attorneys and the opposite party and upon facts somewhat different from those before us. Still, what was said by the court is pertinent to the general subject now being discussed. In its behalf Judge Ruger wrote as follows: "We are of the opinion that the existence of such a lien ⁷³ in favor of the attorneys does not confer a right on them to stand in the way of a settlement of an action which is desired by the parties, and which does not prejudice any right of the attorneys. We do not think that such an agreement deprives a party of the right to control the management of his own cause, and to determine when the litigation shall cease and how far it shall be extended. The client still remains the lawful owner of the cause of action and is not bound to continue the litigation for the benefit of his attorneys when he judges it prudent to stop, provided he is willing and able to satisfy his attorneys' just claims. In fact, the lien under the agreement was intended for, and operates only as, a security for the attorneys' legal claims, and unless those are prejudiced by the client's contract, she has unrestricted control of the subject of the action and the terms upon which a settlement shall be effected."

Fischer-Hansen v. Brooklyn Heights R. R. Co., 173 N. Y. 492, 66 N. E. 395, was an action brought to enforce the lien of the plaintiff upon a judgment which he had recovered for a client against the defendant, and which judgment the latter, after notice of the attorney's lien, had secretly settled with the client, who was financially irresponsible. In writing in that case in behalf of a unanimous court, Judge Vann laid down principles which certainly guide us in the direction of the conclusions already stated. Referring to the lien given by the code to the attorney upon his client's cause of action, he wrote as follows:

“The statute says that the lien (given by the statute) cannot be affected by any settlement between the parties before or after judgment, but does it mean that no settlement whatever can be made without the consent of the attorney? It clearly means this, unless the lien is impliedly transferred to the proceeds of the settlement. But did the legislature, in its effort to protect attorneys, intend to sacrifice the client by preventing him from making an honest settlement of his own cause of action? Did it intend to overturn the ancient and honored rule of law that settlements are to be encouraged, by ⁷⁴ giving the attorney power to insist that the litigation must continue until he consents that it should stop? Did it intend to so tie the hands of the client that he could not settle his own controversy without the permission of his attorney? A cause of action is not the property of the attorney, but of the client. The attorney owns no part of it, for a lien does not give a right to property, but a charge upon it. As it is merely incidental, and for the purpose of security only, it would not be reasonable to hold that the legislature intended it should be the means of blocking an honest and genuine adjustment of controversies. We think the lien is subject to the right of the client to settle in good faith, without regard to the wish of the attorney, and we so held in the *Peri* case (152 N. Y. 521, 46 N. E. 849), where we declared that ‘the existence of the lien does not permit the plaintiff’s attorney to stand in the way of a settlement.’ . . . The legislature did not intend to make the lien the chief thing, nor to compel the client to abdicate his position as principal in favor of the agent or attorney whom he employed in order to secure his rights. It did not intend to prevent him from dealing with his own property as he saw fit, provided he exercised his honest judgment and took no advantage of his attorney.”

In other states an abundance of authority is to be found for the doctrine that a clause prohibiting the client from making a settlement of his litigation without the consent of his attorney is void as against public policy: *Huber v. Johnson*, 68 Minn. 74, 64 Am. St. Rep. 456, 70 N. W. 806; *North Chicago etc. R. Co. v. Ackley*, 171 Ill. 100, 49 N. E. 222, 44 L. R. A. 177; *Lewis v. Lewis’ Admx.*, 15 Ohio, 715; *Key v. Vattier*, 1 Ohio, 132; *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81, 49, S. W. 822, 45 L. R. A. 196.

These views lead to the conclusion that appellants are not entitled to recover from their client upon the quantum meruit upon the ground that the clause prohibiting a settlement was legal, and, therefore, his acts in disregard thereof a breach of contract.

But I do think that they may still recover upon that basis upon the other theory suggested.

⁷⁵ The clause in the contract fixing the value of the services at a certain percentage of the recovery was connected with the provision that the attorneys should have a voice in any settlement and in determining the amount of any recovery by that process. The two clauses were manifestly part of a single plan. Therefore, when the client takes advantage of the invalidity of one clause and repudiates it, the other one cannot stand alone, but must fall with it, and the result of this again is to permit the attorneys to recover for the services which they have actually rendered according to their real value and independent of the original provision in the contract upon this subject: *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81, 49 S. W. 822, 45 L. R. A. 196; *Gammons v. Johnson*, 69 Minn. 488, 72 N. W. 563; *Stearns v. Felker*, 28 Wis. 594.

The order of the appellate division should be reversed and that of the special term affirmed, with costs.

Judge Edward T. Bartlett, Dissenting, said in part: "I agree with my brother Hiscock that the appellants, the attorneys, are entitled to some form of relief in this proceeding. I am, however, unable to agree with the conclusion reached by him that an agreement between an attorney and client, creating a lien upon the cause of action, cannot lawfully contain the provision that neither party shall settle the litigation without the consent of the other.

"If it be the fact that this court has never passed upon the validity of such a clause in a contract, I am of opinion that it is valid. I see no reason why counsel entering upon a long and difficult litigation for an impecunious client should not protect himself against a premature and ill-advised settlement of the litigation. These contracts are under the strict supervision and scrutiny of the court, and I am unable to see anything in contravention of public policy when this clause appears to have been entered into in good faith by both parties. In the absence of such a clause it has been frequently held in this state and elsewhere that the client may negotiate an honest and reasonable settlement at any time. There is no reason, in my judgment, why this right cannot be waived."

The Right of a Litigant to Dismiss His Action without the consent of his attorney is discussed in the note to *Cameron v. Boeger*, 93 Am. St. Rep. 169. Generally, a client may dismiss his suit at pleasure without the intervention of his attorney: *Tompkins v. Railroad*, 110 Tenn. 157, 100 Am. St. Rep. 795; *Boorgren v. St. Paul City Ry. Co.*, 96 Minn. 51, 114 Am. St. Rep. 691; *O'Connor v. St. Louis Transit Co.*, 198 Mo. 622, 115 Am. St. Rep. 495. As to validity of a contract whereby the client abridges this right, see *Lipscomb v. Adams*, 193 Mo. 530, 112 Am. St. Rep. 500; note to *Cameron v. Boeger*, 93 Am. St. Rep. 172-175.

WINTER v. CITY OF NIAGARA FALLS.

[190 N. Y. 198, 82 N. E. 1101.]

MUNICIPAL CORPORATIONS—Presentation of Claims—Infancy.—A provision in a city charter that claims for damages due to negligence must be presented to the common council within thirty days after the occurrence is not a statute of limitations which is suspended during the infancy of the claimant. (p. 542.)

MUNICIPAL CORPORATIONS—Presentation of Claims—Pleading and Proof.—A provision in a city charter that claims for damages founded upon negligence must be presented to the common council within thirty days after the occurrence is reasonable, and a compliance therewith is a fact to be alleged and proved by a complainant, like any other condition precedent to the existence of a right of action. (p. 542.)

MUNICIPAL CORPORATIONS—Presentation of Claims—Infancy.—The fact that a person injured through the negligence of a city is an infant does not exempt him from the operation of a provision of the city charter that claims for damages founded upon negligence must be presented to the common council within thirty days or an action thereon will be barred. (p. 543.)

CONDITION PRECEDENT.—The Omission of an Averment of Performance of a condition precedent, or of an excuse for non-performance, is fatal on demurrer. (p. 544.)

MUNICIPAL CORPORATIONS—Presentation of Claims—Waiver.—If the requirement of a city charter, that claims for damages based upon negligence must be presented to the common council within a specified time, may be waived (which is doubtful), a waiver cannot be relied upon when not pleaded or when no facts are alleged which constitute it. The fact that the mayor called on the claimant while in the hospital, or that his bill for hospital services was paid by the city, or that in response to a subpoena he appeared and was examined by the city attorney, does not establish a waiver. (p. 544.)

F. J. Mackenna, for the appellant.

J. T. Ryan, for the respondent.

¹⁹⁸ GRAY, J. Appeal, by permission, from an order of the appellate division of the supreme court in the fourth judicial department, entered April 30, 1907, which reversed an interlocutory judgment of special term sustaining a demurrer to the complaint and overruled such demurrer.

This action was brought by the plaintiff to recover damages for injuries sustained by him, which are alleged to have been caused by the negligence of the defendant's servants. The complaint sets forth that the plaintiff, in May, 1901, was driving through one of the streets of the city, when a steam roller, operated by one of its employes, suddenly started, making a great noise, frightened his horse and caused it to run away. His wagon was overturned and the injuries complained of were then occasioned. He sets out the nature of the injuries ¹⁹⁹ and alleges that they were caused solely by the negligence of the defendant and without any negligence on his part. He alleges that, as the result of his injuries, he was confined in a hospital for a certain length of time, and that while there he was "visited by Mr. M. B. Butler, at that time mayor of the defendant, who discussed with the plaintiff the accident which resulted in his injury, and who stated to the plaintiff that he 'need not worry' and that 'they would pay the bill,' " and that shortly thereafter the bill for hospital services was submitted to the common council of the city and paid. The complaint further alleges that, in July, 1904, the plaintiff caused to be filed with the clerk of the city "a notice of intention to commence suit to recover damages" and "a verified petition directed to the common council," setting forth "the nature and extent of plaintiff's claims in consequence of the accident"; that "forty days and more have expired since the filing of said petition"; that "after this plaintiff had caused his verified claim to be served upon the common council, he was subpoenaed by a member of the defendant's police force to appear before certain officers of said city, and in compliance with said subpoena did so appear, and was then examined as to the cause of action and the injuries herein alleged; said examination being conducted by the city attorney." Lastly, it alleges that the plaintiff, at the time of the accident, "was in his eighteenth year," and "that he arrived at his majority July 17, 1904." The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained at the special term; but, upon

appeal to the appellate division, the interlocutory judgment sustaining the demurrer was reversed and the case was then certified to this court, upon the question as to the sufficiency of the facts stated in the complaint to constitute a cause of action.

²⁰² Upon the face of this complaint it appears that more than three years had elapsed after the plaintiff sustained his injuries and before he presented a claim for damages to the defendant; but the majority of the learned justices of the appellate division were of the opinion that the defendant had waived compliance with a provision of its charter, which would have barred the action. The charter of the defendant provided that "all claims for damages founded upon alleged negligence of the city shall be presented to the common council, in writing, within thirty days after the occurrence causing such damages"; that the notice shall state the time, place, cause, nature and extent of the damages and shall be verified; that "the omission to present any claim in the manner, or within the time, in this section provided shall be a bar to an action against the city therefor," and that no action or proceeding to recover any claim against the city shall be brought until the expiration of forty days after the claim shall have been presented before the common council for audit.

Very correctly, the opinion of the court below disposed of the plaintiff's contention that the provision of the charter with respect to the time for presentation of a claim was a statute of limitation, the running of which, within the provisions of the Code of Civil Procedure (section 396), would be suspended during infancy. It was nothing of the kind; for, as it was observed, the requirement does not relate to the commencement of an action. The statute requires the presentation of a claim to be made within thirty days of the occurrence causing the damage, and it bars an action against ²⁰³ the city in the case of an omission to do so. The provision, therefore, became an essential part of a complainant's cause of action, and compliance with its requirement was a fact to be alleged and proved, like any other condition precedent to the existence of an obligation: *Reining v. City of Buffalo*, 102 N. Y. 308, 6 N. E. 792; *Curry v. City of Buffalo*, 135 N. Y. 366, 32 N. E. 80; *MacMullen v. City of Middletown*, 187 N. Y. 37, 79 N. E. 863, 11 L. R. A., N. S., 391. Municipal liability for injuries is a matter that is within the

control of the legislature, and when it is enacted what that liability shall be, and the conditions upon which it may be enforced are prescribed, the statutory provisions are controlling upon the subject. To require the presentation of a claim within a specified time is quite a reasonable provision, inasmuch as thereby the municipality is afforded a measure of protection against stale claims or the possible connivance of corrupt officials. It permitted an investigation into the occurrence to be had at a time when the evidence relating to it might more readily be collected. The provision is not so rigid as to be beyond a construction, which admits of a substantial compliance with its requirement, or of an excuse for delay in performance, when caused by the inability of the injured person to comply: *Walden v. City of Jamestown*, 178 N. Y. 213, 70 N. E. 466. In this complaint, however, not only is there no allegation of compliance, but no excuse for the failure to present a claim is alleged. The plaintiff was eighteen years of age and, so far as the complaint shows, presumably was able to cause a claim to be filed, and the statute makes no exception as to persons. The question is not as to the effect of the plaintiff's infancy upon the running of the statute of limitations; it is simply as to the effect upon his cause of action of a failure to present a claim for damages to the city within thirty days after the receipt of the injuries, as the charter required. The question was well discussed below, and I think it needs no further discussion here.

I am not able, however, to agree in the view that the failure of the plaintiff to comply with the requirement of the charter has been waived by the defendant. I am not without doubt upon the question whether a statutory provision of this ²⁰⁴ kind can be waived by the municipal authorities. The liability of the municipality is provided for by a statute, and is rested upon the performance of a certain condition. It is declared that an omission to comply with the provision "shall be a bar to an action against the city." If compliance may be waived, it would tend considerably to lessen the protection intended to be accorded to the city; but, without deciding that question, and if we shall assume that it was within the power of the municipal authorities to waive the failure of the plaintiff to present his claim within the time prescribed by the statute, still I find the difficulty in the plaintiff's case to be that the complaint neither expressly alleges a waiver nor

facts which, taken together, constitute a waiver, on the part of the defendant. It is a familiar rule of law that the omission of an averment of performance of a condition precedent, or of an excuse for the nonperformance, is fatal on demurrer: See 1 Chitty's Pleading, *321, *327; *Oakley v. Morton*, 11 N. Y. 25, 62 Am. Dec. 49; *Weeks v. O'Brien*, 141 N. Y. 199, 36 N. E. 185. That performance of the condition precedent, imposed by the statute upon a complainant intending to bring an action against the defendant, could not be pleaded when this action was commenced, is evident; but, in such a case, it was obligatory either to plead a waiver, or to allege facts which would constitute a waiver, of performance. As already observed, there is no exception made in the statute as to persons under the disability of infancy, and no fact alleged permits an inference that the plaintiff could not have complied with the requirement. The fact that the mayor called upon the plaintiff while in the hospital and sympathized with him, or that the bill for hospital services was paid by the city, does not, even remotely, show a waiver of the requirement that any claim for damages against the city should be presented, as provided for in the statute. Neither do the facts that he was "subpoenaed by a member of the defendant's police force to appear before certain officers of the city," that he did so, and that he was examined by the city attorney, constitute a waiver. The allegations in this respect are somewhat vague; ²⁰⁵ but, allowing all force to them, what more do they amount to than that the city attorney, after the plaintiff filed his claim, performed a duty with which he was charged by the statute? Section 489 of the charter provides that "it shall be the duty of the corporation counsel (in which name the office of the city attorney was continued by the amendment of the charter in 1904) to cause all claims for personal injuries or damages to property to be thoroughly investigated, and he shall advise the proper committee of the common council in respect thereto." In examining the plaintiff, therefore, the corporation counsel simply discharged this duty. It was not for him to say that he might omit to discharge the duty enjoined by the statute upon the incumbent of the office, which he filled; any more than it was possible for him to bind the municipality by his opinion upon the claim. He might, at the most, advise the common council upon the facts. He was not an executive officer; he was only the law ad-

viser, or counsel, of the municipal corporation. Even what he advised the common council is not alleged. That municipal body alone could waive the plaintiff's failure to present his claim within the time fixed by the statute (always assuming that it had the power to do so), and it is not alleged that it took any action whatever. With a pleading neither alleging compliance, substantial or otherwise, with the requirement of the statute, nor alleging a waiver, or any facts excusing the plaintiff from performance, the defendant's demurrer, in my opinion, was properly sustained at the special term.

I advise that the question certified to this court should be answered in the negative, that the order appealed from should be reversed, and that the judgment of the special term should be affirmed, with costs in all the courts; but without prejudice to the plaintiff's rights to apply for leave to amend his pleading, as he may be advised.

Cullen, C. J., Werner and Chase, JJ., concur.

O'Brien and Vann, JJ., dissent.

Willard Bartlett, J., not voting.

Ordered accordingly.

A Provision in a City Charter requiring claims against a city to be presented to the common council before suit thereon is valid: *Cunningham v. Denver*, 23 Colo. 18, 58 Am. St. Rep. 212; *Morrison v. Eau Claire*, 115 Wis. 538, 95 Am. St. Rep. 955; *County of Ada v. Bullen Bridge Co.*, 5 Idaho, 188, 95 Am. St. Rep. 180; and a complaint in an action in tort must aver that presentation has been made: *Barrett v. Mobile*, 129 Ala. 179, 87 Am. St. Rep. 54.

A Charter Provision that No Action shall be maintained against the city to enforce any tortious liability, unless a notice, signed by the person injured, of the wrong and the circumstances thereof and the damage claimed, shall be presented to the council within ninety days after the injury, is a statute of limitations which extinguishes the right of action upon the expiration of the time specified: *Hay v. Barboo*, 127 Wis. 1, 15 Am. St. Rep. 977. As to whether the time for presentation is extended in case of the physical or mental inability of the claimant, see *Forsyth v. Oswego*, 191 N. Y. 441, post, p. 605.

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HALSEY v. JEWETT DRAMATIC COMPANY.

[190 N. Y. 231, 83 N. E. 25.]

FOREIGN CORPORATIONS—Failure to Pay License Tax as Defense to Action.—The neglect of a foreign corporation to pay its license fee is a matter of defense which must be averred in the answer. (p. 547.)

FOREIGN CORPORATION—Failure to Pay License Tax as Defense.—Where the omission of a foreign corporation to pay its license tax under the New York statute is relied upon as a defense to an action brought by it, a failure to allege in the answer that the tax has been assessed and has remained thirty days unpaid, renders the defense insufficient and the answer demurrable. (pp. 547, 548.)

FOREIGN CORPORATION—Failure to Pay License—Assignee. The defense to an action by a foreign corporation that it has not paid its license tax is available against its assignee, except as to negotiable paper taken in good faith before maturity. (p. 548.)

Maxwell C. Katz and Otto C. Sommerich, for the appellant.

Nathan Ottinger, for the respondent.

²³² **HAIGHT, J.** The plaintiff was the assignee of H. A. Thomas & Wylie Lithographing Company, a New Jersey corporation authorized to do business in this state, and brings this action ²³³ to recover a balance alleged to be due upon a contract made by the corporation with the defendant, also a New Jersey corporation, to print and deliver to it a large quantity of lithograph portraits in colors, at prices stipulated in the contract. The action was commenced on the twenty-seventh day of June, 1901, and on the fifth day of February, 1905, amended and supplemental answers were served, from which it is alleged as a defense that, although H. A. Thomas & Wylie Lithographing Company had procured the consent of the Secretary of State to do business in this state on the thirtieth day of June, 1898, it had failed and refused to pay, and did not pay, the state treasurer the license fee required by section 181 of chapter 908 of the Laws of 1896, as amended by chapter 558, Laws of 1901, required to be paid by foreign corporations doing business in this state, until July 3, 1902, at which time the license fee was paid. These allegations were set forth both in the answer and supplemental answer. The plaintiff thereupon demurred separately to the answer and supplemental answer upon the ground that these allegations were insufficient in law to constitute a defense.

Section 181 of the tax law, as amended by chapter 558 of the Laws of 1901, provides that every foreign corporation, except certain companies specifically mentioned, "shall pay to the state treasurer, for the use of the state, a license fee of one-eighth of one per centum for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, to be computed upon the basis of the capital stock employed by it within this state, during the first year of carrying on its business in this state; and if any year thereafter any such corporation shall employ an increased amount of its capital stock within this state, the same license fee shall be due and payable upon any such increase. The tax imposed by this section on a corporation not heretofore subject to its provisions shall be paid on the first day of December, nineteen hundred and one, to be computed upon the basis of the amount of capital stock employed by it within the state during the year preceding ²³⁴ such date, unless on such date such corporation shall not have employed capital within the state for a period of thirteen months in which case it shall be paid within the time otherwise provided by this section. No action shall be maintained or recovery had in any of the courts in this state by such foreign corporation without obtaining a receipt for the license fee hereby imposed within thirteen months after beginning such business within the state, or if at the time this section takes effect, such a corporation has been engaged in business within this state for more than twelve months, without obtaining such receipt within thirty days after such tax is due."

The Laws of 1895 (chapter 240) provide that the license fee to be paid by foreign corporations "shall be fixed by the comptroller, who shall have the same authority to examine the books and records in this state of such foreign corporations, and the employés thereof, and the same power to issue his warrant for the collection of such taxes, as he now has with regard to domestic corporations."

We have recently held in the case of *Wood & Selick v. Ball*, 190 N. Y. 217, 83 N. E. 21, that the neglect to pay the license fee assessed under section 181 of the tax law is a matter of defense, and must be alleged in the answer. Under the statute to which we have alluded it becomes the duty of the comptroller to fix the amount, and then it must be paid within thirty days thereafter. It will be observed that the defend-

ant has failed to allege, either in its amended or supplemental answer, that the amount of the license fee had been assessed by the comptroller, and that more than thirty days had elapsed before the fee was paid on July 3d, 1902. I am, therefore of the opinion that the defense interposed was insufficient in law, and that the demurrer should have been sustained.

Upon the argument of this appeal it was contended that the statute had no application to an assignee of a foreign corporation. We think that the assignee has no greater rights than the corporation itself, and that the defense available against the corporation under the statute would also be good ²³⁵ as against the assignee except as to negotiable paper taken in good faith from the corporation before maturity.

The orders should be reversed and the demurrer sustained, with costs in all courts, and the first three questions certified answered in the negative. We do not deem it necessary to now answer the fourth.

Cullen, C. J., O'Brien, Edward T. Bartlett, Vann, Hiscock and Chase, JJ., concur.

Orders reversed, etc.

In the Subsequent Case of South Bay Co. v. Howey, 190 N. Y. 240, 83 N. E. 26, it is held that under a statute providing that "no foreign stock corporation other than a moneyed corporation shall do business in this state without having first procured a certificate that it has complied with all the requirements of law, . . . ," and that "no foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state, unless prior to the making of such contract it shall have procured such certificate," a foreign corporation which has not procured the required certificate cannot maintain an action on a fire insurance policy to recover for the destruction of its property. For other recent authorities on the right of a foreign corporation to enforce its contract obligations when it has not complied with the law of the state in which it is doing business, see *Tri-State Amusement Co. v. Forest Park Amusement Co.*, 192 Mo. 404, 111 Am. St. Rep. 511; *Garratt Ford Co. v. Vermont Mfg. Co.*, 20 R. I. 187, 78 Am. St. Rep. 852, and cases cited in the cross-reference note thereto; *Buffalo Zinc etc. Co. v. Crump*, 70 Ark. 525, 91 Am. St. Rep. 87.

PEOPLE v. GASS.

[190 N. Y. 323, 83 N. E. 64.]

TAXATION—Exemption of Corporation.—The Power of the Legislature to amend a corporate charter, whether by virtue of a state constitution or a general law of the state reserving such right, includes the power to repeal a provision exempting the property of the corporation from taxation. (p. 552.)

William S. Jackson, attorney general, and James A. Donnelly, for the appellant.

W. E. Carnochan and Henry B. Closson, for the respondent.

³²⁵ WILLARD BARTLETT, J. The tax law of this state, as amended in 1906, imposes a recording tax on mortgages: Laws 1906, c. 532. The relator, being the owner of a mortgage, presented it to the register of the county of New York for record. The register refused to record the mortgage unless the recording tax was paid. The relator, claiming that the mortgage was exempt from taxation under the provisions of its charter, applied to the supreme court at special term and obtained therefrom a peremptory writ of mandamus commanding the register to place the mortgage on record in his office upon the payment of his legal fees for recording the same, but without the payment of any tax upon the said mortgage. The register appeals to this court from an order of the appellate division affirming the special term order directing the issuance of the writ.

The corporate charter of the Cooper Union for the Advancement of Science and Art is chapter 279 of the Laws of 1859. It authorized Peter Cooper, the well-known philanthropist, to convey to the corporate body thereby created the block of land on Astor place, in the city of New York, since occupied by the celebrated Cooper Union building. The form of the deed to be given was prescribed in the statute itself. The purposes of the corporation were fully set forth and are comprehensively indicated by the corporate name. In section 11, near the end of the act, occurs the exemption clause, which the courts below have held still to be effective. It is in the following words:

“Sec. 11. The premises and property mentioned in the said deed, and which shall at any time belong to or be held

in trust by the corporation hereby created, or the trustees thereof, including all endowments made to it, shall not, nor shall any part thereof, be subject to taxation while the same ³²⁶ shall be appropriated to the uses, intents and purposes hereby and in the said deed provided for."

If it was within the power of the legislature to repeal this exemption, there can be no doubt that it was repealed, so far as mortgages belonging to the Cooper Union are concerned, by the amendment to the tax law adopted in 1906 and constituting section 292 of the statute, which reads as follows:

"No mortgage of real property situated within this state shall be exempt, and no person or corporation owning any debt or obligation secured by mortgage of real property situated within this state shall be exempt, from the taxes imposed by this article by reason of anything contained in any other statute, or by reason of any provision in any private act or charter which is subject to amendment or repeal by the legislature, or by reason of nonresidence within this state or for any other cause": Laws 1906, c. 532.

This is conceded by the learned judge who wrote for the appellate division; but it was there held that Peter Cooper was a party to the incorporation of the relator; that in consideration of the conveyance which he made the state agreed that the property conveyed should be devoted to certain specified charitable uses; that by subjecting it to taxation it would pro tanto be diverted from those uses; and consequently that the agreement on the part of the state that it should not be taxed must be observed by the legislature, and could not be disregarded under the guise of an amendment to the corporate charter.

In 1859, when the charter of the relator was enacted, there existed a reserved right on the part of the legislature to alter and amend it. The provisions of the constitution of 1846 on the subject were the same as those contained in the present constitution, to wit: "Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to ³²⁷ this section may be altered from time to time or repealed": Const., art. 8, sec. 1.

Mr. Peter Cooper, when he executed and delivered his deed, and the incorporators of the Cooper Union when they ac-

cepted the charter, must be presumed to have known that this was the fundamental law of the state. The reservation of the right to amend or repeal special charters was undoubtedly inserted in our constitution in view of the doctrine of the Dartmouth College case (*Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629) that the charter of a private corporation is a contract, and that if it confer benefits upon the corporators inducing its acceptance, such benefits cannot be withdrawn without the consent of the corporation, in the absence of a reserved power in the legislature to withdraw them. Notwithstanding that decision, some eminent judges have questioned its application to charter stipulations restricting the taxing power of the state, and have insisted that one legislature of a state has no power to bargain away the right of any succeeding legislature to levy taxes in as full a manner as the constitution will permit: See opinions of Miller, J., in *New Jersey v. Yard*, 95 U. S. 104, 24 L. ed. 352, and Cole, J., in *West Wisconsin Ry. Co. v. Board of Supervisors*, 35 Wis. 257. A contrary view, however, has been adopted by the supreme court of the United States, and that tribunal must be regarded as committed to the proposition that the legislature may bind the state in relinquishing the right to tax a corporation; and that such a provision in a corporate charter constitutes a contract which the state may not subsequently impair: *Humphrey v. Pegues*, 16 Wall. 244, 21 L. ed. 326, and the cases there cited.

But this doctrine of constitutional law is subject to a very important qualification. "To avoid the force of the principle that a corporate charter is a contract which oftentimes operates in some unexpected manner, and perhaps unjustly to the public at large, the people of some of the states have made express provision by their constitutions that all charters of private incorporation granted by the legislature shall be subject to amendment or repeal at the legislative will": 1 Cooley on ³²⁸ Taxation, 115. Such is the case in this state. "The charters are still contracts, but contracts with a reserved right on the part of the state to amend or terminate them. The rule would be the same if the charter were granted while a general law of the state was in force which declared that all grants of the kind should be subject to the legislative power of alteration and repeal; for the grantees would accept their franchises with notice of and qualified by such declaration."

The legislative power to amend a corporate charter, where it exists at all—whether by virtue of a state constitution, or a general law of the state reserving such right—includes the right to repeal a provision exempting the property of the corporation from taxation: *Tomlinson v. Jessup*, 15 Wall. 454, 21 L. ed. 204; *West Wisconsin Ry. Co. v. Board of Supervisors*, 35 Wis. 257; affirmed, 93 U. S. 595, 23 L. ed. 814; *Wagner Institute v. Philadelphia*, 132 Pa. 612, 19 Am. St. Rep. 613, 19 Atl. 297.

In the *Tomlinson* case the reserved right of amendment was contained in a general statute of South Carolina. In the exercise of the power conferred upon it by this law, the legislature repealed an exemption from taxation which had been granted to a railroad company. The repeal was upheld by the supreme court of the United States, in an opinion written by Mr. Justice Field, in which all the members of the court concurred. He conceded that the exemption might have added greatly to the value of the stock of the corporation and induced the plaintiff to purchase his shares, but refused to allow this consideration any weight in determining the validity of the subsequent taxation. The power reserved to the state by the general law authorized any change in the contract or its entire revocation. I quote from his opinion: "The original corporators, or subsequent stockholders, took their interests with knowledge of the existence of this power, and of the possibility of its exercise at any time in the discretion of the legislature. The object of the reservation and of similar reservations in other charters is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest ³²⁹ should at any time require such interference. It is a provision intended to preserve to the state control over its contract with the corporators, which without the provision would be irrepealable and protected from any measures affecting its obligation. . . . The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the state." Certainly, exemption from taxation is an immunity derived directly from the state.

The *Wisconsin* case arose under a provision of the constitution of that state which declared that all general laws or special acts under which corporations without banking powers

were created might be altered or repealed by the legislature at any time after their passage. This was held to warrant the repeal of a statute exempting certain property of a railroad company from taxation, the court holding that, although the exemption constituted a part of the contract between the state and the corporation, it was, nevertheless, by virtue of the reservation of power in the fundamental law, liable to be revoked in the wisdom of the legislature, like any other provision of the charter.

The case of *Wagner Institute v. Philadelphia*, 132 Pa. 612, 19 Am. St. Rep. 613, 19 Atl. 297, is particularly interesting, because there the party claiming exemption, like the relator here, was a charitable corporation organized for similar purposes, its full corporate name being the Wagner Free Institute of Science. Exemption was claimed under the corporate charter, which provided as follows: "The cabinet collections and lot of ground on which it is erected, belonging to the said institution, with any requests, gifts or endowments, so long as the same shall be used for free lectures, shall be exempt from taxation." Under the constitution of Pennsylvania as it existed when this exemption was granted the legislature possessed the power to alter or revoke any charter of incorporation "whenever in their opinion it may be injurious to the citizens of this commonwealth." The supreme court of Pennsylvania held that a repeal of the exemption had been effected by a subsequent general enactment, ³³⁰ saying: "Under the constitution of the United States and the decisions of the supreme court a charter is ordinarily a contract, but a charter which is revocable at the will of the grantor is only a quasi contract and approaches much more closely to the character of a license. To such a charter the rule of the *Dartmouth College* case does not apply and the decisions are uniform to this effect."

Many other decisions might be cited illustrative of the exercise of the reserved power to amend or repeal corporate charters in the direction of abolishing special exemptions from taxation. It will suffice to refer to *Covington v. Kentucky*, 173 U. S. 231, 19 Sup. Ct. Rep. 383, 43 L. ed. 679; *Citizens' Savings Bank v. City of Owensboro*, 173 U. S. 636, 19 Sup. Ct. Rep. 571, 43 L. ed. 840, and the cases therein cited.

It seems to me that it is a mistaken view of the facts, as they existed at the time when the law constituting the charter of the Cooper Union was enacted, to assume that one of

the considerations moving to Peter Cooper for the conveyance of the land which he gave to the corporation was an irrevocable agreement on the part of the state that neither that land nor any other property of the corporation should be subjected to taxation. It may very well be that he was influenced to some extent by the present assurance then given by the legislature that it should not be taxed, but this was accompanied by the knowledge on his part that the legislature possessed the constitutional power to revoke the exemption, and might at any time exercise it. He must be deemed to have acted in the light of what the law presumes him to have known in this respect; and, if so, how can it be held that he conveyed the Cooper Union property to the corporation in consideration of an irrevocable promise that it should be exempt from taxation?

I am clear that from any point of view the repeal of the exemption conferred by the charter of the relator was within the power of the legislature. This fact, however, should be mentioned: The relator's petition for the writ of mandamus shows that the mortgage which it sought to have recorded, without paying the mortgage tax, represented funds received ³³¹ from endowments, and not in any manner proceeding from the real estate conveyed to it by Peter Cooper. Thus, even if the appellate division were right in regarding that particular real estate as having been irrevocably exempted from taxation, it is difficult to perceive how the irrevocable exemption could extend to personal property derived from other sources. But I do not desire to base my vote for the reversal of the order on this distinction. I think the legislature, under the constitution, did not, and could not, abdicate its power to repeal the exemption as to any or all of the property of the relator, and that it was free to exercise that power whenever it deemed that sufficient reason existed to do so. With the wisdom of its exercise the courts have nothing to do.

The orders appealed from should be reversed and the application for a writ of mandamus should be denied, with costs and ten dollars costs of motion.

Cullen, C. J., O'Brien, Vann, Werner and Chase, JJ., concur.

Gray, J., concurs in result.

Ordered accordingly.

For Authorities upon the Question decided in the principal case, see *Lord v. Litchfield*, 36 Conn. 116, 4 Am. Rep. 41; *Wagner Free Institute v. Philadelphia*, 132 Pa. 612, 19 Am. St. Rep. 613; *Ladd v. Portland*, 32 Or. 271, 67 Am. St. Rep. 526; *Board of Education v. Phillips*, 67 Kan. 549, 100 Am. St. Rep. 475.

WHEELER v. STATE.

[190 N. Y. 406, 83 N. E. 54.]

STATE—Payment of Claims Founded on Moral Obligation.—The legislature may provide for the payment of private claims against the state which are not legal but which are founded on justice and supported by moral obligation. (p. 557.)

STATE—Claims Against on Cancellation of Land Patent.—A statute authorizing the court of claims to determine claims arising out of the cancellation of letters patent, and to render judgment against the state therefor, is not unconstitutional as providing for the allowance of private claims not founded upon legal liability. An award thereunder to a claimant who has been evicted from lands which he has purchased may properly be made for the purchase price of the land, with interest, and for expenses incurred in resisting eviction; but the award should not include the increased value of the land at the time of eviction. (p. 559.)

William S. Jackson, attorney general, and Timothy I. Dillon, for the appellant.

John P. Kellas, for the respondent.

408 CULLEN, C. J. In 1893, the forest commission, under provisions of law, advertised for sale, with other wild lands in the Adirondacks, a tract of two thousand nine hundred acres, for which the respondent bid the sum of five dollars and fifty-seven cents an acre. His bid being the highest was accepted. Before the sale was consummated it was discovered that the tract being within twenty miles of Clinton prison its sale was unauthorized, whereupon an act was passed by the legislature (Laws 1894, c. 209) which confirmed the sale and directed the execution to respondent of the necessary deeds of transfer upon his payment of the purchase money. The respondent paid the proper sum and received from the state a patent executed by the governor whereby the people of the state granted, released and quit-claimed unto him the tract in question. The patent concluded with this provision: "And these presents shall in no

wise operate as a warranty of title." The respondent entered into possession of the premises, and shortly thereafter ejectment suits were brought against him by former owners of the land to recover parts of the tract so conveyed to him. He defended these suits but was unsuccessful, and by the judgments recovered by the plaintiffs therein he was ejected from three hundred and twenty acres. It appeared on the trial of those actions that the title of the state had been acquired by sales for unpaid taxes. The defect in the proceedings was this: The lands of the plaintiffs in those suits had been assessed together with other lands which belonged to the state as a single tract and a tax for a single amount levied upon the whole. At the sale, upon the theory that ⁴⁰⁰ the lands belonged to the state, the comptroller, claiming to act under the provisions of section 66 of chapter 427 of the Laws of 1855, declined to receive bids from parties attending the sale, but sold the land to the state for the amount of the tax. This was held to be an illegal appropriation of the lands of the plaintiffs and to confer no title thereto on the state. This illegality in the conduct of the sale did not appear on any records in the comptroller's office or elsewhere, but was proved by the testimony of witnesses who attended the sale. After the respondent had been thus ousted from the said three hundred and twenty acres an act was passed by the legislature (Laws 1900, c. 762), which conferred upon the court of claims power to hear, audit and determine the claim of the respondent against the state "in consequence of the cancellation, annulling and setting aside of the letters patent executed to him, . . . and to make an award and render judgment therefor against the state and in favor of said claimant." Thereupon the respondent presented to that court a claim for the purchase price of the land from which he had been evicted, with interest, the costs recovered against him in the two ejectment suits and the expenses incurred by him in defending the same, and for twelve dollars and fifty cents an acre for loss of profit. On the first hearing the court of claims rendered judgment for the state, holding that the respondent had no valid claim. This was reversed by the appellate division and a new trial awarded: *Wheeler v. State*, 97 App. Div. 276, 90 N. Y. Supp. 18. On the second trial the respondent recovered judgment which, having been affirmed by the appellate division, is now brought for review by this court.

The principal question in the case is the validity of the act of 1900. It is contended by the learned attorney general that if the act is to be construed as giving the claimant a right of action where none existed before, it violates section 19 of article 3 of the constitution of the state, which provides that the legislature shall neither audit nor allow any private claim, and that if it was the intention of the legislature to deprive the state of the defense that here was no ⁴¹⁰ covenant of warranty in the conveyance, the statute in effect appropriates money for a private purpose and is ineffective, not having received the assent of two-thirds of the members of each branch of the legislature, as required by section 20 of the same article. These constitutional provisions have recently been several times before this court. In *Cole v. State*, 102 N. Y. 48, 6 N. E. 277, a statute of this state had provided for harbor masters exacting fees from vessels using the wharves in the city of New York, out of which their compensation and their expenses should be defrayed. These provisions were held unconstitutional by the supreme court of the United States, and the fund for the payment of the harbor masters consequently failed. Thereupon a statute was passed authorizing the court of claims to award to the harbor masters reasonable compensation for their services and expenditures. The validity of the statute was upheld, this court declaring that the constitutional provisions did not preclude the legislature from passing a law under which a private claim could be recognized or established against the state, however just and equitable it might be, unless it was founded on a legal liability which could be enforced in the courts of justice against an individual or corporation. *Coxe v. State*, 144 N. Y. 396, 39 N. E. 400, is to the same effect. In *Wrought Iron Bridge Co. v. Town of Attica*, 119 N. Y. 204, 23 N. E. 542, it was held that the legislature had power to legalize and validate a claim supported by moral obligation and founded in justice against a town, although it had previously been declared invalid for technical defects despite the constitutional provision forbidding the appropriation of town moneys to or in aid of any individual: Const., art. 8, sec. 10; art. 3, sec. 23. The question therefore presented is, Had the respondent such an equitable claim against the state for the refund of the purchase money it had received from him on the sale of land to which the state had no title and from which its grantee

was ejected as to support the statute? That, as the deed contained no covenants, an action against a private grantor would not lie is conceded. An executory ⁴¹¹ contract to give "a good and sufficient conveyance of land" requires the grantor to convey a good title, as well as to deliver a conveyance proper in form. But after the contract is executed and the conveyance accepted, the grantee must rely solely on the covenants in his deed. If his deed contains no covenants, he is without remedy either for eviction or encumbrance: *Burwell v. Jackson*, 9 N. Y. 535; *Sandford v. Travers*, 40 N. Y. 140. Such being the general rule, and the conveyance to the plaintiff containing no covenants, some of our number are inclined to doubt whether the mere receipt and retention by the state of money for which it had given no consideration would create a sufficient claim in equity to authorize recognition of the claim by the legislature and a direction for its payment. There is, however, this further fact in the case. The defect by reason of which the title failed was the misconduct or error of the state officer, which no diligence on the part of the purchaser in the examination of the title could have discovered. The case before us, however, does not rest on this equity alone. Ever since the Revised Statutes there has existed a provision of law that where the title of the people to lands granted under their authority fails, there shall be refunded to anyone presenting a legal claim for compensation for such failure the purchase money, with six per cent interest (1 Rev. Stats., p. 198, sec. 6), a provision now found in the Public Lands Law (sec. 5). While the respondent received no covenants, he was entitled to the benefit of this statutory provision, unless the form of the conveyance is such as to show a clear intention to exclude him from any right thereunder. We think there was no such intent as disclosed. The patent is not in terms a mere quitclaim, but purports to grant the premises. The lands themselves were offered for sale by the commissioners, not merely the right, title and interest of the state therein. At any time before the acceptance of the deed had the respondent known of the defect he might have refused to consummate the sale, because the state was unable to give him what it had contracted to give—a good title to the ⁴¹² lands agreed to be sold. The provision in the patent that it should in no case operate as a warranty of title undoubtedly relieved the state from any obligation as warrantor to defend the title

of its grantee, but it did not operate to deprive the grantee of the lesser benefit created by the statute, a refund of the purchase money and interest. The case is plainly distinguishable from the two decisions of the appellate division cited by the learned attorney general. In *People v. Woodruff*, 57 App. Div. 342, 68 N. Y. Supp. 100, the granting words of the patent were the same as those before us, to wit, grant, release and quitclaim, but the subject of the grant was very different; it was "all the right, title and interest acquired by us from or through the sale for taxes made by the comptroller . . . in and to the premises described as follows." In that case the people assumed to sell not the lands, but merely their right, title and interest to them, whatever it might be. The case was similar to that of a sale by a sheriff on execution. It was properly held that the failure of title created no liability on the part of the state to refund. In *Killam v. State*, 64 App. Div. 243, 71 N. Y. Supp. 1041, the patent did not state any consideration, nor was any consideration for its issue proved on the trial, though on appeal the counsel for the claimant stated that the consideration was the outstanding taxes thereon which were paid to the state. The notice of claim submitted by the appellant under an enabling act (Laws 1897, c. 155) did not refer to the alleged consideration, if there were any, but sought to recover the value of the land at the time of eviction with expenses and costs for defending the suit.

But while we thus uphold the validity of the statute and the claim of the respondent made thereunder, we think an error was committed on the trial for which the judgment must be reversed unless the respondent consents to a reduction. Over the objection and exception of the counsel for the state the respondent was allowed to prove the increased value of the lands at the time of the eviction. This ruling was erroneous, even if the action had been on a warranty, for in ⁴¹³ such a case the damages are limited to the purchase money and interest: *Morris v. Phelps*, 5 Johns. 49, 4 Am. Dec. 323; *Kinney v. Watts*, 14 Wend. 38; *Kelly v. Dutch Church of Schenectady*, 2 Hill, 105; *Rawle on Covenants*, p. 235. But in this case a warranty was expressly excepted, and, therefore, the plaintiff's claim is limited to the amount fixed by the statute or that which would obtain in an action for money had and received, the two being in this case the same, to wit, the amount paid with interest.

The judgment appealed from should, therefore, be reversed and a new trial granted, costs to abide the event, unless the respondent, within twenty days, consents to reduce the judgment of the court of claims to the sum of two thousand six hundred and ninety-one dollars and forty-two cents, in which case the judgment as reduced is affirmed, without costs in this court to either party.

O'Brien, Edward T. Bartlett, Haight, Vann and Hiscock, JJ., concur.

Chase, J., not sitting.

Judgment reversed, etc.

On the Constitutionality of Statutes Appropriating Money for purposes in the nature of a gift, see Ingram v. Colgan, 106 Cal. 113. 46 Am. St. Rep. 221; Conlin v. Board of Supervisors, 99 Cal. 17. 37 Am. St. Rep. 17; Bourn v. Hart, 93 Cal. 321, 27 Am. St. Rep. 203; State v. Moore, 50 Neb. 88, 61 Am. St. Rep. 538.

WEITZMANN v. BARBER ASPHALT COMPANY.

[190 N. Y. 452, 83 N. E. 477.]

NEGLIGENCE—Duty of Land Owner to Trespasser.—The only duty of the owners or occupiers of land toward mere trespassers or bare licensees is to abstain from inflicting intentional, wanton or willful injuries. (p. 563.)

NEGLIGENCE—Duty to Persons on Adjoining Premises.—When an owner or occupier of land uses upon it appliances, devices or methods that may cause injury to persons on adjoining premises, or in public places, he owes to them the duty to take reasonable precautions to avoid injury. (p. 564.)

Frank V. Johnson, for the appellant.

George M. Pinney and Warren V. Van Slyke, for the respondent.

452 WERNER, J. 'Appeal from a judgment of the appellate division of the supreme court in the second judicial department, entered June 17, 1907, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

On June 15th, 1906, the plaintiff, a boy then between eleven and twelve years of age, was playing upon a pontoon or float moored to the shore in front of premises leased by

the defendant. While thus engaged the plaintiff was seriously injured, and this action was subsequently brought to recover the damages which are said to have been occasioned by the culpable negligence of the defendant.

The defendant is engaged in the manufacture of asphalt, and in that business it leased from one Brady certain premises at Stapleton, Staten Island, fronting on the waters of New ⁴⁵³ York bay. These premises are situate between Prospect street on the north and Wave street on the south. At Prospect street, adjacent to the shore, the defendant had erected a hoist about thirty feet high, from the top of which a wire cable was suspended, which ran from the hoist on an incline toward Wave street. This hoist was equipped with a device called a carrier. Barrels were attached to this carrier by means of tongs that hung from the cable and were thus conveyed from the top of the hoist down the incline to what was called the dump at Wave street. This cable at places in its course passed over the shallow water bordering on the irregular shore, and when it reached the dump was about three or four feet from the ground. The hoist was not constantly in use. It was being used at the time when the plaintiff was playing upon the pontoon as stated. Just as a barrel had been projected down the wire hoist, the plaintiff raised his head above the level of the pontoon, and was struck with such force as to cause a serious fracture of the skull.

The float or pontoon on which the plaintiff was playing when he was struck by the barrel lay a few feet below high-water mark adjacent to the premises in question near Wave street. It was between twenty-five and thirty feet in length, fifteen feet wide and about six feet deep. At high tide it was surrounded by about five feet of water. At extreme low tide it was high and dry. The combined weight of the barrel and the carrier was between three hundred and three hundred and twenty-five pounds, and caused the cable to sag so that the barrel was low enough to strike the plaintiff's head when he raised it above the top of the float.

It is not clear from the record just how the plaintiff reached this float. The defendant's evidence was to the effect that the approach was piled up with barrels and cans over which it was necessary for the plaintiff to climb in getting to the float. The plaintiff's evidence tended to show

that he crossed a continuation of Sand street, which terminates at the water's edge just about where the float was moored; that there was a traveled way there between twelve and fifteen feet wide, passing Brady's ⁴⁵⁴ barn to a dock, from which there was a plank that extended to the float.

The record indicates that the plaintiff and some other boys had been upon and about this float on the day prior to the accident, and had observed some fish there. On the day of the accident the plaintiff went there with two boy companions, and was struck as stated. He had seen the cable and barrels passing over it. The plaintiff's father had seen boys playing about the float on several occasions prior to the accident. He said that he had observed this cable and the barrels passing over it, but that the place had not impressed him as being dangerous; that at extreme low tide the barrels would pass about five or six feet above the float, and that the distance varied with the tide. Other evidence tended to show that when boys were on the float they were in plain sight of the men on the hoist engaged in sending the barrels over the cable. There was also evidence tending to show that the defendant employed a watchman to keep away from the premises persons who were not employed there.

The place where the float was moored is designated as Front street, which runs along the shore of the premises in question. Although called Front street, it was covered with water at high tide. The defendant's lessor, Brady, testifying as a witness for the defendant, disclaimed any ownership of the land under water at the place where the float lay.

⁴⁵⁵ There are two questions in this case which survive the unanimous affirmance of the judgment entered upon the verdict, and they arise upon exceptions taken to the charge of the learned trial court in submitting the case to the jury. The charge, so far as material to the questions thus raised, was as follows: "Now, if a person's premises, under ordinary circumstances, are so situated that a person walks upon them and there is a dangerous part of them—a hole, for instance, or anything of that kind—and he falls into it, he being at the time a trespasser, going there without permission, the owner of the premises is not liable for anything. If in this particular instance the boy had fallen into the hole of that pontoon or float, the defendant in this action would not be liable at all, because that would be a danger that a person

going upon the premises naturally assumed. But this case presents a different situation. Here was a danger that existed at one moment and did not exist at another. Here was a line drawn across there from one point to another that at one time it would be so high that it would not touch the boy, an object passing over it would not touch him; at one time no object is going over it and at another time the position of the line would change and at the rate of a mile a minute a heavy object would be shot over it. You are to decide whether, with that situation, about which there is no dispute here, the defendant in this action took the necessary precaution to see that people were not injured in any way coming in contact with objects moving over it. It was a different situation, to ⁴⁵⁶ my mind, and I so charge you, than where it was a stationary danger or a danger that would be present all the time. It was more in the nature of a projectile fired from some gun or instrument which suddenly shot across the premises." At the conclusion of the charge, the defendant's counsel took the following exception: "I except to your honor's charge, or that part of it in which you stated that the circumstances of this case present a situation different from a stationary danger, or words to that effect, and your honor's charge in regard thereto." Later the defendant's counsel said: "It is my theory that the defendant owed no duty to keep people off from that property; that if people came there they took all the risks in connection with its transferring of the barrels over this cable, and I ask you to charge that." The court declined to so charge, and the refusal was excepted to.

While the locus in quo is not very accurately or clearly described, we think it is fairly to be inferred from the record that the float upon which the plaintiff was when the accident occurred was not upon the land leased by the defendant, but was in Front street, so called, on the land below high-water mark bordering upon the leased property. Bearing this in mind, it will be noted that under the charge of the trial court the case was submitted to the jury upon the assumption that the accident happened on the premises actually occupied and controlled by the defendant. The jury were instructed, in effect, that if the accident happened upon the property leased or controlled by the defendant, it would be liable if it did not take sufficient precaution to warn trespassers of the danger to be apprehended. We think the

learned trial court misapprehended the rule governing the liability of the defendant upon that assumption. The defendant had the undoubted right to maintain the apparatus in question on its property, and while it was probably much more dangerous than stationary machinery, we do not think that circumstance altered the rule with respect to its liability toward mere trespassers or bare licensees. As to such persons the well-settled rule is that the only duty of the owners or occupiers of the land is to ⁴⁵⁷ abstain from inflicting intentional, wanton or willful injuries: *Magar v. Hammond*, 183 N. Y. 387, 76 N. E. 474, 3 L. R. A., N. S., 1038; *Downes v. Elmira Bridge Co.*, 179 N. Y. 136, 71 N. E. 743; *Birch v. City of New York*, 190 N. Y. 397, 83 N. E. 51. Neither is this case within the rule that an owner of property is liable where he places an engine of destruction upon his land for the purpose of injuring trespassers, such as spring-guns and kindred devices: *Bird v. Holbrook*, 4 Bing. 628; *Hooker v. Miller*, 37 Iowa, 613, 18 Am. Rep. 18.

Nor were the instructions to the jury appropriate to a case where the person injured was not upon the property leased by the person charged with inflicting the injury, but upon adjoining premises. Such a case involves still another rule than either of those above referred to. If an owner or occupier of land uses upon it appliances, devices or methods that may cause injury to persons upon adjoining premises, or in public places, such owner or occupier owes to such persons the duty to take reasonable precautions to avoid injuring them. An illustration of this last-mentioned rule is found in *Driscoll v. Newark & R. Lime & Cement Co.*, 37 N. Y. 637, 97 Am. Dec. 761, where the plaintiff was going along a footpath which ran across defendant's property, and was injured by stones thrown from a blast in defendant's quarry. It did not clearly appear in that case whether the plaintiff, at the time of the accident, was upon the defendant's property or upon adjoining premises. In affirming a judgment for the plaintiff this court held that the question whether the defendant had taken sufficient precautions to warn persons who might reasonably be anticipated to be within range of the stones thrown from the blast was properly submitted to the jury. Other cases involving the same principle are *Wilson v. American Bridge Co.*, 74 App. Div. 596, 77 N. Y. Supp. 820, and *Wittleder v. Citizens' El. Ill. Co.*, 47 App. Div. 410, 62 N. Y. Supp. 297, 50 App. Div. 478, 64 N. Y. Supp.

114. Whether the defendant did take such precautions as are suggested by this rule, assuming that there was a question whether the plaintiff was upon its land or not, should have been submitted to the jury under instructions clearly pointing out the defendant's duty and liability in such circumstances.

⁴⁵⁸ It is practically impossible to decide upon the record now before us just what means of access to the float were open to the plaintiff or others, either across the land leased by the defendant or in other ways. The trial court did submit to the jury the question whether, under the circumstances, the defendant took sufficient precautions to avoid accidents to persons coming upon the defendant's premises. But this must be taken in connection with the erroneous instruction that the plaintiff could recover, even though he were a trespasser. This was an erroneous view of the law as applicable to the situation assumed by the court to have existed at the time of the accident. It may be that the jury understood that the plaintiff was not upon the defendant's land at the time of the accident, but that was clearly not the theory upon which the learned trial judge instructed the jury.

The judgment appealed from should be reversed and a new trial granted, with costs to abide the event.

Cullen, C. J., Gray, Edward T. Bartlett, Haight, Willard Bartlett and Hiscock, JJ., concur.

Judgment reversed, etc.

DUTY AND LIABILITY OF LAND OWNERS TO ADJOINING PROPRIETORS.

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I. Right of Proprietor to Make Use of Premises.

a. Reasonable Use of Property.—As a general rule, the owner of land has absolute dominion over it, and may put it to any legitimate use without being accountable to adjoining proprietors for consequential injuries to their property, any damages to them being *damnum absque injuria*. A land owner is not liable to his neighbors for damages resulting to them for acts performed on his own premises, unless they are negligently or unskillfully done, or unless the damages are the natural and probable consequences of such acts. Nevertheless the use of the land by the proprietors is not an absolute right; it is qualified and limited by the right of others to the lawful possession and enjoyment of their property: *Gregory v. Layton*, 36 S. C. 93, 31 Am. St. Rep. 857, 15 S. E. 352; *Anthony Wilkinson Live Stock Co. v. McIlquam*, 14 Wyo. 209, 83 Pac. 364. No one has a right to use his land so as to render his neighbor's property useless; his enjoyment must have reference to the rights of others: *Froelicher v. Oswald Iron Works*, 111 La. 705, 35 South. 821, 64 L. R. A. 228; *Sullivan v. Dunham*, 161 N. Y. 290, 76 Am. St. Rep. 274, 55 N. E. 923, 47 L. R. A. 715; he holds it subject to the implied obligation that he will use it as not unreasonably to interfere with the rights of others: *State v. Yopp*, 97 N. C. 477, 2 Am. St. Rep. 305, 2 S. E. 458. And the test to determine whether a particular use is reasonable is to inquire whether or not it is such a use as the ordinary man would make of his premises: *Hamlin v. Blankenburg*, 73 N. H. 258, 60 Atl. 1010.

b. Test of Permissible Use.—It is said that the test of the permissible use of one's own land is not whether the use causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act was in the nature of a nuisance, but the

inquiry is, Was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy? *Booth v. Rome etc. Terminal R. R. Co.*, 140 N. Y. 267, 37 Am. St. Rep. 552, 35 N. E. 592, 24 L. R. A. 105. And in determining to what uses land may properly be put by its owner, with reference to neighboring lands, the importance of the use to the owner, as well as the extent of the damage to be inflicted upon his neighbor, must be taken into consideration, and the rights of the parties adjusted in a practical way, the question being whether the proposed use is a reasonable one under all of the circumstances: *Gulf etc. Ry. Co. v. Oakes*, 94 Tex. 155, 86 Am. St. Rep. 835, 58 S. W. 999, 52 L. R. A. 293.

It is declared by some authorities that if one uses his own land for the prosecution of some business from which injury to his neighbor must necessarily or probably ensue, he is liable if such injury does result, though he may have used reasonable care in the prosecution of such business: *Frost v. Berkeley Phosphate Co.*, 42 S. C. 402, 46 Am. St. Rep. 736, 20 S. E. 280, 26 L. R. A. 693; *Cahill v. Eastman*, 18 Minn. 324, 10 Am. Rep. 184.

c. **Creation of Danger by Third Persons.**—Where a dangerous condition is created on premises by a third person without the knowledge or assent of the owner, the latter is not responsible for injuries resulting therefrom until he has notice, or unless he would have been aware of the danger in the exercise of a reasonable care: *Earle v. Hall*, 43 Mass. (2 Met.) 353; *Mahoney v. Libbey*, 123 Mass. 20, 25 Am. Rep. 6; *Grogan v. Pennsylvania R. Co.*, 213 Pa. 340, 62 Atl. 924; *Clapp v. La Grill*, 103 Tenn. 164, 52 S. W. 134. Said the supreme court of Massachusetts in *Mahoney v. Libbey*, 123 Mass. 20, 25 Am. Rep. 6: "But, assuming that this duty is absolute while the structures are in the condition in which the owner has put them, or knows or is bound to know them to be, yet, when he has been guilty of no negligence, and the condition of the structures has been changed so as to render them injurious or dangerous, by vis major, or the act of a third person, which the owner had no reason to anticipate, he cannot be held liable for the injury, or bound to make the structures safe, until he has had a reasonable time, after they have so become dangerous, to take the necessary precaution."

It follows, therefore, that the owner of a building is not answerable for the falling of bricks from his chimney which is caused by a third person leaning against the chimney who has entered on the roof without the knowledge of the owner, through the premises of another: *Strasburger v. Vogel*, 103 Md. 85, 63 Atl. 202; *Scullin v. Dolan*, 4 Daly, 163.

But if a proprietor permits third persons to place his premises in a situation to cause injury, he is responsible: *Gardner v. Heartt*, 2

Barb. 165. And where the owner of property knows that it has been rendered dangerous by the act of others, and yet allows the dangerous condition to remain, he becomes responsible therefor if a person suffers injuries therefrom. Thus, when a wall falls because of the pulling by an electric wire attached thereto by third persons, the owner is liable if he knew, or in the exercise of reasonable diligence might have known, that the wire was so attached: *O'Connor v. Andrews*, 81 Tex. 28, 16 S. W. 628.

Persons who by their several acts or omissions maintain a public or common nuisance are jointly and severally liable for such damages as are the direct, immediate, and probable consequence of it. Where, therefore, three several owners of adjoining lots on a city street permit a brick wall extending along the fronts of their several lots to remain in a leaning, unsafe, and dangerous condition, after the buildings of which they were a part have been burned down, and such wall falls upon and kills a person who was lawfully standing on the sidewalk adjacent thereto, all of said owners are jointly and severally liable, although no part of the wall of one of them touched him: *Simmons v. Everson*, 124 N. Y. 319, 21 Am. St. Rep. 676, 28 N. E. 911. For an extended discussion of actions against two or more persons creating or maintaining a nuisance, see the note to *Mansfield v. Bristor*, 118 Am. St. Rep. 868.

The liability of a property owner for a nuisance which he did not create is the subject of a note to *Leahan v. Cochran*, 86 Am. St. Rep. 508; and the liability to third persons of lessors of real estate is the subject of an extended note to *Griffin v. Jackson Light etc. Co.*, 92 Am. St. Rep. 499.

II. Erection and Maintenance of Buildings and Structures.

a. **Insecure Walls and Structures.**—While the owner of a building is not an insurer against accidents from its condition, yet, so far as the exercise of ordinary care enables him to do so, he is bound to keep it in such condition that it will not, by any insecurity or insufficiency for the purpose to which it is put, injure any person rightfully in, around, or passing it: *St. Joseph Ice Co. v. Bertch*, 33 Ind. App. 491, 71 N. E. 56; *Ryder v. Kinsey*, 62 Minn. 85, 54 Am. St. Rep. 623, 64 N. W. 94, 34 L. R. A. 557. Buildings near a highway should be constructed with sufficient strength to stand ordinary storms, and the owner must take care that they are kept in proper condition: *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Uggla v. Brokaw*, 117 App. Div. 586, 102 N. Y. Supp. 857. If they are dangerous from faulty construction or other cause, he must inspect them from time to time; but it seems that he is held only to the duty of reasonable inspection: *Connolly v. Des Moines Inv. Co.*, 130 Iowa, 633, 105 N. W. 400. It is negligence to leave broken window glass above a highway where it is likely to be precipitated by ordinary winds upon pedestrians who are passing: *Detzur v. B. Stroh Brewing Co.*, 119 Mich.

282, 77 N. W. 948, 44 L. R. A. 500. And if a traveler upon a highway is injured by the fall of an awning attached to the building, the owner of such building is prima facie guilty of negligence: Waller v. Ross, 100 Minn. 7, 117 Am. St. Rep. 661, 110 N. W. 252, 12 L. R. A., N. S., 721.

The owner of a building will not be held liable for damages caused by the falling of the walls, though it appears that he was informed on Sunday, the day previous to the injury, that the walls were settling and leaning, and had said that he would attend to the matter, but really did not do so on that day, unless it also appears that the danger was so obvious that a reasonable and prudent man, the safety of whose person and property depended upon the walls, would have taken immediate measures on that day to have secured them: Schwartz v. Gilmore, 45 Ill. 455, 92 Am. Dec. 227.

b. Walls Standing After Fire.—The owner of a building who leaves the walls standing in a dangerous condition after a fire is liable, after the expiration of a reasonable time, for failing to repair them or to take measures to prevent them from falling. He is not relieved from responsibility by the fact that persons attempting to save the contents interfere with his work: Lauer v. Palms, 129 Mich. 671, 89 N. W. 694, 58 L. R. A. 67. Nor is he relieved from liability by the fact that the building is in the hands of the insurance company for repairs: Steppe v. Alter, 48 La. Ann. 363, 55 Am. St. Rep. 281, 19 South. 147. It has been affirmed, however, that where he employs a competent mechanic to examine the walls, he is not liable for the injuries occasioned by their falling after the mechanic reports them to be safe: Freeman v. Carter, 28 Tex. Civ. App. 571, 67 S. W. 527. Where there is standing in close proximity to other property the wall of a building destroyed by fire, the fall of which must injure a neighbor, the owner must pull down the wall or use such care in its maintenance as will absolutely prevent injuries, except from causes over which he can have no control, such as vis major, acts of public enemies, or wrongful acts of third persons which human foresight could not reasonably be expected to anticipate and prevent: Ainsworth v. Lakin, 180 Mass. 397, 91 Am. St. Rep. 314, 62 N. E. 746, 57 L. R. A. 132. The owner of a building on the side of a public alley in city who negligently permits the walls thereof, weakened and made dangerous by fire, to remain unsupported, is liable to the owner of a building on the opposite side of the alley for injury thereto caused by the ruined walls falling upon it, although the city marshal volunteered to take charge of the walls and the owner assented: City of Anderson v. East, 117 Ind. 126, 10 Am. St. Rep. 35, 19 N. E. 726, 2 L. R. A. 712.

In Sessengut v. Posey, 67 Ind. 408, 33 Am. Rep. 98, the owner of a house which had been burned suffered the walls to stand in an unsafe and tottering condition for three weeks, meantime removing the rubbish. He then contracted for the rebuilding of the house. About

seven or eight weeks after the fire, and while the premises were in the charge and possession of the contractor, one of the walls fell on the buildings of an adjoining owner. It was held that the owner of the ruinous premises was liable for the damage.

In *Mahoney v. Libbey*, 123 Mass. 20, 25 Am. Rep. 6, the defendant's building and one on an adjoining lot, the side walls of which were very near each other, were destroyed by a fire, leaving the walls partly standing, with rubbish heaped up to the top of each. Six months afterward, while the plaintiff was removing the wall on the adjoining lot, the defendant's wall fell, injuring him. In the absence of evidence that the defendant's wall was dangerous, or would have fallen before the fire or before the removal of the other wall, or that the defendant knew or was notified of that removal, or that it was contemplated, it was decided that an action for such injury could not be maintained.

A part owner of a party-wall who negligently permits it to stand after its partial destruction and weakening by fire is liable to another part owner who is using part of the wall for damages resulting to the latter from a falling of another portion of the wall in which he has no interest and is not using: *Beidler v. King*, 209 Ill. 302, 101 Am. St. Rep. 246, 70 N. E. 763.

An adjoining owner, who has notified the owner of a dangerous standing wall of its insecure condition, is not guilty of contributory negligence in not taking means to prevent such wall from falling, to his injury and resulting damage: *Beidler v. King*, 209 Ill. 302, 101 Am. St. Rep. 246, 70 N. E. 763.

c. **Dangerous Chimneys.**—One who constructs a chimney so if it falls it will fall upon and injure the adjoining premises, is bound to so construct it that it will withstand any gales which, from past experience, are reasonably to be expected in that locality. He cannot relieve himself from responsibility in case the chimney is defective by employing a competent mason to examine it and relying on his own opinion. He is not, however, an insurer of the safety of the chimney, and if its fall occurs from any hidden defect which no examination could have disclosed or prevented, he is not liable: *Cork v. Blossom*, 162 Mass. 330, 44 Am. St. Rep. 362, 38 N. E. 495, 26 L. R. A. 256. Where stones or brick falling from a defective chimney into the street where they injure pedestrians, the owner is chargeable with negligence: *Scullin v. Dolan*, 4 Daly, 163.

d. **Falling Tools, Bricks and Material.**—A person engaged in erecting a building near a public street, or near premises where other people are likely to be in the exercise of their rights, is held to a degree of care commensurate with the danger to take precautions to prevent injury from the falling of tools, brick or building materials; if he does not exercise due care and injury to such persons results therefrom, he must respond in damages: *Mayer v. Thompson-Hutchinson Building Co.*, 104 Ala. 611, 53 Am. St. Rep. 88, 16 South. 620,

28 L. R. A. 433; *Dixon v. Pluns*, 98 Cal. 384, 35 Am. St. Rep. 180, 33 Pac. 268, 20 L. R. A. 698; *Jager v. Adams*, 123 Mass. 26, 25 Am. Rep. 7; *Smith v. Humphreyville* (Tex. Civ. App.), 104 S. W. 495; *Smith v. Milwaukee Builders' and Traders' Exchange*, 91 Wis. 360, 51 Am. St. Rep. 912, 64 N. W. 1041, 30 L. R. A. 504. In the case of *Murray v. McShane*, 52 Md. 217, 36 Am. Rep. 367, a foot-passenger on a city street sat for a moment on the door-sill of a house fronting on the street, to tie his shoe, and there was injured by a brick falling from the dilapidated wall of the house, upon his head, which was within the street lines. It was held that the owner of the house was liable.

The owner of a city lot on which he is constructing a building is not liable for injury to a trespassing child caused by the falling of building stone while playing on the lot without the knowledge of the owner, or any express or implied invitation or inducement to enter upon the premises: *Witte v. Stifel*, 126 Mo. 295, 47 Am. St. Rep. 668, 28 S. W. 891.

e. **Roof Casting Snow and Water on Other Premises.**—One who so constructs a building that the roof casts water, snow or ice on the premises or buildings of an adjoining owner is liable to the latter for such injuries as he sustains: *Conner v. Woodfill*, 126 Ind. 85, 22 Am. St. Rep. 568, 25 N. E. 876; *Copper v. Dolvin*, 68 Iowa, 757, 56 Am. Rep. 872, 28 N. W. 59; *Davis v. Niagara Falls Tower Co.*, 171 N. Y. 336, 89 Am. St. Rep. 817, 64 N. E. 4, 57 L. R. A. 545; *Huber v. Stark*, 124 Wis. 359, 109 Am. St. Rep. 937, 102 N. W. 12. If he fails to guard his neighbors against such injuries, he cannot say in defense of their action for damages that no damage would have resulted had their buildings been properly constructed: *Fitzpatrick v. Welch*, 174 Mass. 486, 55 N. E. 178, 48 L. R. A. 278; *Davis v. Smith*, 144 N. C. 297, 56 S. E. 940; *Gould v. McKenna*, 86 Pa. 297, 27 Am. Rep. 705. Where two buildings on adjacent lots are so situated that the eaves of one come within a few inches of the wall of the other, and have no gutter or water-conductor, and the eavesdrip falls upon and injures the wall of the other, the owner of the former is liable for the damage: *Hazeltine v. Edgmand*, 35 Kan. 202, 57 Am. Rep. 157, 10 Pac. 544.

f. **Roof Casting Snow and Ice on People.**—The owner of a lot fronting on a city street, who erects thereon a building with a roof so constructed that ice and snow collecting on it naturally falls upon the sidewalk and injures a person traveling thereon with due care, is liable, without other proof of negligence, for the injury. And it is no defense that he exercised all the care he could to remove the snow and ice from the roof; the gist of the negligence consists, not in the management of the roof, but in its improper and unsafe construction: *Shepard v. Creamer*, 160 Mass. 496, 36 N. E. 475; *Hannem v. Pence*, 40 Minn. 127, 12 Am. St. Rep. 717, 41 N. W. 657. "It appears to us," says the supreme court of Massachusetts, in *Shipley*

v. Fifty Associates, 106 Mass. 194, 8 Am. Rep. 318, "that the defendants have no right to erect or maintain a building so near to the street, and with a roof of such a construction that, notwithstanding all the care that can be taken, passengers upon the sidewalk shall be subjected to the kind of injury complained of in this case. This would be an appropriation of the sidewalk, or an application of it to their own convenience, at the risk of the traveler, and without regard to public right, which they cannot lawfully make. No man would claim for them the right to collect, in one stream, the rain that falls upon their roof, and pour it by means of a spout upon the street below. They have no better right to collect and retain the snow till it falls by its own weight. In either case, it would be an attempt to extend their right as proprietors beyond the limits of their own property, and to secure an advantage that does not belong to them, at the expense of their neighbor, or of the traveler, whose rights for this special purpose are as complete as those of an adjoining proprietor."

One who is unloading a wagon in the street in a reasonable and proper manner is considered a traveler, so as to be entitled to recover for injuries caused by snow falling from an adjacent building. And the negligence of the owners of the building is the proximate cause of his injuries where the snow strikes his horse, causing it to start and throw him from his wagon: *Smethurst v. Barton Square Independent Congregational Church*, 148 Mass. 261, 12 Am. St. Rep. 550, 19 N. E. 387, 2 L. R. A. 695.

g. Erection of Spite Fences.—The erection of fences and other structures by one land owner for the purpose of annoying his neighbor has been the subject of frequent litigation; and the generally accepted rule has become, that in the absence of a contrary statutory provision the erection by one proprietor upon his own premises of a high or unsightly fence or other structure which obstructs the light, air or view of an adjoining proprietor is not unlawful or a nuisance per se, although the motive in building the fence or structure may have been malicious or for the purpose of annoying the neighbor. This rule is based on the principle that where one has a legal right to do a thing, his motive in exercising that right is immaterial; in other words, a person having a legal right can enjoy it without having his motive questioned: *Giller v. West*, 162 Ind. 17, 69 N. E. 548; *Saddler v. Alexander*, 21 Ky. Law Rep. 1835, 56 S. W. 518; *Kuzmiak v. Kuzminski*, 107 Mich. 444, 61 Am. St. Rep. 344, 65 N. W. 275; *Bordeaux v. Greene*, 22 Mont. 254, 74 Am. St. Rep. 600, 56 Pac. 218; *Horan v. Byrnes*, 72 N. H. 93, 101 Am. St. Rep. 670, 54 Atl. 945, 62 L. R. A. 602; *Letts v. Kessler*, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177; *Koblegard v. Hale*, 60 W. Va. 37, 116 Am. St. Rep. 868, 53 S. E. 793; *Metzger v. Hochrein*, 107 Wis. 267, 81 Am. St. Rep. 841, 83 N. W. 308, 50 L. R. A. 305; *Anthony v. Wilkinson Live Stock Co. v. McIlquam*, 14 Wyo. 209, 83 Pac. 364.

This rule permitting spite fences has been abrogated by statute in many states, and the law so modified that one proprietor cannot lawfully erect a fence on the boundary line solely for the purpose of gratifying his malice toward his neighbor. Statutes of this kind are certainly reasonable in curtailing the right of one to use his property as he pleases, and they have been upheld as constitutional: *Western Granite & M. Co. v. Knickerbocker*, 103 Cal. 111, 37 Pac. 192; *Whitlock v. Uhle*, 75 Conn. 423, 53 Atl. 891; *Lord v. Langdon*, 91 Me. 221, 39 Atl. 552; *Rideout v. Knox*, 148 Mass. 368, 12 Am. St. Rep. 560, 19 N. E. 390, 2 L. R. A. 81; *Lovell v. Noyes*, 69 N. H. 263, 46 Atl. 25; *Karasek v. Peier*, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345. It is not their purpose to curtail the use of the land generally, nor to curtail the owner's right to those uses of property which are the immediate rights of ownership, but their purpose is limited to curtailing a more or less necessary incident of ownership, namely, erecting a fence or other structure for the sake of annoying a neighbor. Accordingly, it has been held that while the application of such statutes is not confined to fences on the boundary line, it does not extend to fences which are not substantially adjoining the injured person's land: *Brostrom v. Lauppe*, 179 Mass. 315, 60 N. E. 785.

III. Placing of Earth Near Boundary Line.

One who placed an unusual quantity of earth near the boundary line of his land must take precautions for its confinement so that adjoining owners will not be injured thereby: *American Security & Trust Co. v. Lyon*, 21 App. D. C. 122. Where sand is placed on a vacant lot so as to press against a wall on an adjoining lot with such force as to injure the wall, the owner of the first lot is liable: *Barnes v. Masterson*, 56 N. Y. Supp. 939, 38 App. Div. 612. And where one places a bank of dirt on his own land above his neighbor's, he is bound to erect a proper retaining wall to prevent the dirt from encroaching on his neighbor's premises. This rule applies to cities as well as to individuals. The fact that one has built a wall as a foundation to his building is not an invitation to his neighbors to bank earth against it: *Abrey v. Detroit*, 127 Mich. 374, 86 N. W. 785.

IV. Growing Trees and Vegetation.

a. **Branches Overhanging Boundary Line.**—It has been said that where the limbs of trees near a boundary line overhang the land of the adjoining owner, he may cut them off at the line, and if the roots penetrate his soil, he may dig them out, but that he can carry his objection no further: *Grandona v. Lovdal*, 70 Cal. 161, 11 Pac. 623; *Harndon v. Stultz*, 124 Iowa, 440, 100 N. W. 329; *Tanner v. Wallbrunn*, 77 Mo. App. 262. Yet the mere fact that branches overhang the land of an adjoining owner cannot reasonably be said to constitute a nuisance so as to authorize their destruction or a re-

covery of damages, unless he suffers sensible damages: *Countryman v. Lighthill*, 24 Hun, 405.

In *Grandona v. Lovdal*, 78 Cal. 611, 12 Am. St. Rep. 121, 21 Pac. 366, it is affirmed that the maintenance of growing trees upon a boundary line between plaintiff's and defendant's land cannot be enjoined as a nuisance, where the only damage shown to have resulted to the plaintiff from such trees were: 1. That they might have interfered with the growing of fruit trees had any been planted; 2. That they crowded over the fences on the plaintiff's land at a place where it was the duty of the defendant to repair them.

And in *Musch v. Burkhart*, 83 Iowa, 301, 32 Am. St. Rep. 305, 48 N. W. 1025, 12 L. R. A. 484, it is decided that when trees from thirty to sixty feet high on the boundary line between two tracts of land are used by the owner on the south as a fence by fastening wire thereto, and afford valuable protection from storm and wind to his buildings and stock, while they render a strip of land four or five rods wide, belonging to the owner on the north, unproductive, such adjoining owners are tenants in common as to the trees, and either may be restrained by injunction from cutting down or destroying them.

b. **Roots of Trees Near Division Line.**—Where the roots of a tree run into and pollute a well on the lands of an adjoining owner, the latter may have an action for the damage, after refusal of the owner of the tree to abate the nuisance: *Buckingham v. Elliott*, 62 Miss. 296, 52 Am. Rep. 188. In *Brock v. Connecticut etc. R. R. Co.*, 35 Vt. 373, a railroad company was enjoined from planting out willow trees along the line of its right of way, on proof that the spread of the roots into and the branches over the land of an adjoining proprietor would occasion him serious injury.

c. **Noxious Weeds and Grasses.**—It seems that there is no duty as between adjoining owners of land to cut noxious weeds and grasses which are the natural growth of the land: *Giles v. Walker*, L. R. 24 Q. B. D. 656. And the mere spreading to neighboring lands of Bermuda grass planted by a railway company upon its right of way does not render the company liable for the damages caused thereby, in the absence of proof that the planting of such grass was an unjustifiable use of the property, or that a person of ordinary prudence would not have so planted it: *Gulf etc. Ry. Co. v. Oakes*, 94 Tex. 155, 86 Am. St. Rep. 835, 58 S. W. 999, 52 L. R. A. 293.

V. Pollution of Wells and Underground Waters.

While one may have the right to appropriate underground water on his premises and thus prevent its use by another, he has no right to pollute, contaminate or poison it, however innocently, so that when it reaches his neighbor's land it is in such condition as to be unfit for use, either by man or beast. Therefore, one who suffers filthy water or substances to stand in a vault, or who collects injurious or

offensive matter upon the surface of his premises, which by percolation through the soil or by diffusion over the surface, pollutes his neighbor's well, is liable for the damages sustained. To entitle the injured person to damages in such a case, it is enough that they are the natural and probable consequences of the defendant's acts; it is not necessary that the fact of contamination be known to the defendant: *Brown v. Illius*, 27 Conn. 84, 71 Am. Dec. 49; *Ball v. Nye*, 99 Mass. 582, 97 Am. Dec. 56; *Beatrice Gas Co. v. Thomas*, 41 Neb. 662, 43 Am. St. Rep. 711, 59 N. W. 925.

One who maintains a warehouse on his land for the storage of coal-oil, and permits it to leak from casks and penetrate the ground and contaminate an underground stream of water, from which a spring on the land of an adjacent proprietor is fed, is answerable for the damages thus occasioned, though he did not know of the injury which the percolation of the oil was doing to the spring: *Kinnaird v. Standard Oil Co.*, 89 Ky. 468, 25 Am. St. Rep. 545, 12 S. W. 937. The court in this case, in rendering its opinion, said: "It seems to us, after a careful review of the authorities referred to by counsel for the corporation, all of which are entitled to great weight, that there is a manifest distinction between the right of the owner of land to use the underground water upon it that originates from percolation, or is found in hidden veins, and the right to contaminate it so as to injure or destroy the water when passing to the adjoining land of his neighbor. It is a familiar doctrine that one must so use his property as not to injure his neighbor; and because the owner has the right to make an appropriation of all the underground water, and thus prevent its use by another, he has no right to poison it, however innocently, or to contaminate it, so that when it reaches his neighbor's land it is in such condition as to be unfit for use, either by man or beast. One may be entitled, by contract with his neighbor, to all the water that flows in a stream on the surface that passes through the land of both; and while he can thus appropriate it, he has no right to pollute the water in such manner as when it passes to his neighbor its use becomes dangerous or unhealthy to his family, or to the beast on his farm."

Of course one is not an insurer that the use of his property shall not pollute the well or spring of his neighbor. Therefore, a person who buries the carcass of an animal on his own land is not responsible in case his neighbor's spring is thereby polluted, unless the circumstances are such as to show that a man of ordinary prudence should have anticipated that such a result would probably follow: *Long v. Louisville etc. R. R. Co. (Ky.)*, 107 S. W. 203, 13 L. R. A., N. S., 1063.

VI. Creation of Offensive Fumes and Vapors.

Where one puts his property to such a use that it emits offensive, poisonous or noxious fumes and vapors, producing danger to health and injury to adjoining property, he may be enjoined from continu-

ing this injurious use of his property: Appeal of Pennsylvania Lead Co., 96 Pa. 116, 42 Am. Rep. 534. See, also, Sullivan v. Royer, 72 Cal. 248, 1 Am. St. Rep. 51, 13 Pac. 655; McMorran v. Fitzgerald, 106 Mich. 649, 58 Am. St. Rep. 511, 64 N. W. 569. And the owner of real property who wrongfully causes noxious vapors to rise on the land of another is liable therefor, the same as if such vapors had been wrongfully caused to rise from his own land: Garland v. Aurin, 103 Tenn. 555, 76 Am. St. Rep. 699, 53 S. W. 940, 48 L. R. A. 862.

VII. Operation of Machinery and Appliances.

One who operates machinery or appliances on his own land must do so with due regard to the rights of adjoining proprietors; failing to do so he is answerable to them for damages resulting to their persons or properties, yet everyone is entitled to make any legitimate use of his premises in the way of operating machinery, boilers, and appliances generally; and the fact that injury results therefrom, because of an explosion or other accident, raises no presumption of negligence. His liability to his neighbors depends upon the question whether or not he has used reasonable care and skill: Weitzmann v. Barber Asphalt Co., 190 N. Y. 452, ante, p. 560, 83 N. E. 477; Barber v. Manchester, 72 Conn. 675, 45 Atl. 1014; Ft. Wayne Cooperage Co. v. Page (Ind. App.), 82 N. E. 83; Snyder v. Philadelphia Co., 54 W. Va. 149, 102 Am. St. Rep. 941, 46 S. E. 366, 63 L. R. A. 896; Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; Cosulich v. Standard Oil Co., 122 N. Y. 118, 19 Am. St. Rep. 475, 25 N. E. 259; Davis v. Charleston & W. C. Ry. Co., 72 S. C. 112, 51 S. E. 552; Vieth v. Hope Salt & Coal Co., 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410.

VIII. Setting Out Fires.

The liability of land owners for loss of property resulting from fires set out by them has been discussed in a previous volume of this series of Reports: See note to McNally v. Colwell, 30 Am. St. Rep. 501. One has a right to set out a fire on his premises for the purposes of husbandry, and for other lawful purposes, and the mere setting out of the fire for the mere spreading thereof, which results in the loss of his neighbor's property, does not of itself establish negligence. This rule is often applied where one uses fire as an agency for burning brush, stubble and rubbish for the purpose of improving his land: Dolby v. Hearn, 1 Marv. 153, 37 Atl. 45; Bolton v. Calkins, 102 Mich. 69, 60 N. W. 297; Vansyoc v. Freewater Cemetery Assn., 63 Neb. 143, 88 N. W. 162; Hitchcock v. Riley, 89 N. Y. Supp. 890, 44 Misc. Rep. 260; Hays' Admr. v. Miller, 6 Hun, 320, affirmed 70 N. Y. 112; Fahn v. Reichart, 8 Wis. 255, 76 Am. Dec. 237. The general rule is that a property owner has a right to kindle a fire upon his premises for the purpose of reducing his land to cultivation, providing he does so at a proper time, under ordinarily favorable circumstances, and in a reasonably prudent manner. In such

case, he is not liable to an adjoining owner for injury arising from the spread of the fire, unless he is guilty of negligence in not using proper care to prevent its spread: *Brummit v. Furness*, 1 Ind. App. 401, 50 Am. St. Rep. 215, 27 N. E. 656.

“The burning of a fallow, and of brush, logs, and rubbish, on the surface of one’s own land, is of frequent necessity in husbandry, and is a lawful act unless the fire is set at an improper time, or is carelessly managed. As is said in 2 *Shearman and Redfield on Negligence*, section 669: ‘The owner of land has a right to burn the fallow and wood thereon for the purpose of bringing the land into cultivation, and is not liable for injuries caused to his neighbors thereby, without proof of some other act or default, or some other circumstance making the act itself negligent. He must, however, use ordinary care to prevent spreading the fire upon the land of others.’ The purpose may be lawful, the time opportune, and the manner prudent; yet if, in consequence of negligence in the care of the fire, it spreads, and injures the property of another, the liability attaches. The gist of the action for the injury is negligence, and it is sufficient if a want of ordinary care is established”: *Needham v. King*, 95 Mich. 303, 54 N. W. 891.

“In this country, with few exceptions,” said the supreme court of Nebraska, “the rule has always prevailed that one may lawfully kindle a fire on his own premises for purposes of husbandry, and that he does not become liable for injury caused by it to the property of another, in the absence of negligence in its management. This being the rule, we are of the opinion that one who kindles a fire on his own land is not bound to anticipate and guard against a whirlwind or any extraordinary high winds that may ensue, and such is the holding in several well-considered cases in other states”: *Bock v. Grooms* (Neb.), 92 N. W. 603. But one who negligently sets fire to his own building is liable for the consequences when the fire spreads to the property of others, although atmospheric conditions render the damages more than ordinarily serious: *Lillibridge v. McCann*, 117 Mich. 84, 72 Am. St. Rep. 553, 75 N. W. 288, 41 L. R. A. 381.

A property owner cannot rightfully set out a fire for the purpose of burning rubbish or otherwise improving his premises without taking all reasonable precautions which a prudent man would take under the circumstances to guard against the spread of the fire to neighboring premises: *Harris v. Savage*, 70 Kan. 561, 79 Pac. 113; *Allen v. Bainbridge*, 145 Mich. 366, 108 N. W. 732; *Ulrich v. Stephens* (Wash.), 93 Pac. 206. But if he has not been negligent in setting out the fire, he is required to exercise only reasonable diligence to prevent its spread to his neighbor’s property: *Hayes v. Brandt*, 80 Ark. 592, 98 S. W. 368; *Baird v. Chambers*, 15 N. D. 618, 109 N. W. 61, 6 L. R. A., N. S., 882.

“Although setting a fire on one’s own land for a proper purpose is a lawful act, and there is no liability for it unless there is negli-

gence in setting or caring for it, such a fire immediately becomes a nuisance to adjacent property if it is negligently suffered to send sparks or flames into combustible material on the property. The sending of sparks which kindle fires upon adjacent property is not strictly a trespass, but it is much like a trespass. The fire which sends them, if negligently suffered to burn, is strictly a nuisance. A neighbor claiming damages because his property is injured by it presents his case properly if he states the facts which constitute the nuisance, and alleges the injury. His own conduct has no such probable connection with such an injury as to require him to aver negatively his freedom from fault': *King v. Norcross*, 196 Mass. 373, 82 N. E. 17.

In starting a fire one must have regard to the season of the year, the atmospheric conditions, the combustibility of materials, the nearness of inflammable substances on adjoining premises, and other circumstances which a prudent man would take into consideration before making use of so dangerous an agent as fire: *Brummit v. Furness*, 1 Ind. App. 401, 50 Am. St. Rep. 215, 27 N. E. 656; *Allen v. Brainbridge*, 145 Mich. 366, 108 N. W. 732. It may be regarded as negligence per se to set out a fire at a season of the year when such a fire is prohibited by statute: *Kelley v. Anderson*, 15 S. D. 107, 87 N. W. 579.

If a person lights a fire upon his own premises, on which he has maintained inflammable material extending to his neighbor's lands, and the fire, fed by this material, spreads upon abutting lands, the damage is the proximate result of the act and a liability exists; but this is the limit, and, if the fire once set runs across the lines of an abutting owner, and upon the lands of other proprietors, the damage caused to the latter is the remote result of starting the fire, and the one who started it is not answerable for such damage: *Hoffman v. King*, 160 N. Y. 618, 73 Am. St. Rep. 715, 55 N. E. 401, 46 L. R. A. 672. The doctrine of proximate cause, as applied to the spread of fires, will be found discussed at length in the note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 823.

IX. Use and Storage of Explosives.

a. **Storage in General.**—The duty and liability of persons handling or storing on their premises substances of a highly explosive nature, such as dynamite, have been discussed in a previous note in this series of reports (note to *Kinney v. Koopman*, 67 Am. St. Rep. 134), so that no further consideration of that question will here be given except to call attention to the general rule that one who stores or handles such substances is held to the highest degree of care, and must take every reasonable precaution to prevent injury to the person or property of others: *Flynn v. Butter*, 189 Mass. 377, 75 N. E. 730; *Mattson v. Minnesota etc. R. R. Co.*, 95 Minn. 477, 111 Am. St. Rep. 483, 104 N. W. 443, 79 L. R. A. 403; *Sowers v. McManus*, 214

Pa. 244, 63 Atl. 601; Fort Worth etc. Ry. Co. v. Beauchamp, 95 Tex. 496, 93 Am. St. Rep. 684, 68 S. W. 502, 58 L. R. A. 716. Same authorities appear to take the view that he is liable for the consequences of an explosion, without proof of negligence: McAndrews v. Collerd, 42 N. J. L. 189, 36 Am. Rep. 508; Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co., 60 Ohio St. 560, 71 Am. St. Rep. 740, 54 N. E. 528, 45 L. R. A. 658.

b. **Blasting Which Throws Rocks and Debris.**—Where one explodes blasts on his own land and thereby throws rock, earth or debris on the premises of his neighbor, he commits a trespass and is answerable for the damage caused, irrespective of whether the blasting is negligently done: Fitzsimons & Connell Co. v. Braun, 199 Ill. 390, 65 N. E. 249, 59 L. R. A. 421; Hoffman v. Walsh, 117 Mo. App. 278, 93 S. W. 853; Faust v. Pope (Mo. App.), 111 S. W. 878; Blackford v. Heman Const. Co. (Mo. App.), 112 S. W. 287; Hay v. Cohoes Co., 2 N. Y. 159, 51 Am. St. Rep. 279; Simmons v. McConnell, 86 Va. 494, 10 S. E. 838. Under this rule it has been declared that a railroad company is liable to adjacent proprietor for injuries to their property caused by blasting in the construction of its road, although the blasting is necessary and is done without negligence: Gossett v. Southern Ry. Co., 115 Tenn. 376, 112 Am. St. Rep. 846, 89 S. W. 737, 1 L. R. A., N. S., 97. The same rule applies to the contractor who is doing the blasting: Langshorne v. Wilson (Ky.), 91 S. W. 254.

The case of Hay v. Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279, cited above, has become a leading authority on this question. "We think that the Hay case," to quote from Sullivan v. Dunham, 161 N. Y. 290, 76 Am. St. Rep. 274, 55 N. E. 923, 47 L. R. A. 715, "has always been recognized by this court as a sound and valuable authority. After standing for fifty years as the law of the state upon the subject, it should not be disturbed, and we have no inclination to disturb it. It rests upon the principle, founded in public policy, that the safety of property generally is superior in right to a particular use of a single piece of property by its owner. It renders the enjoyment of all property more secure by preventing such a use of one piece by one man as may injure all his neighbors. It makes human life safer by tending to prevent a land owner from casting, either with or without negligence, a part of his land upon the person of one who is where he has a right to be. It so applies the maxim of 'sic utere tuo' as to protect the person and property from direct physical violence, which, although accidental, has the same effect as if it were intentional. It lessens the hardship by placing absolute liability upon the one who causes the injury."

c. **Blasting Which Merely Causes Concussion.**—Some courts have refused to extend the foregoing doctrine to cases where the injuries from blasting are not due to actual physical invasion, but are merely consequential and due to concussion or vibration of the air or earth. As has been expressed by the New York courts, "where the injury

is not direct, but consequential, such as is caused by concussion, which, by shaking the earth, injures property, there is no liability, in the absence of negligence": *Sullivan v. Dunham*, 161 N. Y. 290, 76 Am. St. Rep. 274, 55 N. E. 923, 47 L. R. A. 715; *Holland House Co. v. Baird*, 169 N. Y. 136, 62 N. E. 149. "It is doubtless the rule," said the court in *Fitzsimons v. Braun*, 94 Ill. App. 533, "well-established in the courts of New York and New Jersey, and approved by some of the text-writers, that when blasting, conducted upon ground where the operator has lawful right to blast, by the mere disturbance of the earth or air causes injury to adjacent property, a liability for such injury can be imputed only when there has been some negligence in the manner or process of handling the explosive. It is there held that it is not enough to impute liability that the blasting, however carefully conducted, would naturally cause the injury, provided it is conducted where it lawfully might be, and provided that no substance is thrown upon the premises injured so as to constitute a physical invasion of them"; citing *Simon v. Henry*, 62 N. J. L. 486, 41 Atl. 692; *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156, 30 Am. St. Rep. 649, 31 N. E. 328, 17 L. R. A. 220; *Booth v. Rome W. & O. T. R. R. Co.*, 140 N. Y. 267, 37 Am. St. Rep. 552, 75 N. E. 592, 24 L. R. A. 105; *French v. Vix*, 143 N. Y. 90, 37 N. E. 612.

"Undoubtedly each person has a right," declares the supreme court of Alabama, "to use his own property, and to improve it for the uses and purposes for which he holds it, in any manner which will enable him best to adapt it to his purposes, provided he does not invade the rights of his neighbor; and as is said in a well-considered, New York case, hereafter cited, 'to exclude the defendant from blasting to adapt its lot to the contemplated uses, at the instance of the plaintiff, would not be a compromise between conflicting rights, but an extinguishment of the right of one for the benefit of the other' (*Booth v. R. W. & Q. T. R. Co.*, 140 N. Y. 267, 37 Am. St. Rep. 552, 35 N. E. 592, 24 L. R. A. 105). Such a rule would allow one man to purchase a lot, and excavate and improve without limit, and then demand that all surrounding property should remain in a state of nature. We think that, according to the best considered decisions, the rule is that if one, in blasting upon his own lands, invades the premises of his neighbor, by throwing stones and debris thereon, he is liable for the resulting injury, but for any other injury, such as may result from the mere concussion of the atmosphere, sound, or otherwise, there is no liability, unless it is shown that the work was done negligently and that the injury was the result of negligence, and not the result of blasting according to the usual methods and with reasonable care": *Bessemer Coal etc. Co. v. Doak* (Ala.), 44 South. 627, 631.

The doctrine of the Alabama, New York and New Jersey courts appeals to us as sound. The Illinois court of appeals, however, has

taken a different view, and declined to make any distinction between those damages which are the result of a direct physical invasion and those which are merely consequential from vibration and concussion. In reaching this conclusion, the court relies upon the following authorities: *Colton v. Onderdonk*, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395; *Mears v. Dole*, 135 Mass. 508; *Harding v. Boston*, 163 Mass. 14, 39 N. E. 411; *Cahill v. Eastman*, 18 Minn. 324, 10 Am. Rep. 184; *Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co.*, 60 Ohio St. 560, 71 Am. St. Rep. 740, 54 N. E. 528, 45 L. R. A. 658. The view of the Illinois court is well expressed in the following extract from its opinion: "It would seem, therefore, that while all decisions agree as to liability under circumstances like those here presented, where the injury resulting from the use of dangerous explosives is a direct injury by physical invasion, the courts of New York and New Jersey distinguish an injury which results from concussion or vibration only, and hold that it is a consequential injury for which no liability can be imputed unless through specific negligence in the method of use; and the courts of Massachusetts, Ohio, California and Minnesota disregard any such distinction, and hold to a liability for injuries, whether direct or consequential, if they are the probable and natural result of the use of a dangerous agency. We regard the announcement in the *Harwood* case (*Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17), as indicating that our supreme court would adopt the latter doctrine": *Fitzsimons v. Braun*, 94 Ill. App. 533.

Our study of the opinions of the different courts on this subject yields the belief that when trespass or continuous injury is absent, liability for injury due to an explosion occurring in the conduct of a business depends on negligence, and that most courts expressly or impliedly proceed on this theory, although occasionally they differ as to what is sufficient proof of negligence, and dispose of the case in a manner which disguises the fact that negligence is regarded as essential to a recovery: *Houghton v. Loma Prieta Lumber Co.* (Cal.), 93 Pac. 82; *Thurmond v. Ash Grove White Lime Co.*, 125 Mo. App. 73, 102 S. W. 617; *Booth v. Rome etc. R. R. Co.*, 140 N. Y. 267, 37 Am. St. Rep. 552, 95 N. E. 592, 24 L. R. A. 105; *Page v. Dempsey*, 184 N. Y. 245, 77 N. E. 9; *Tucker v. Mack Paving Co.*, 61 App. Div. 521, 70 N. Y. Supp. 688; *De Carvajal v. Young Men's Christian Assn.*, 37 Misc. Rep. 727, 76 N. Y. Supp. 474; *Luria v. Cusick*, 47 Misc. Rep. 126, 93 N. Y. Supp. 507; *Forrester v. O'Rourke E. etc. Const. Co.*, 48 Misc. Rep. 390, 95 N. Y. Supp. 600; *Wynne v. Bailey*, 107 N. Y. Supp. 545; *Klepsch v. Donald*, 4 Wash. 436, 31 Am. St. Rep. 936, 30 Pac. 991.

d. Place Where Blasting Carried on.

1. In General.—It is obvious that the place, whether secluded or thickly populated, where blasting operations are carried on is a

material consideration in determining whether the explosion of a blast is negligence per se. The weight of authority and better reason appears to be that blasting, without reference to the particular locality in which it is carried on, is not so intrinsically dangerous as to be ipso facto a nuisance, so that the blaster will be liable for the injury caused by it whether or not he is guilty of any negligence in the manner in which the blasting is done; but that the question of his liability will depend upon whether or not he is guilty of any negligence: *Houghton v. Loma Prieta Lumber Co.* (Cal.), 93 Pac. 82; *Thurmond v. Ash Grove White Lime Assn.*, 120 Mo. App. 73, 102 S. W. 617; *Cary v. Morrison*, 129 Fed. 177, 63 C. C. A. 267, 65 L. R. A. 659.

The owner of a city lot, blasting rocks on his land with gunpowder, is held liable in *Colton v. Onderdonk*, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395, for the natural and proximate injury to adjacent property, whether from contact of rock or from concussion. Where injuries are inflicted by exploding gunpowder in a thickly settled part of a city, the persons causing the explosion are not relieved from liability by the fact that they employed careful and experienced men and exercised the highest degree of care; *Munro v. Pacific etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303. And blasting operations carried on continuously for more than one year on premises platted for city purposes constitute a nuisance prima facie, irrespective of the degree of care exercised, and recovery may be had for injury to neighboring property, arising from concussions of the air: *Longtin v. Persell*, 30 Mont. 306, 104 Am. St. Rep. 723, 76 Pac. 699, 65 L. R. A. 655.

2. **Near Highway.**—One who, for a lawful purpose and without negligence or want of skill explodes a blast on his own land and thereby causes fragments of rock or wood to strike a person lawfully traveling in a public highway, is liable for the injury thus inflicted as a trespasser: *Wright v. Compton*, 53 Ind. 337; *Sullivan v. Dunham*, 161 N. Y. 290, 76 Am. St. Rep. 274, 55 N. E. 923, 47 L. R. A. 715. "The question involved," said the Indiana court, "is not one of negligence on the part of the defendants. The act charged against them is in itself unlawful—not the act of blasting and quarrying rock, but the act of casting fragments of rock upon the plaintiff, to his injury. When the act in itself is unlawful, it is immaterial whether it is done ignorantly, negligently, or purposely, except in the measure of damages. Every person must so use his property and exercise his rights as not to injure the property or restrict the rights of others. In this case the defendants could not lawfully so use their stone quarry as to embarrass the rights of travelers along the public highway. The public travel must not be endangered to accommodate the private rights of an individual," approved in *Sullivan v. Dunham*, 10 App. Div. 438, 41 N. Y. Supp. 1083.

It is negligence to place or to cause to remain in a public highway a bomb or explosive capable of inflicting injury by being exploded; and it is unimportant how long the same is allowed to remain in the highway if injury results from placing or leaving it there: *Wells v. Gallagher*, 144 Ala. 363, 113 Am. St. Rep. 50, 39 South. 747, 3 L. R. A., N. S., 759. As to the liability for injuries caused by the explosion of fireworks in a public street, see *Dowell v. Guthrie*, 99 Mo. 653, 17 Am. St. Rep. 598, 12 S. W. 900; *Speir v. Brooklyn*, 139 N. Y. 6, 36 Am. St. Rep. 664, 34 N. E. 727, 21 L. R. A. 641; *Landau v. New York*, 180 N. Y. 48, 105 Am. St. Rep. 709, 72 N. E. 631; *Hill v. Charlotte*, 72 N. C. 55, 21 Am. Rep. 451.

3. **On Railroad Right of Way.**—In a sparsely settled country, blasting by means of gunpowder or dynamite is a reasonable and justifiable way of removing ledges and rocks for the purpose of bringing a railroad to a proper grade, and a corporation and its contractors have the right to use this method, provided they exercise reasonable care to protect others from injury. But while a railroad company has the right to blast rock from its right of way by means of gunpowder or dynamite, it has no right, without warning, to throw rocks upon adjacent premises or upon persons occupying them, and such an act is a trespass. It is the duty, however, of one who is occupying neighboring property, and who is warned of a coming explosion, to use reasonable diligence to escape from the approaching explosion, and not contribute to injury by remaining there in the face of impending danger: *Blackwell v. Lynchburg etc. R. R. Co.*, 111 N. C. 151, 32 Am. St. Rep. 786, 16 S. E. 12, 17 L. R. A. 729; *Watts v. Norfolk etc. R. R. Co.*, 39 W. Va. 196, 45 Am. St. Rep. 894, 19 S. E. 521, 23 L. R. A. 674; *Cary v. Morrison*, 129 Fed. 177, 63 C. C. A. 267, 65 L. R. A. 659.

It has been affirmed that a railroad company, or its contractor, is liable to adjacent proprietors for injuries to their property caused by blasting in the construction of the roadbed, notwithstanding the blasting is necessary and is done without negligence: *Langshorne v. Wilson (Ky.)*, 91 S. W. 254; *Gossett v. Southern Ry. Co.*, 115 Tenn. 376, 112 Am. St. Rep. 846, 89 S. W. 737, 1 L. R. A., N. S., 97.

But if a railroad company has the right, in constructing its road, to cast stones by blasting in a proper manner on adjoining premises, it owes a duty to remove them within a reasonable time. Failing to do so, it becomes answerable for the damage caused the owner of the premises by such neglect: *Whitehouse v. Androscoggin R. R. Co.*, 52 Me. 208; *Sabin v. Vermont Cent. R. R. Co.*, 25 Vt. 363.

e. **Notice and Warning of Blasts.**—It is the duty of one who is doing blasting to take every reasonable precaution to avoid injury to the person and property of others, and this duty includes the giving of warning and notice of intended blasts to persons on neighboring premises: *Driscoll v. Newark etc. Cement Co.*, 37 N. Y. 637,

97 Am. Dec. 761; *Blackwell v. Lynchburg etc. R. R. Co.*, 111 N. C. 151, 32 Am. St. Rep. 786, 16 S. E. 12, 17 L. R. A. 729. But when such notice is given it becomes the duty of the persons thus notified to use reasonable diligence to avoid and escape from the danger. If they neglect to do so, they may be charged with contributory negligence, barring the right to recover for injuries sustained: *Graetz v. McKenzie*, 9 Wash. 696, 35 Pac. 377; *Cary v. Morrison*, 129 Fed. 177, 63 C. C. A. 267, 65 L. R. A. 659.

When a business requiring blasting has been conducted for several weeks in the near vicinity of a resident with his knowledge that blasts were of frequent occurrence, it is not negligence to fail to notify such resident of each intended blast: *Mitchell v. Prange*, 110 Mich. 78, 64 Am. St. Rep. 329, 67 N. W. 1096, 34 L. R. A. 182.

f. **Injury to Property in General.**—Where blasting is done under such circumstances or in such manner as negligently to occasion adjacent buildings, structures or land, the operator is liable for the damages caused: *Moross v. Burke*, 99 Ga. 110, 24 S. E. 969; *St. Nicholas Skating etc. Co. v. Cody*, 26 Misc. Rep. 764, 56 N. Y. Supp. 1063; *Page v. Dempsey*, 184 N. Y. 245, 77 N. E. 9; *Kratzer v. Village of Saratoga Springs*, 8 App. Div. 613, 40 N. Y. Supp. 474, affirmed in 158 N. Y. 736, 53 N. E. 1127. In case the blasting is done in the city, without due care, it is no defense to an action for damages the operator complied with the municipal regulations: *Central of Georgia Ry. Co. v. Bernstein*, 113 Ga. 175, 38 S. E. 394. The measure of damages, in the event of injury to a building, is the cost of repairing and restoring it to its proper condition: *Fitzsimons v. Braun*, 199 Ill. 390, 65 N. E. 249, 59 L. R. A. 421.

g. **Injury to Crops and Cattle.**—Where blasting throws stones and earth on neighboring premises, and injures crops and cattle thereon, the owner may recover his damages from those responsible for the blasting: *Thurmond v. Ash Grove White Lime Co.*, 125 Mo. App. 57, 102 S. W. 619.

h. **Personal Injuries.**—Where one conducts blasting without due regard for the safety of persons on neighboring premises he is liable to them for personal injuries which they receive from fragments of rock thrown on or against them by force of the explosions: *St. Peter v. Dennison*, 58 N. Y. 416, 17 Am. Rep. 258; *Simmons v. McConnell*, 86 Va. 494, 10 S. E. 838; unless they have by their own negligence, after due warning of danger, contributed to their own injuries: *Graetz v. McKenzie*, 9 Wash. 696, 35 Pac. 377. One who explodes a blast on his own land and thereby throws pieces of rock or wood upon travelers in a public highway is liable therefor regardless of whether he acts with care and skill in doing the blasting: *Wright v. Compton*, 53 Ind. 337; *Sullivan v. Dunham*, 161 N. Y. 290, 76 Am. St. Rep. 274, 55 N. E. 923, 47 L. R. A. 715.

i. **Annoyance and Sickness.**—An action lies for sickness or nervous shock occasioned by negligence in blasting in such a manner as

to throw stones on and through a near-by house; after the blasters have been notified by the occupant of the house and requested to desist: *Watkins v. Kaolin Mfg. Co.*, 131 N. C. 536, 42 S. E. 983, 60 L. R. A. 617. And where fright from negligently throwing a rock through a house by a blast nearly causes a miscarriage to a woman and wrecks her nervous system, a recovery therefor in damages may be had: *Kimberly v. Howland*, 143 N. C. 398, 55 S. E. 778, 7 L. R. A., N. S., 545.

A railroad company is not liable for the noise and vibration occasioned by necessary and skillful blasting in the construction of its road, which merely causes an adjacent owner disquietude and alarm unaccompanied by sickness or physical injuries, but is liable if such noise and vibration lessen the usable or rental value of his home to such an extent that the law will award damages therefor: *Gossett v. Southern Ry. Co.*, 115 Tenn. 376, 112 Am. St. Rep. 846, 89 S. W. 737, 1 L. R. A., N. S., 97.

j. **Injunction Against Blasting.**—But an action for damages is not the only remedy which one has against negligent blasting on adjoining premises; he is entitled to an injunction, upon a showing that the blasting is, or will if continued, throw stone and debris upon his property, or person, or will jar, crack or otherwise endanger his buildings: *Blackford v. Heman Const. Co.* (Mo. App.), 112 S. W. 287; *Hill v. Schneider*, 13 App. Div. 299, 43 N. Y. Supp. 1; *Stevenson v. Pucci*, 32 Misc. Rep. 464, 66 N. Y. Supp. 712.

OLMSTED v. OLSTED.

[190 N. Y. 458, 83 N. E. 569.]

LEGITIMATION OF CHILDREN—Conflict of Laws.—When an illegitimate child has by the subsequent marriage of his parents become legitimate by virtue of the laws of the state or country where the marriage took place, he is thereafter legitimate everywhere; but to have this effect the marriage must be lawful, not polygamous, incestuous nor prohibited by law. (p. 588.)

FOREIGN JUDGMENTS—Full Faith and Credit.—While a court of one state must give full faith and credit to the decrees of the courts of sister states, it has the right to inquire whether they obtained jurisdiction of the person and the subject matter; and if it finds they did not, their judgments and decrees become of no force or effect. (pp. 589, 590.)

LEGITIMATION OF CHILDREN—Conflict of Laws.—If a resident of New York deserts his wife and goes to another state where he obtains a divorce which is void under the law of New York, and where he thereafter marries the mother of his illegitimate child, the child will not be recognized as legitimate by the courts of New York, although in the state of the marriage the law provides that illegitimate children are legitimated by the subsequent marriage of their parents. (pp. 590, 591.)

Charles H. Luscomb and Read L. Dilworth, for the appellants.

Mortimer W. Byers, for the respondents.

⁴⁶¹ HAIGHT, J. This action was brought to obtain a partition or sale of real estate claimed by the appellants as tenants in ⁴⁶² common, and for a determination of the rights of the parties to share in the proceeds of any sale that should be made thereof.

It appears, in substance, from the findings made by the trial court, that the real estate in question was formerly owned by one Silas Olmsted, late of Tarrytown, New York, who died in 1874, leaving a last will and testament with codicils attached which were admitted to probate, by which he devised the use of the property to his sons, William F. and Benjamin Franklin, during their natural lives, and upon their death the remainder was to vest in the "lawful issue of each of my said sons, such issue to take share and share alike; the children of any deceased child of either of my said sons to take the share their parent would have taken if living." Benjamin F. Olmsted, one of the sons of the decedent to whom a life interest in the real estate in question had been given by the testator, was married to Mary J. Olmsted in the state of New York on the twenty-fifth day of December, 1850, by whom he had four children, to wit, the plaintiff, Daniel H. Olmsted, and the defendants, Mary O. Decker, Clarence E. Olmsted and Frank S. Olmsted. Benjamin F. and his wife Mary were residents of the state of New York at the time of their marriage and at the time their children were born, and Mary continued to be a resident of this state until her death, on the twenty-second day of January, 1902.

It further appears from the finding that on the twenty-eighth day of February, 1874, Benjamin F. Olmsted joined in a marriage ceremony with one Sarah Louise Welchman in the state of New Jersey, by whom he had two children, who were the defendants, John E. Olmsted and William H. Olmsted; and that thereafter, during the summer of 1880, they removed to the state of Michigan, and on the tenth day of February, 1882, in the circuit court of Wayne county, Michigan, on the application of Benjamin F. Olmsted, reciting that he then was, and had been for more than a year, a resident of the state of Michigan, procured a subpoena to

be issued, directing Mary Jane Olmsted, his former wife, to appear and defend ⁴⁶³ an action brought by him for divorce under the law of the state of Michigan, on account of extreme cruelty and desertion; that the subpoena was never personally served upon Mary J. Olmsted, and on proof that she was not a resident of the state of Michigan, but was a resident of the state of New York, service thereof was ordered to be made by publication in a Detroit paper. After the period of publication prescribed by the order had expired, the said Mary Jane Olmsted not having appeared or answered, judgment was entered in favor of said Benjamin F. Olmsted for a dissolution of the marriage, and thereafter, on the twenty-second day of August, 1882, in the city of Detroit, Michigan, Benjamin F. Olmsted again joined in a marriage ceremony with the said Sarah Louise Welchman, and lived with her until the time of her death, January 30, 1900; that in June, 1883, Mary Jane Olmsted commenced an action in the supreme court in the state of New York against Benjamin F. Olmsted and others, setting forth in her complaint that in June, 1870, Benjamin F. Olmsted deserted and abandoned her and her children at Newburgh, N. Y., and took up his abode in New Jersey, and demanded a decree of separation against him and asking for alimony and counsel fee, and the application of the property of the said Benjamin F. Olmsted for the purpose of furnishing the money required therefor; that in that action the judgment-roll shows that Benjamin F. Olmsted was represented by an attorney on a motion for the sequestration of his property to pay the alimony, etc., decreed in the judgment; and that on the twenty-second day of January, 1885, judgment was entered in that action for the plaintiff, Mary Jane Olmsted, and against the defendant, Benjamin F. Olmsted, separating Mary Jane from him and requiring the payment by him of alimony and counsel fees; that thereafter an appeal was taken from the judgment so entered to the general term of the supreme court, in which the judgment was affirmed. Benjamin F. Olmsted died July 16, 1905, and thereupon his lawful issue became entitled to the real estate as remaindermen.

The trial court found as conclusions of law that the lawful ⁴⁶⁴ issue of Benjamin F. Olmsted were the plaintiff, Daniel H. Olmsted, and the defendants Mary O. Decker, Clarence E. Olmsted and Frank S. Olmsted; that the defendants John

H. Olmsted and William H. Olmsted, the children of Benjamin F. Olmsted and Sarah Louise Welchman, were not the lawful issue of Benjamin F. Olmsted, and were not entitled to any share in the said property. The appellate division has modified the judgment, holding that the defendants John H. Olmsted and William H. Olmsted are the lawful issue of Benjamin F. Olmsted, and are entitled to share in the said property.

Under the common law, the legitimacy or illegitimacy of a person was determined by the law of the country in which he was born. If by the law of that country he was legitimate, he should be deemed legitimate everywhere. If, however, by that law he was illegitimate, then he should be deemed illegitimate in every other country. There were some exceptions; for instance, if the parents were citizens or representatives of some foreign country, passing through or temporarily staying in the country of the birth. But these exceptions do not arise in the case under consideration, and are not necessary to be now considered. In some of the countries of Europe there were laws under which illegitimate children became legitimate by the subsequent marriage of their parents. This was the case in France, and its courts consequently held that a child born out of wedlock in its country became legitimate by a subsequent marriage of its parents, although the marriage took place in England, where a different law prevailed, and where a subsequent marriage would not have the effect of rendering the child legitimate: See Story on Conflict of Laws, Redfield edition, secs. 93, 93s, and other authorities cited.

In this state the law is now settled in accordance with the French rule, that when an illegitimate child has by the subsequent marriage of his parents become legitimate by virtue of the laws of the state or country where such marriage took place and the parents were domiciled, he is thereafter legitimate ⁴⁶⁵ everywhere and is entitled to all of the rights flowing from that status, including the right to inherit, notwithstanding the fact that he was born in another country: *Miller v. Miller*, 91 N. Y. 315, 43 Am. Rep. 669.

Recently many of our sister states have adopted statutes similar to those of France, providing that the subsequent marriage of the parents legitimized the child or children previously born. Such a statute was adopted in Michigan in 1881, and in this state in 1895. These statutes, however, were

passed long after the death of Silas Olmsted and the admitting of his will to probate, under which his legitimate grandchildren became vested as remaindermen in the estate left by him, subject to the life use by their father. But the statutes to which we refer, both in this state and in Michigan, only relate to such marriages between parents as may be lawfully made, and not to those which are polygamous, incestuous or are prohibited by law: See Story on Conflict of Laws, secs. 113a, 114.

In the case of *Adams v. Adams*, 154 Mass. 290, 28 N. E. 260, 13 L. R. A. 275, a testator in Massachusetts bequeathed property to the wife of his brother, "for the benefit of herself and all the children of such brother." Thereafter the brother went to California and obtained a divorce from his wife without living there the requisite time, or of giving her notice. He then married another woman, by whom he had previously had an illegitimate son. Under the code of California, children begotten before marriage were legitimized by subsequent marriage of the parents. The illegitimate son, claiming to be legitimized by the code of California, brought an action in equity to establish his share in the fund left by the testator for the benefit of the wife and all the children of the testator's brother. The action was dismissed, the court holding that the validity of the divorce might be inquired into, notwithstanding the recitals in the record; that the marriage was void and did not legitimize the plaintiff, and consequently he was not entitled to take under the will. That case, in many respects, is similar to this case. As we have seen, Benjamin F. Olmsted ⁴⁰⁶ was a resident of this state, married here, and had four children. He then left his family and went to New Jersey, where he lived with another woman, by whom he had two sons. Those children were concededly illegitimate. He then removed to Michigan, brought an action against his wife for divorce, who was still living in the state of New York, and procured a decree in that court annulling the marriage upon the ground that his wife had deserted him, without personal service upon her of process or other notice of the commencement of the action. He then married the mother of his two illegitimate children.

While the courts of this state are required to give full faith and credit to the decrees of the courts of our sister states, we have the right to inquire as to whether such courts had

obtained jurisdiction of the person and the subject matter; and if we find that they had not obtained jurisdiction, then their judgment or decrees become of no force or effect: *Matter of Kimball*, 155 N. Y. 62, 49 N. E. 331; *Winston v. Winston*, 165 N. Y. 553, 59 N. E. 273; *Haddock v. Haddock*, 201 U. S. 562; *Atherton v. Atherton*, 155 N. Y. 129, 63 Am. St. Rep. 650, 49 N. E. 933, 40 L. R. A. 291, 181 U. S. 155, 21 Sup. Ct. Rep. 544, 45 L. ed. 794. The Michigan courts never obtained jurisdiction of Benjamin F. Olmsted's wife, a resident of this state. She had no notice, and consequently did not appear in the action. The ground upon which the divorce was sought was one not recognized by the laws of this state as a ground for divorce. It was a decree such as the courts of this state have repeatedly refused to recognize as valid and binding. Not only have our courts refused to recognize such decrees as valid, but with reference to this particular decree an action had been brought in this state by Mrs. Olmsted for separate support and maintenance, and for the sequestration of the property of her husband for that purpose; and although he appeared by counsel, the court has adjudged her entitled to such sequestration and support, and upon the ground that he had deserted her and her family. Thus we have an adjudication in our own courts establishing the fact that Mrs. Olmsted was still his wife, notwithstanding the Michigan decree. It is, however, urged that, ⁴⁶⁷ although the Michigan decree may be invalid and of no force or effect, still the illegitimate children became legitimate under that decree, and, therefore, our courts are bound to recognize them as legitimate. We cannot approve of the soundness of such a contention. As we have already stated, the statute was designed only for such persons as were free from legal obstacles preventing their marriage, and it consequently follows that if the divorce was void, then legal obstacles did exist to the marriage of these persons; for Olmsted had another wife living from whom he had no valid divorce, and his marriage under such circumstances was polygamous; and had the ceremony been performed in this state it would have been bigamous and punishable criminally.

Should we sanction the doctrine contended for, then the legislature in any state could, in effect, nullify our own statutes and deprive our own citizens of property, which under our laws they had become lawfully vested with and en-

titled to receive. Not only this, but the statute of Michigan, passed in 1881, could change the provisions of a will executed here and probated in 1874, bringing in persons as remaindermen who, under the provisions of the will, were not remaindermen nor entitled to share in the estate. We think this should not be permitted.

The judgment of the appellate division should be reversed, and that of the trial court affirmed, with costs in both courts.

Cullen, C. J., O'Brien, Edward T. Bartlett, Vann, Hiscock and Chase, JJ., concur.

Judgment accordingly.

The Legitimation of a Child by the Marriage of its parents after its birth in the state of their and its domicile has the effect of legitimatizing it in another state, and conferring upon it the capacity to inherit realty in the latter state, as if it had been born in lawful wedlock: *Dayton v. Adkisson*, 45 N. J. Eq. 603, 14 Am. St. Rep. 763. See, however, *Williams v. Kimball*, 35 Fla. 49, 48 Am. St. Rep. 238; *Succession of Petit*, 49 La. Ann. 625, 62 Am. St. Rep. 659.

SCHLESINGER v. LEHMAIER.

[191 N. Y. 69, 83 N. E. 657.]

USURY, Purchase by National Banks of Paper Infected by.— If Negotiable Paper, Based on a Consideration Partly Usurious, is Purchased by a National Bank with Knowledge of Its Consideration, it is subject to the defense of usury to the same extent as if it remained in the hands of the original payee. (p. 595.)

Appeal from an order of the appellate division of the supreme court reversing an order of the appellate term reversing a judgment of the city court of New York in favor of the plaintiff in an action on promissory notes.

Otto C. Sommerich and Maxwell C. Katz, for the appellant.

George W. Glaze, for the respondent.

HAIGHT, J. This action was brought by the receiver of the Federal Bank, a domestic corporation engaged in the banking business in the city of New York, to recover the amount of two promissory notes made by the defendant for five hundred dollars and four hundred and fifty-four dollars and fifty cents, respectively, each made payable to the or-

der of the maker and indorsed by him. The complaint alleges that, before maturity the notes were discounted by the Federal Bank and that the plaintiff as receiver now holds them. The answer, in substance, alleges that the notes described in the complaint were made by the defendant and delivered to the Globe Security Company in payment for another note of the ⁷² defendant held by that company and for the sum of one hundred and thirty-five dollars and fifty cents interest, which sum was far in excess of interest at the legal rate, and was, therefore, usurious, and that the Federal Bank subsequently discounted the notes and received them, with full knowledge of the payment of such usurious rate of interest. Upon the trial the City Court awarded judgment for the plaintiff, holding that the facts alleged and set forth in the answer did not in law constitute a defense to the action.

We are again called upon to construe the provisions of the national banking act, so called, and our own banking law, based thereon, which is as follows: "Every bank and private and individual banker doing business in this state may take, receive, reserve and charge on every loan and discount made, or upon any note, bill of exchange or other evidence of debt, interest at the rate of six per centum per annum; and such interest may be taken in advance, reckoning the days for which the note, bill or evidence of debt has to run. The knowingly taking, receiving, reserving or charging a greater rate of interest shall be held and adjudged a forfeiture of the entire interest which the note, bill or evidence of debt carries with it, or which has been agreed to be paid thereon. If a greater rate of interest has been paid, the person paying the same or his legal representatives may recover back twice the amount of the interest thus paid, from the bank and private or individual banker taking or receiving the same, if such action is brought within two years from the time the excess of interest is taken. . . . The true intent and meaning of this section is to place and continue banks, and private and individual bankers on an equality in the particulars herein referred to with the national banks organized under the act of Congress entitled 'An act to provide a national currency secured by pledges of United States bonds, and to provide for the circulation and redemption, thereof,' approved June the third, eighteen hundred and sixty-four": Laws 1870,

c. 163; Laws 1892, c. 689, sec. 55, as amended by Laws 1900, c. 310, sec. 1.

The general statutes of our state forbid the taking of ⁷³ interest upon the loan of money in excess of the rate prescribed by law, and also render void all bonds, notes and other contracts given to secure a loan made in violation thereof: 2 Rev. Stats. 772, secs. 2, 5; Laws 1837, c. 430, sec. 1. These statutes still remain in full force as to individuals and corporations except in so far as they have been modified or superseded by the banking law enacted for the benefit of banking corporations and private and individual bankers, but the precise extent of such modification is a question involving some difficulty in its solution and has already been the subject of discussion in this court. In the case of *Schlesinger v. Gilhooly*, 189 N. Y. 1, 81 N. E. 619, the construction of the national banking act and of our state banking law was discussed in two opinions, one written by Cullen, C. J., and the other by Vann, J., in which the chief judge reached the conclusion that the statutes referred to only applied to cases where the banks had been paid an unlawful rate of interest and that they had no application to negotiable paper purchased by the banks which had previously been tainted with usury; while Vann, J., reached the conclusion that these statutes extended to and covered negotiable paper purchased by the bank before maturity in good faith without knowledge of its previous taint. Two of my associates concurred with the chief judge and two concurred with Judge Vann. Willard Bartlett, J., concurred with Judge Vann in the result, upon the ground that, under the negotiable instruments law, a bona fide purchaser takes a note free from the defense of usury. The judgment was, therefore, affirmed, thus holding that where a bank has in good faith discounted negotiable paper for value before maturity without notice that it was already void for usury, the defense of usury is not available, and that must now be regarded as the law of this state.

The question we now have presented was not disposed of in the former case, and is quite different. It is now contended that the bank may purchase void paper of the holder, with full knowledge that the maker has been compelled to pay a usurious rate of interest, and that by such purchase the paper ⁷⁴ becomes validated, and in the hands of the bank may be collected of the maker. If such an interpreta-

tion is adopted, then it practically nullifies our usury laws, for any person who has exacted usury for the loan of money may take his paper into a bank and arrange for its prosecution and thus evade the defense of usury. The decision of our court in the case of *Schlesinger v. Gilhooly*, 189 N. Y. 1, 81 N. E. 619, has already eliminated from our usury statutes their most drastic features, so far as banks are concerned, and no longer can a person put in circulation negotiable paper void for usury, which may be transferred to innocent banks who purchase in good faith without knowledge of its taint, and thus be deprived of the right to collect it from the maker.

Until a recent amendment of section 378 of the Penal Code the acceptance of an unlawful rate of interest for the use or loan of money was a misdemeanor and punishable criminally. The taking of usury is still a wrong and against the public policy of the state. If the statutes are to receive the construction contended for, then the officers of a bank may become parties to a wrong and, against the policy of the state, aid the wrongdoers in their receipt of usury by the taking of such paper and practically collecting it for them. Assuming, for the purposes of the argument, that national and state banks are governmental agencies, and that among the powers given to banks, either state or federal, is that of purchasing negotiable paper, and that in the discharge of such powers they are entitled to protection, evidently such protection was only intended to apply in so far as the officers of such banks acted in good faith in accordance with the law, and not where they departed therefrom and knowingly and intentionally joined with wrongdoers in an attempt to evade the laws.

The learned appellate division appears to have ascertained the view that the purchase of commercial paper with knowledge that it was void for usury did not place the bank in a worse position than it would have been in had it taken usurious interest itself. The answer to this is that the statute makes it different. The usury laws, as between individuals, ⁷⁵ have not been changed, and as between the maker and the holder, if usury is exacted, the paper is still void and no recovery can be had thereon. Not so, however, with banks which have received unlawful interest; the paper is not affected or rendered void, but the bank is subjected to a forfeiture of all interest and to penalties for that which it has received. In *Caponigri v. Altieri*, 165 N. Y. 255, 59 N. E.

87, we held that the penalties could be collected in an action brought for that purpose, but how could such an action be maintained against the Federal Bank upon the paper in question? It has received no unlawful rate of interest. It has not violated any statute in this regard. The unlawful interest was collected by the Globe Company before the bank had become the purchaser of the paper. That company was not a banking corporation, and consequently is not liable for the penalties provided by the banking law. True, it forfeits its right to collect the balance remaining due upon the paper, and it may be liable for the interest received in excess of the legal rate; but, under the view of the appellate division, the maker would be deprived of his defense of usury, and also of his right to maintain an action for the penalties provided by the banking law. To my mind, the legislature never intended such an interpretation of the act. It pertains to negotiable instruments, and should be construed in connection with the other legislation upon the same subject. In the negotiable instruments law it is expressly provided that a holder, who becomes such before maturity in good faith and for value without notice of any infirmity, holds the same "free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce the payment of the instrument for the full amount thereof against all parties liable thereon." Here we have the legislative intent expressed in clear and unmistakable language. It establishes a just and proper rule which protects the bank in making purchases of commercial paper in good faith before maturity, for value and without notice of infirmity. But where it purchases with actual knowledge of the infirmity or ⁷⁶ defect, or knowledge of such facts that its action in taking the instrument amounted to bad faith, it is not protected.

I am therefore of the opinion that the matter set forth in the answer is sufficient in law to constitute a defense and that, consequently, the judgment of the appellate division should be reversed and the order of the appellate term affirmed, with costs to appellant in the appellate division and this court.

CULLEN, C. J. I concur in the opinion of my brother Haight for reversal, but deem it proper to add a word explanatory of my position. In the case of *Schlesinger v. Gil-*

hooly, 189 N. Y. 1, 81 N. E. 619, I dissented from the decision in an opinion. While I retain the views then expressed, I recognize fully the effect of the decision there made, and accept it as a binding authority declaring the law to be that a bank acquiring, in good faith for value, commercial paper void between the parties for usury may recover thereon. In that case, however, the recovery was sought to be upheld on two separate grounds—the banking laws, state and national, and the negotiable instruments law. Had a majority of the court placed their decision on either ground I should have felt the decision binding not only as to the point actually decided, but as to the propositions on which the decision was founded. I understand, however, that while my opinion in its entirety commanded the assent of two only of my associates, the member of the majority who based his decision on the effect of the negotiable instruments law expressed his approval in that part which dealt with the effect of the banking laws, though it may be that approval was obiter, his action proceeding on a different question. Therefore, for the reasons stated in my former opinion as well as for those stated in the opinion of my brother Haight, now rendered, I concur in the reversal of the judgment appealed from.

WILLARD BARTLETT, J. I concur in the opinion of Haight, J., for reversal—having concurred with the opinion ⁷⁷ of the chief judge in *Schlesinger v. Gilhooly*, 189 N. Y. 1, 81 N. E. 619, except as to the effect of the negotiable instruments law, although the statement of such concurrence was inadvertently omitted from the report of that case.

Werner and Hiscock, JJ., concur with Haight, J., and Cullen, C. J., and Willard Bartlett, J., also concur in memoranda with Haight, J.

Gray and Chase, JJ., dissent.

Judgment accordingly.

The Defense of Usury is good in an action by a national bank to recover unpaid interest, when the contract rate exceeds that prescribed by the national banking act: *Tomlin v. Higgins*, 53 Neb. 92, 68 Am. St. Rep. 596. See, too, *Second Nat. Bank v. Morgan*, 165 Pa. 199, 44 Am. St. Rep. 652; *Central Nat. Bank v. Haseltin*, 155 Mo. 58, 85 Am. St. Rep. 531.

The Defense of Usury against a bona fide holder of negotiable paper is discussed in *Culver v. Osborne*, 231 Ill. 104, 121 Am. St. Rep. 302; *Lynchburg Nat. Bank v. Scott*, 91 Va. 652, 50 Am. St. Rep. 860.

PEOPLE v. GIBSON.

[191 N. Y. 227, 83 N. E. 976.]

APPELLATE PROCEDURE—Questions of Fact, When not to be Considered by the Court of Appeals.—The unanimous affirmance of a judgment of conviction by the appellate division of the supreme court precludes the court of appeals from any consideration of the question whether there was sufficient evidence to sustain the verdict of the jury. (p. 597.)

PERJURY, What Constitutes.—An official may be convicted of perjury for the doing of either of these three acts: Asking, receiving or agreeing to receive a bribe upon an understanding or agreement that his vote or other official action should be influenced thereby, or that he will do or omit some act or proceeding, or in some way neglect or violate some official duty, but he cannot be separately convicted of each of these several acts. (p. 599.)

BRIBERY, Limitation of Prosecution for.—Though a statute makes the asking, receiving, or agreeing to receive, a bribe criminal, the crime may consist of either of these acts, and a conviction may be sustained under an indictment found within the statutory time after the receiving of the bribe, notwithstanding it was asked for, and agreed to be received, before that time. (p. 599.)

Edward H. Hatch, Willard H. Ticknor and Frank W. Brown, for the appellants.

Frank A. Abbott, district attorney, for the respondents.

228 HISCOCK, J. The appellants have been convicted under section 72 of the Penal Code of receiving bribes by which their votes as supervisors were to be influenced.

The case is a companion to that of *People v. Neff*, 191 N. Y. 210, 83 N. E. 970, decided at this term, in this respect, that these appellants, as the defendant in that case, have been convicted of crime in connection with proceedings by the board of supervisors of Erie county to acquire cemetery lands for an armory site.

The unanimous affirmance of the judgment of conviction precludes us from any consideration of the question whether there was sufficient evidence to sustain the verdict of the jury. But perhaps it is proper to say, as bearing upon the disposition of some of the objections and exceptions to testimony, that if that question were open we should feel that there was a great abundance of competent testimony tending **229** to prove beyond any reasonable doubt whatever that the appellants while solemnly bound as public officials to protect public interests were guilty of the particularly insidious and despicable crime of bartering away those interests for pecuniary gain.

The proposition which is most earnestly pressed upon our attention on the appeal is that the crime charged against them was barred by the statute of limitations. Section 72 of the Penal Code, under which the indictment is found, provides that such an officer, as these appellants were, "who asks, receives, or agrees to receive a bribe, . . . upon any agreement or understanding that his vote . . . or other official proceeding, shall be influenced thereby, or that he will do or omit any act or proceeding, or in any way neglect or violate any official duty, is punishable," etc.

The specific form of offense charged by the indictment against appellants was that of "receiving a bribe upon an agreement and understanding that their votes, opinions . . . and other official proceedings and the vote, opinion . . . and other official proceedings of each of them, would be influenced thereby," with respect to a resolution pending before the board of supervisors while they were members, March 20, 1901, and which said resolution was acted on by the board at or near said date. Said indictment also charged that the bribe was paid on or about June 25, 1901.

The evidence corresponded with these charges and it is conceded that the agreement was made and the votes of the appellants given more than five years before the indictment was found, and that the only act performed within five years was the actual receipt of the bribe.

Under these circumstances the counsel for the appellants argues that the only receipt of a bribe for which one may be convicted under this section of the code must accompany the agreement under which it occurs, and must take place before the vote or action which is to be influenced thereby; that if any other construction is adopted, somehow it will lead to 230 the result that a person may be indicted and punished for each one of the three acts of asking for, agreeing to receive and actually receiving a bribe, although the same bribe was involved in each act; that under this view the receipt of the bribe within five years before indictment found was not sufficient to prevent the crime from being barred, the agreement upon which it was received and the action influenced thereby having occurred more than five years before indictment.

We are not impressed with this argument. This section of the code undoubtedly does specify three acts, any one of which by itself and alone might be punished as a completed

crime. In the interest of public safety and to discourage the commission of this species of crime, the legislature undoubtedly did enact that a person might be convicted simply for asking, or for agreeing to receive, a bribe, even though his request or agreement did not ripen into actual receipt of the money. But while this question is academic in this case, and, therefore, not decided, we do not think that this section would be so construed as to mean that a person might be punished for receiving a bribe and also separately and independently for asking and also for agreeing to receive the same bribe, but that these separate acts, when forming a connected series relative to the same subject matter, would be regarded as constituting a single crime. The people are not compelled to rely upon any such proposition as the former one for the purpose of supporting this judgment. They charge the act of having received a bribe upon an agreement such as is described in the statute, and there is no suggestion of separate or independent crimes preceding it. Neither is there any doubt but that the acts thus charged constitute within the definition of the statute a crime, and, therefore, there simply remains the question whether this crime may be established by proof that the bribe was actually received after the vote of the bribed official had been given, the agreement upon which it was received having been made before vote. If this may be the case, then concededly the crime was consummated within the period of five years before the indictment was found. It ²³¹ does not seem to us that there is anything in the language of the code which makes the answer to the query at all doubtful. The agreement is made that the vote of the official "shall be influenced thereby," that is by the bribe. The action which is to be influenced is necessarily of the future. The bribe by which this influence is to be exerted may be paid in the present or in the future and after the influence has been exerted. The agreement and the receipt together constitute a single crime, and if the briber deems it safer for his purposes to postpone payment till he has secured his consideration, the consummation of the offense and the running of the statute will be delayed till that event has occurred. That is what has transpired in this case, and we see no reason for disturbing the judgment on this ground.

All of the various objections and exceptions to the admission of evidence urged by the appellants have been considered, but we think that no one of them suggests any such

substantial error or infringement of appellants' rights as requires a reversal of the judgment.

The judgment of conviction should be affirmed.

Cullen, C. J., Gray, Haight, Vann, Willard Bartlett and Chase, JJ., concur.

Judgment of conviction affirmed.

The Crime of Bribery is the subject of a note to *Rudolph v. State*, 116 Am. St. Rep. 38. See, too, the recent case of *Butt v. State*, 81 Ark. 173, 118 Am. St. Rep. 42.

WALLINGFORD v. KAISER.

[191 N. Y. 392, 84 N. E. 295.]

THE MEASURE OF DAMAGES in Actions for Conversion, as a general rule, is the value of the property at the place where converted. (p. 601.)

THE MEASURE OF DAMAGES in Actions for Conversion Where There is No Market Value for the property converted or like property at the place of conversion is found by resorting to evidence of its value at the nearest place where there is a market, less the expense of taking it to that place. (pp. 601, 602.)

MEASURE OF DAMAGES for the Conversion of Property in the Hands of a Carrier for Transportation—Place of Destination.—If property in the course of transportation is converted at an intermediate point, the measure of damages is its value at the place of destination, less the cost of carriage and of effecting a sale in that market. (pp. 603, 604.)

DAMAGES for the Conversion of Property in the Course of Transportation—Mitigation of by Want of Knowledge of the Destination.—Where property in the hands of a carrier and in course of transportation is converted at an intermediate point, the want of knowledge on the part of the person guilty of the conversion of the place of destination is not available to him in mitigation of damages. (p. 604.)

Action to recover damages, verdict and judgment in favor of the plaintiff. The defendant moved for a new trial, which was denied, and an appeal was taken by him to the appellate division of the supreme court for the fourth judicial department, where the judgment was affirmed.

C. A. Dolson and Edwin L. Dolson, for the appellant.

Irving W. Cole, for the respondent.

393 WILLARD BARTLETT, J. The only question which we consider it necessary to discuss in passing upon this ap-

peal relates to the measure of damages adopted by the trial court. The action was for the conversion of a number of horses which were seized by the defendant, assuming to act under a warrant ³⁹⁴ of attachment issued to him as sheriff of Erie county, the animals having been taken from a railroad train at East Buffalo while in course of transportation from Chicago, Illinois, to Liverpool, England. The learned trial judge instructed the jury that if the plaintiff was entitled to recover at all he was entitled to recover the value of the horses in Liverpool, less the expense of transporting them and putting them on the market in Liverpool for sale and selling them. No exception was taken to this instruction; but counsel for the appellant had previously disputed the correctness of the rule thus laid down for ascertaining plaintiff's damages by objecting to a question as to the value of one of the horses in Liverpool at the time that it would have arrived there in due course of transportation and taking exception to the decision of the court in overruling that objection; the court having stated at the time that one objection to like questions was sufficient and that the defendant need not object to each like question.

In actions for conversion, and actions of a similar character, the general rule is that the value of the property at the place of conversion is the correct measure of damages: 2 Sedgwick on Damages, 8th ed., sec. 496; *Tiffany v. Lord*, 65 N. Y. 310; *Parmenter v. Fitzpatrick*, 135 N. Y. 190, 31 N. E. 1032; *Fleischmann v. Samuel*, 18 App. Div. 97, 45 N. Y. 404; *Hamer v. Hathaway*, 33 Cal. 117. But this rule is subject to important qualifications and exceptions. Among these may be mentioned (1) cases where there is no market value for such or like property at the place of conversion. In that event resort is had to evidence of market value at the nearest place where there is a market: *Keller v. Paine*, 34 Hun, 167. This may be as far removed as San Francisco is from the Isthmus of Panama (*Harris v. Panama R. R. Co.*, 58 N. Y. 660), or half way around the earth: *Bourne v. Ashley*, 1 Low. 27; Fed. Cas. No. 1699. The case last cited was a libel in admiralty by the owners of one whaling ship against the owners of another, both vessels hailing from New Bedford, for the conversion of a whale in the Okhotsk Sea. There being no market price for whales at the place of conversion, the court held that the libelants were ³⁹⁵ entitled to the value of the oil and bone at New Bedford,

which was the controlling market of the country as well as the home port of both the whalers, less the expense of taking the oil and bone out of the whale and getting it to such port.

(2) A second class of cases, constituting an exception to the rule that the value of the converted article at the place of conversion is ordinarily the true measure of damages, are actions against common carriers, where the goods are lost, destroyed or damaged in transit, in which the damages recoverable against the carrier are based on the market value at the point of destination: 2 Sedgwick on Damages, 8th ed., sec. 844; Mayne on Damages, 285; Sturgess v. Bissell, 46 N. Y. 462; Holden v. New York C. R. R. Co., 54 N. Y. 662.

So far as I have been able to ascertain, the precise question presented by this appeal does not appear to have been determined in this state; that is, whether where property in the custody of a common carrier in the course of transportation is converted by a stranger, the owner's right of recovery is limited to the market value at the place of conversion or nearest market, or may be measured by the market value at the place of destination, less the cost of conveyance thither and the selling expenses. That the latter is the only just rule was strongly suggested in *Suydam v. Jenkins*, 3 Sand. 614, by Duer, J., in the course of what was pronounced an "extremely able opinion" by Rapallo, J., in *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507. Judge Duer said: "When the market price is justly assumed as the measure of value, there are numerous cases in which the addition of interest would fail to compensate the owner for his actual loss. It may be shown that had he retained the possession, he would have derived a larger profit from the use of the property than the interest upon its value; or that he had contracted to sell it to a solvent purchaser at an advance upon the market price; *or that when wrongfully taken or converted, it was in the course of transportation to a profitable market where it would certainly have arrived*; and in each of these cases the difference between the market value when the right ³⁹⁶ of action accrued and the advance which the owner, had he retained possession, would have realized, ought plainly to be allowed as compensatory damages, and as such be included in the amount for which judgment is rendered."

The view of Judge Duer, as expressed in the passage which I have emphasized by italics, was adopted by the supreme court of Missouri in a well-considered case decided in 1860:

Farwell v. Price, 30 Mo. 587. Referring to the rule as to which some doubt then existed, but which is now well established, that the measure of damages in the case of a conversion by the common carrier is the market value at the point of delivery, the court went on to say: "And where the wrongdoer is a mere stranger, a trespasser, it is not easy to see upon what ground he can insist that the value of the property at the place where the conversion occurred shall be the measure of damages to which the owner is entitled. Such a rule would in effect force the owner to dispose of his property in a market not of his own selection, and one where perchance the property might be valueless." In that case the property consisted of flour consigned from St. Louis to Boston, and was converted en route by the forwarding agent at New Orleans. "Going no further for illustration than the case under consideration, we see, as a matter of fact, that the market value of flour at New Orleans is not at all times the same as at Boston, minus the cost of transporting it from one point to the other, though doubtless any considerable disparity could not long continue. Scarcity of capital or other circumstances may depress the price of an article in one market below its value in another, after deducting the expense of removing the article, though in the present condition of trade this could not continue long. But as the price of an article must mainly be regulated by its value for home consumption, and must be so altogether if there is no capital engaged in its removal to other places, the price at the place of conversion would in most instances prove an inadequate compensation for the loss sustained by the owner."

This last proposition seems strictly correct as applied to the ³⁹⁷ proof in the case at bar, which showed that the horses taken from the railway train by the sheriff had been selected at great pains and with special care in reference to the demand in the Liverpool market.

As may be inferred from what has already been said, I think there is, and ought to be, an exception to the general rule in trover that the value of the property at the place of conversion is the owner's measure of damages, in the case of goods converted by a stranger at an intermediate point while in the course of transportation; and that where the property, when wrongfully taken, is on the way to a profitable market, where it would certainly have arrived, the owner is entitled to recover the value of the goods at the place of

destination, less the cost of carriage and the cost of effecting a sale in that market. The purpose of the law is to afford just and reasonable compensation to the injured party for the natural and proximate consequences of the wrongful act; and this can hardly otherwise be accomplished in such a case as that which we have presented for our consideration here. The special damage which the plaintiff claimed to have sustained by reason of his inability to sell the horses in Liverpool was distinctly alleged in the complaint; and the defendant's lack of information as to the particular destination of the animals is not available to him in mitigation: See *Lathers v. Wyman*, 76 Wis. 616, 45 N. W. 669. The circumstances under which the horses were taken constituted notice that they were destined for some point beyond East Buffalo.

The appellant relies upon the cases of *Brizsee v. Maybee*, 21 Wend. 144, and *Spicer v. Waters*, 65 Barb. 227, but in neither of those cases was the property converted while in the course of transportation. The *Brizsee* case (21 Wend. 144) was an action of replevin for a quantity of sawlogs which were replevied at the mills of the defendant in Niagara county. The defendant was allowed to prove what would have been the value of the stuff made from the logs in the Albany and Troy markets at the time when it would in the ordinary course of business have reached those cities. The old supreme court, per ³⁹⁸ Cowen, J., held that the ultimate value at Albany or Troy, when in the ordinary course of business the boards would reach there, deducting the expense of manufacturing and the price of transportation, was a proper topic of inquiry, with a view of ascertaining the value of the sawlogs at the place where they were replevied, but not for any other purpose. In the *Spicer* case (65 Barb. 227) there was a conversion of lumber in Lewis county, and the trial judge charged the jury that if the lumber was to be taken thence to the Troy market and there to be held in the plaintiff's lumber-yard, they were entitled to recover its market value in Troy, less the cost and risk of transportation. The general term of the fifth district (Mullen and Morgan, JJ., Bacon, J., dissenting) held that this charge was erroneous in view of the general rule that in an action for the conversion of personal property the measure of damages was the market value at the time and place of conversion, with interest up to the time of trial. The prevailing opinion shows that the court deemed the decision in *Brizsee v. May-*

bee, 2 Wend. 144, controlling on the question, although, as already suggested, that was not a case of the conversion of goods in transit.

I find nothing in the reasoning or decision of these cases in conflict with the conclusion that the present judgment should be affirmed, with costs.

Justice Vann Dissented on the ground that a sheriff, sued as such for an official act done in his own county, ought not to be subjected to damages measured by a market price three thousand miles away; that such officer should not, because of his mistake in an effort to discharge an official duty, be compelled to visit foreign countries and import witnesses to keep the damages within reasonable limits.

The Measure of Damages for the Conversion of personal property is discussed in the note to *Baker v. Wheeler*, 24 Am. Dec. 70-88. It has recently been held that the plaintiff in trover is entitled to recover the highest market value of the goods at the time of the trial: *Gregg v. Bank of Columbia*, 72 S. C. 458, 110 Am. St. Rep. 633, and see the cases cited in the cross-reference note thereto. In *Austin v. Vanderbilt*, 48 Or. 206, 120 Am. St. Rep. 800, it is affirmed that the value of property at the time of its conversion is generally the measure of damages in an action of trover; but to ascertain that value, evidence of its worth a reasonable time prior and subsequent to the conversion is admissible.

FORSYTH v. CITY OF OSWEGO.

[191 N. Y. 441, 84 N. E. 392.]

MUNICIPAL CORPORATIONS, Failure to Present Claim Against, When Excused by Mental and Physical Inability.—If a plaintiff suing a municipal corporation to recover damages for personal injuries alleged to be due to its negligence is met with the defense that his claim was not presented to the city within three months, as prescribed by law, he may nevertheless prevail if he shows that he was physically and mentally unable to prepare and present his claim, or to give directions for its preparation and presentation, during the whole of such three months, and that he did present it within a reasonable time thereafter. (p. 607.)

MUNICIPAL CORPORATIONS—Time for Presentation of Claim When Claimant was Physically and Mentally Unable to Present It Within the Time Allowed by Statute.—If the time within which a claimant may present his claim against a city is limited to three months, and during that time he is unable to prepare and present such claim because of his mental and physical condition, he is not necessarily entitled to an additional three months after the cessation of his disability, but must present the claim within what, in the judgment of a jury, is a reasonable time thereafter, and an instruction that he is entitled to three months' additional time constitutes reversible error. (p. 608.)

MUNICIPAL CORPORATIONS, Waiver of the Failure to Present Claim Against Within the Time Fixed by Statute.—The refer-

ence to a committee and an attorney of a claim against a city, and the examination of the claimant at the meeting of such committee and the giving of a hearing to him, do not amount to a waiver of his failure to present the claim within the time prescribed by statute, nor of any other defect in such claim. (p. 608.)

Action to recover damages. Verdict and judgment in favor of the plaintiff, which, on appeal, were affirmed by the appellate division of the supreme court in the fourth judicial department.

Francis D. Culkin, for the appellant.

F. T. Cahill, for the respondent.

443 WERNER, J. The plaintiff was injured by being thrown from a wagon while driving upon one of the defendant's public streets. He brought his action upon a complaint containing allegations of negligence against the defendant in its maintenance of the particular street, and asseverating plaintiff's freedom from contributory negligence. He recovered a verdict, and the judgment entered upon it has been affirmed by a divided appellate division. We have examined the record and are satisfied that the judgment is not without the support of evidence. Thus we are precluded from disturbing the judgment upon the merits. The further question presented for our consideration is whether there are errors in the record of such importance as to demand a reversal.

The defendant is a municipal corporation, and its charter provides that "All claims against the city for damages or injury alleged to have arisen from the defective, unsafe, dangerous or obstructed condition of any street of the city, or from negligence of the city authorities in respect to any such street, shall, within three months after the happening of such damage or injury, be presented to the common council by a writing signed by the claimant, and properly verified, describing the time, place, cause and extent of the damage or injury. The omission to present such claim as aforesaid within said three months shall be a bar to any action or proceeding therefor against the city": Laws 1895, c. 394, sec. 345.

444 The plaintiff was injured on the twenty-fourth day of December, 1902. A statement of his claim was served upon the defendant on the eighteenth day of May, 1903. As this was four months and twenty-four days after the acci-

dent, the plaintiff's claim is clearly barred unless his failure to comply with the requirements of the defendant's charter has been properly excused or waived: *Reining v. City of Buffalo*, 102 N. Y. 308, 6 N. E. 792. The plaintiff's complaint sets forth that as a result of the injuries sustained by him on the twenty-fourth day of December, 1902, he was mentally and physically incapacitated from filing his claim until the eighteenth day of May, 1903, when he filed it. There is evidence in the record which tends to sustain this allegation. Thus the question which should have been submitted to the jury upon that branch of the case was, whether the plaintiff filed his claim within a reasonable time after the lapse of the period for filing named in the charter. That period was, as we have seen, limited to three months after the happening of the accident, and the plaintiff's claim was not filed until four months and twenty-four days had passed. In the absence of any explanation of plaintiff's delay in this respect, the direction of the statute would have been conclusive and final. There was an explanation, however, and it was for the jury to say whether it was credible and satisfactory. If the plaintiff was, as he claimed, physically and mentally unable to prepare and present his claim, or to give directions for its preparation and presentation during the whole of the three months within which he was required by the defendant's charter to present it, then he was entitled to a reasonable additional time in which to comply with the charter in that regard. This is because the law does not seek to compel that which is impossible: *Walden v. City of Jamestown*, 178 N. Y. 213, 70 N. E. 466. Upon the evidence in the record the learned trial court should have instructed the jury that if the plaintiff, by reason of the injuries for which he seeks to hold the defendant responsible, was incapacitated from presenting his claim within the period prescribed by the defendant's charter, he was entitled to such additional time as the jury might find to be reasonable in the ⁴⁴⁵ circumstances. The court, to the contrary, charged expressly that the plaintiff was entitled to an extension of three months from the time when he became mentally able to act. This was the substance of the charge upon that subject, repeated explicitly in various forms, and it is in direct conflict with the rule laid down by this court in *Walden v. City of Jamestown*, 178 N. Y. 213, 70 N. E. 466, and *Winter v. City of Niagara Falls*, 190 N. Y. 198, ante, p. 540, 82 N.

E. 1101. This error in the charge was material. It was not rendered harmless by the fact that the evidence tended to show that the plaintiff's incapacity continued almost, if not quite, to the day when he presented his claim. For aught that appears in this record the jury may have concluded that the plaintiff's incapacity did not continue during the whole of the three months within which the defendant's charter required him to present his claim, but that he had presented it within three months from the time when his capacity ceased, and, under the instructions of the trial court, that was a compliance with the law.

Another question which we think the learned trial court erroneously submitted to the jury was whether the defendant waived the defects in the notice or claim presented and filed on the part of the plaintiff. It appears, as already stated, that the plaintiff presented his claim on the eighteenth day of May, 1903. On the following day the common council referred the matter to its committee on claims and the city attorney. In June of the same year the plaintiff attended a meeting of that committee, at which the city attorney was present. At that meeting the plaintiff was interrogated as to the time, place and circumstances of the accident, and later the committee reported unfavorably upon plaintiff's claim. There is nothing in the proceedings had before the committee on claims to support the plaintiff's contention that the defendant waived any of the defects in the notice or claim presented by the plaintiff. Neither is the fact that the plaintiff was given a hearing before that committee evidence of the defendant's intention to waive anything. The defendant had the right to investigate the circumstances under which the claim arose before ⁴⁴⁶ deciding what action it would take. Municipal corporations, acting through their officers and agents, have the right to conduct such investigations for the very purpose of ascertaining whether they are liable or not: *Winter v. City of Niagara Falls*, 190 N. Y. 198, ante, p. 540, 82 N. E. 1101. This record is barren of either pleading or evidence showing, or tending to show, a waiver by the defendant of the defects in the plaintiff's notice of claim. It was error, therefore, for the trial court to charge that if the claims committee of the common council were fully informed at that hearing as to the time, the place and extent of the plaintiff's injuries, the jury might find that the defendant had waived the defects in the notice of

claim. It was also error for the court to refuse to charge upon request of defendant's counsel "that the reception of the notice by the city officials, its subsequent reference to the claims committee, and the alleged hearing thereon did not waive the irregularities contained in the said notice."

Both of the questions which we have discussed were clearly presented by appropriate requests and exceptions, and our views upon them necessarily lead to the conclusion that the judgment must be reversed and a new trial granted, with costs to abide the event.

Cullen, C. J., Haight, Vann, Willard Bartlett, Hiscock and Chase, JJ., concur.

Judgment reversed, etc.

The Fact that a Person having a Claim Against a City for damages due to a personal injury is a minor does not excuse him from presenting his claim to the common council within the time limited by the charter for the presentation of such claims: Winter v. City of Niagara Falls, 190 N. Y. 198, ante, p. 540.

SMITH v. RYAN.

[191 N. Y. 452, 84 N. E. 402.]

INSANE PERSONS.—The Deeds and Contracts of a Person of Unsound Mind Who has not been Judicially Declared Incompetent are not absolutely void, but voidable only. (p. 610.)

INSANE PERSONS—Necessity for Resorting to Equity to Avoid Deeds of.—Though a person of unsound mind has not been judicially declared to be such at the time he executes a conveyance, resort to equity is not necessary to avoid such conveyance, but it may be attacked and defeated in an action of ejectment. (p. 616.)

Ejectment. Judgment in favor of the defendant, which was affirmed in the appellate division of the supreme court in the first judicial department.

Louis H. Hall and Henry B. Twombly, for the appellant.

Edward W. S. Johnstone, Charles E. Le Barbier and James A. Boylan, for the respondents.

⁴⁵⁴ CULLEN, C. J. The action was ejectment to recover premises in the city of New York. The plaintiffs claimed as ⁴⁵⁵ heirs at law of one Michael L. Flynn, concededly at one

time seised and possessed of the premises, who died January 14, 1889. Defendants claimed title through a deed executed by said Flynn, bearing date January 25, 1887, to John Dollard, and another made by said Dollard, on January 27th of the same year, to Mary M. Flynn, the wife of said Michael L. Flynn. They also claimed title through a will of said Michael L. Flynn made on March 13, 1885. The complaint alleged that the plaintiffs were entitled to the immediate possession of the premises, and that the defendants wrongfully withheld the possession thereof. The answers of the several defendants set forth the deeds and will above recited. On the trial the plaintiffs proved the possession and ownership of Michael L. Flynn, his death and that they were his heirs at law. The defendants put in evidence the deeds and will. In rebuttal the plaintiffs sought to prove that at the time of the execution of those instruments Michael L. Flynn was of unsound mind and incompetent. This evidence the court excluded on the ground that as the said Flynn had not been judicially declared incompetent, the deed executed by him could be avoided only in equity, and thereupon directed a verdict for the defendants. It was conceded that the validity of the will might be assailed for lack of competency on the part of the testator, but an attack on the will would have been profitless as long as the deed remained unimpeached. The judgment entered on that verdict was affirmed by the appellate division by a divided court.

The law settled in this state that the deeds and contracts of a person of unsound mind, who has not been judicially declared incompetent, are voidable, not absolutely void (*Blinn v. Schwarz*, 177 N. Y. 252, 101 Am. St. Rep. 806, 69 N. E. 542), and the same doctrine generally prevails throughout this country and in England. This, however, by no means proves the proposition that such deeds or contracts can be avoided only in equity. As to the personal property, the law is clear that where a party has the right to rescind or avoid a contract, he may do so either at law or in equity. The most familiar instances of this rule are contracts ⁴⁵⁶ obtained by fraud. Such contracts are not void, but merely voidable. A vendor defrauded into selling his goods may repudiate the contract and sue in replevin for the goods sold. If on the sale he has received anything from the vendee, he must tender a return of what he has received before bringing suit, while in equity it is sufficient that in his bill

of complaint he offer a restoration. This is substantially the only difference between the two procedures: *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 75, 99 N. Y. 333. There are cases of constructive fraud, and those arising from false representations of a promissory character, in which relief can be had only in equity. Where, however, the fraud is of such a nature as would sustain a common-law action of deceit, it may safely be said that the contract may be avoided, either at law or in equity, at the election of the defrauded party, provided only that at law the offer to rescind must precede the institution of the action.

Some text-writers, while conceding that this doctrine is true of personalty, contend that a different rule obtains in the case of real estate. Mr. Bigelow, in his work on *Frauds* (volume 1, page 76), writes: "If, however, the property sought is realty, the case will be different, according to the general view of the common law. The guilty party acquires indeed only a voidable title, as in the case of personalty; but the title of real estate can be conveyed only by deed, and it follows that it can be divested only by deed. Tender and demand would not then restore the legal title to the defrauded vendor. He would have no right to enter; he could not then expel the purchaser, and he could not maintain an action of ejectment, for that requires a legal title." The authorities cited by the learned author in support of his position (*Pearsoll v. Chapin*, 44 Pa. 9; *Mitchell v. Moore*, 24 Iowa, 394; *Blaney v. Hanks*, 14 Iowa, 400; *Nicholson v. Halsey*, 1 Johns. Ch. 417) hold merely that where a deed has been duly executed and delivered, a subsequent surrender or destruction of it will not divest the estate conveyed, but that a reconveyance should be tendered. In *Feret v. Hill*, 15 Com. B. 207, the only proposition decided ⁴⁵⁷ was that representation as to the intended use of premises leased from the defendant being merely promissory and collateral could not defeat the tenant's right to possession in an action at law. The author concedes that the law in Massachusetts is the reverse of that stated by him: *Bassett v. Brown*, 100 Mass. 355. In this state it has been held that a judgment creditor may, without resort to equity, sell on execution lands conveyed by his debtor in fraud of creditors, and that the purchaser at the sale may recover the lands in ejectment (*Chautauque Co. Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347), and it has never been the practice with us when resort is

had to equity, either in a case of a deed fraudulent as to creditors or in one where the deed has been obtained by fraud on the grantor, to do more than to declare the deed fraudulent and void, not to require a reconveyance by the grantee.

Accepting, however, the distinction made by the learned text-writer between the principle applicable in realty and that applicable to personalty, there nevertheless are, unquestionably, certain kinds of fraud for which a deed can be avoided at law. It is said in Story's Equity (section 60): "Thus, for example, although fraud, accident and trust are proper objects of courts of equity, it is by no means true that they are exclusively cognizable therein. On the contrary, fraud is in many cases cognizable in a court of law. Thus, for example, reading a deed falsely to an illiterate person, whether it be so read by the grantee or by a stranger, avoids it as to the other party at law": Citing *Thoroughgood's Case*, 2 Coke, 9. The same is true as to a deed executed by a blind man: *Shulter's Case*, 12 Coke, 90. There are two kinds of fraud, which differ essentially in their character; in the one the grantor is induced to convey his property by fraudulent representations as to the value, nature or character of the consideration he receives for the conveyance. This is sometimes called fraud in the consideration. In the other case the grantor is deceived into the execution of an instrument of the contents of which he is ignorant. This is sometimes called fraud in the execution of the deed. The distinction⁴⁵⁸ between the two cases lies just here. It is elementary law that the assent of the parties is necessary to constitute a binding contract. In the first case the assent of the party, though obtained by fraud, is nevertheless obtained not only to the execution of the instrument, but to the contract which it evidences. In the second case there is procured only the signature to, and execution of, the written instrument, but not assent to the contract therein stated. In cases of this latter class the deed can be avoided at law: *Wilcox v. American Telephone & Telegraph Co.*, 176 N. Y. 115, 98 Am. St. Rep. 650, 68 N. E. 153. It seems to me plain that a deed by an incompetent person falls within the second class. The ground on which such deeds are avoided in case of fraud is that the party has been misled by deception and has never assented to the contract. The ground on which the deed of an incompetent is avoided is that by infirmity of intellect he is

incapable of giving assent. The element that avoids the deed is the same in the two cases—lack of assent, and it is not material whether it exists through deceit or through imbecility. The earlier authorities in this state so considered it. In *Jackson v. Hills*, 8 Cow. 290, where a defense of fraud was ruled out, it was said by the supreme court: “The defense was, that the lease was obtained by fraud; not that the defendant was incompetent, by reason of age, infirmity, or mental imbecility, to make a valid contract, or that she was ignorant when she executed the lease, of its nature and effect; but that the lessor was guilty of a misrepresentation as to a part of the consideration or inducement as to the making of the lease.” This case is cited with approval in *Osterhout v. Shoemaker*, 3 Hill, 513, where again the distinction is pointed out between fraud in the consideration of a deed and fraud in its execution. In *Phillips v. Gorham*, 17 N. Y. 270, the action was to recover the possession of lands. The complaint stated title in the plaintiff as heir at law of a deceased ancestor; that the defendant was in possession claiming under a deed from said ancestor; that at the time of the making of such deed to the defendant said ancestor was of unsound mind, and wholly incompetent to ⁴⁵⁹ make the deed, and that the deed was obtained fraudulently by threats, false promises and other improper influences. The trial court refused to charge the defendant’s request that before the deed could be avoided for fraud or undue influence it was necessary to procure a judgment to that effect in an action brought for that special purpose. The action was tried at law before a jury. Recovery by the plaintiff was sustained, this court holding that in an action to recover specific real property the plaintiff might attack a deed under which the defendant claimed upon grounds which were formerly cognizable in equity as well as those cognizable at law. The only criticism that can be made on the application of that decision to the case at bar is that in the case cited the complaint alleged a cause of action in equity as well as at law, while in the one before us the complaint states only a cause of action at law. It is to be observed, however, that the defendants’ request to charge presented no contention that, so far as relates to the ground of imbecility, resort must be first had to equity, but was confined to the allegation of fraud. The case is cited with approval in *Mandeville v. Reynolds*, 68 N. Y. 528, where it is said: “So, if in an action

of ejectment, the defense rests upon a deed or will, the plaintiffs can make proof that it was procured by fraud or other imposition." Finally, in *Van Deusen v. Sweet*, 51 N. Y. 378, the commission of appeals squarely decided that the deed of an incompetent person could be avoided in an action of ejectment, and that it was not necessary to resort to equity. That case, unless it is to be overruled, is decisive of the question before us. There, as in this case, the action was in ejectment, the complaint simply stating that the plaintiff was the owner in fee and entitled to the possession of the real estate therein described, and that the defendant unlawfully withheld possession thereof.

The rule stated seems to generally prevail in this country. In Massachusetts the deed of an incompetent person is voidable, not void (*Allis v. Billings*, 6 Met. 415, 39 Am. Dec. 744); nevertheless ejectment lies to avoid the deed. The rule obtains in Pennsylvania ⁴⁶⁰ (*Crawford v. Scovell*, 94 Pa. 48, 39 Am. Rep. 766); in Maine (*Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705); in New Jersey (*Eaton v. Eaton*, 37 N. J. L. 108, 18 Am. Rep. 716); in New Hampshire (*Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592); in Indiana (*Brown v. Freed*, 43 Ind. 253), and in North Carolina (*Fitzgerald v. Shelton*, 95 N. C. 519). It may be objected to the application of some of these authorities that the courts of Massachusetts and Pennsylvania, being for a long time without equity jurisdiction, resort for relief was necessarily had to the common-law courts, and that in Massachusetts it is not necessary to restore the consideration, even where the contract with the incompetent person has been made in good faith and in ignorance of such incompetency. No state, however, has maintained more steadily the distinction between common law and equity jurisdiction than New Jersey, and in that state, the same as in our own, a person dealing in good faith with an incompetent person, ignorant of his imbecility, is protected. Yet, as appears by the New Jersey case cited, in an action in ejectment a plaintiff may attack the deed of his ancestor for incompetency. The law seems to be the same in England: *Ball v. Mannin*, 1 Dowl. & C. 380.

Let us now turn to analogy. Nearly all the text-writers and judicial decisions treat lunacy or mental unsoundness and infancy as disability similar in character and in their effect on the contracts of the parties. In *Bool v. Mix*, 17

Wend. 119, 31 Am. Dec. 285, Judge Bronson said: "Deeds procured by duress, or executed by persons of unsound mind, stand on nearly the same footing as the deeds of infants." In *Blinn v. Schwarz*, 177 N. Y. 252, 101 Am. St. Rep. 806, 69 N. E. 542, Judge Vann quoted from Blackstone, Chancellor Kent and the principal text-writers on contracts to the effect that the contracts of lunatics and infants were of the same character, not void and mere nullities, but voidable only. It is clearly settled that an infant, on arriving at age, may avoid his deed in an action at law: *Jackson v. Carpenter*, 11 Johns. 539; *Clapp v. Byrnes*, 155 N. Y. 535, 50 N. E. 277; *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569, 13 S. W. 906; *Miles v. Lingerian*, 24 Ind. 385; *Cole v. Pennoyer*, 14 Ill. 158. See Tyler on Infancy, p. 69. We see no ⁴⁶¹ reason why a different rule should apply in the case of persons of unsound mind.

The learned judge who wrote for the majority of the court below relied on a previous opinion rendered by him in the case of *Blinn v. Schwarz*, 63 App. Div. 25, 71 N. Y. Supp. 343. The only case there cited as authority for the proposition that relief from the deed of a person of unsound mind must be had in equity alone is *Jacobs v. Richards*, 18 Beav. 300. But it could have decided no such proposition, for it was not an action at law but a suit in equity. The action was for the foreclosure of a mortgage, and all that was there held was that the defense of lunacy must be set up by a cross-bill. The only case that I can find supporting the position of the learned justice of the appellate division is the case of *Moran v. Moran*, 106 Mich. 8, 58 Am. St. Rep. 462, 63 N. W. 989, but, as conceded in the opinion there delivered, the decision is opposed to the current of authority elsewhere. It is doubtless true that an executed contract made with a person of unsound mind in good faith, for a valuable consideration, without knowledge of such mental unsoundness, will not be set aside or avoided, at least without a return of the consideration paid: *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541. It may also be true that a court of equity could, in such case, deal with the rights of the parties more adequately than a court of law. But this cannot deprive the plaintiffs of their right to try the issue before a jury in a court of law, if that has hitherto been the mode of trial of such an action. Nor is there so great embarrassment in such a trial as has been suggested. If in analogy to the case of fraud

it is necessary for the plaintiffs to return the consideration paid before suit brought, and they have failed to tender such return (a question we do not decide), then the action will be dismissed and it is the plaintiffs alone who will suffer by resorting to law instead of to equity. If, on the other hand, payment of a valuable consideration in good faith is in the nature of an equitable defense, still the Code of Civil Procedure (section 500) in express terms authorizes the interposition and determination of such defenses in an action at law: *New York Cent. Ins. ⁴⁶² Co. v. National Protection Ins. Co.*, 14 N. Y. 85. On this appeal we do not pass on those questions, for the record now before us does not show whether a valuable consideration was paid or, if paid, whether it was paid in good faith, without knowledge of the infirmity of the grantor.

The judgment appealed from should be reversed and a new trial granted, costs to abide the event.

Gray, Vann, Werner, Willard Bartlett and Chase, JJ., concur.

Haight, J., not voting.

Judgment reversed, etc.

The Deeds and Contracts of Insane Persons are by some authorities supposed to be void: *Walker v. Winn*, 142 Ala. 560, 110 Am. St. Rep. 50; but they really are voidable only: *Sprinkle v. Wellborn*, 140 N. C. 163, 111 Am. St. Rep. 827; *Blinn v. Schwartz*, 177 N. Y. 252, 101 Am. St. Rep. 806, and cases cited in the cross-reference note thereto; note to *Flach v. Gottschalk Co.*, 71 Am. St. Rep. 425, on contracts of insane persons.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

ALLEN v. HIRLINGER.

[219 Pa. 56, 67 Atl. 907.]

WILL, Construing, When of Conflicting Intent.—In construing wills, the effort is to discover the actual principal intent of the testator, and when it is clear, it will not be departed from. (p. 618.)

WILLS—Presumption When there is a Gift and a Subordinate Inconsistent Disposition.—The tendency of the decisions is to construe the first gift as a fee, and the subsequent words which appear to be repugnant as merely precatory or as expressive of a subordinate intent which must fail as an attempt to deprive the estate given of its legal attributes. (p. 619.)

WILLS—Devise and Bequest of a Fee, When Cut Down by Subsequent Provisions as to Disposition.—A devise and bequest to the testator's widow of all his estate, real and personal, to be the real owner thereof and for her proper use and benefit during her natural life, or so long as she remains his widow, with full permission to use therefrom as her necessities may require the same as the testator has had during his life, followed by a direction that, on her death, whatever remains is to be given his daughter, does not give the widow the fee. (p. 620.)

WILLS, Power of the Devisee to Convey Though She does not Acquire the Fee.—Where the person to whom property is devised for life is also given unlimited power to consume it, this includes the power to convey the fee. (p. 621.)

Appeal from the superior court of the case reported in 33 Pa. Sup. Ct. 413.

William R. Brinton, for appellant, Leonora Allen.

William S. Furst, for appellee, J. W. Hirlinger.

C. E. Montgomery and J. W. Denlinger, for J. W. Denlinger.

57 MITCHELL, C. J. The testator directed the payment of his debts and a small legacy to his daughter and then devised the residue of his estate to his wife for life or widowhood, with permission to use and live therefrom and to have the full ownership, the same as he had himself during his life, and at her death whatever should remain to be given to his daughter.

The class of wills to which this belongs present inherent difficulties in construction by their indication of an intent not accurately defined in the testator's own mind, if not of double and to some extent conflicting intents. The testator gives to the first taker, the estate, or, what is practically the same thing, the power to consume the whole, and yet manifests his expectation at least, if not his intention, that it shall not all be consumed. These two purposes, manifestly present in his mind, but not accurately defined, and their possible conflict perhaps not perceived at all, at once raise the question, Has the will limited the estate given, or has it attempted to deprive the estate given of some of its essential legal properties? The cases must be classified on this line of distinction. In *Good v. Fichthorn*, 144 Pa. 287, 27 Am. St. Rep. 630, 22 Atl. 1032, it was said: "The true test of the effect of language apparently at variance with other parts of the devise, is whether the intent is to give a smaller estate than the meaning of the words of the gift standing alone would import, or to impose restraints upon the estate given. The former is always lawful and effective—the latter rarely, if ever; the first, because the testator's intention is the governing consideration in the construction and carrying out of a will; the second, because even a clear intention of the testator cannot be permitted to contravene the settled rules of law by depriving any estate of its essential legal attributes." While similar language has been differently construed in different wills, yet the difference has been in the application not in the guiding principle. The effort has uniformly been to discover the actual principal intent of the testator, and where that has been clear there is no case in which it has been departed from. It has been very generally observed that the **58** testator, *inops consilii*, rarely observes or even appreciates the distinction between the two classes of cases. With the general idea in his mind that he can dispose of his property as he may please, he fails to see that he cannot make a gift and at the same time withhold it or its essential attributes.

Hence, the numerous cases where the effort is made to give the first taker, especially a widow, the full authority and enjoyment of the property and yet to dictate what shall be done with it in her life or particularly after her death. As the first donee is usually the principal object of the testator's bounty, the presumption in case of conflict is always in his favor. Hence, there is a strong trend, notably in the later cases, to construe the first gift as a fee, and the subsequent words which appear to be repugnant, as either merely precatory, as in *Good v. Fichthorn*, 144 Pa. 287, 27 Am. St. Rep. 630, 22 Atl. 1032, and *Boyle v. Boyle*, 152 Pa. 108, 34 Am. St. Rep. 629, 25 Atl. 494, or as expressive of a particular and subordinate intent which must fail as an attempt to deprive the estate given of its legal attributes, as in *Jaureche v. Proctor*, 48 Pa. 466, *Levy's Estate*, 153 Pa. 174, 25 Atl. 1068, 1070, *Evans v. Smith*, 166 Pa. 625, 31 Atl. 346, *Gilchrist v. Empfield*, 194 Pa. 397, 45 Atl. 46, and *Huber v. Hamilton*, 211 Pa. 289, 60 Atl. 789.

A few cases, notably *Fox's Appeal*, 99 Pa. 382, and *Follweiler's Appeal*, 102 Pa. 581, are frequently cited as sustaining contrary views to those here expressed, but they do not. While there is room for difference of opinion as to the application, there is no departure from the guiding principle of endeavoring to ascertain the testator's primary or main intent. The very first sentence of Chief Justice Sharswood's opinion in *Fox's Appeal* is that "every will is to be construed from its four corners, to arrive at the true intention of the testator." In neither that case nor *Follweiler's Appeal* was there any direct or express gift of a power to consume from which a fee simple could be inferred, but the inference was sought to be drawn from a reference to the disposition of "what remains" or "what shall be left" at the death of the wife, and it was held that the direct gift limited to a life estate was not enlarged by such reference.

In construing the infinite variety of phrases and expressions which testators have used to express their intentions, there is room for difference of opinion as to the application of rules⁵⁹ and presumptions, but no case sanctions a departure from the principle that all rules and presumptions are subordinate to the intent of the testator where that is ascertained.

Some few cases in which the good faith of the life tenant has been questionable, such as *LaBar's Estate*, 181 Pa. 1, 37 Atl. 111; *Tyson's Estate*, 191 Pa. 218, 43 Atl. 131, and

Trout v. Rominger, 198 Pa. 91, 47 Atl. 960, must be read in connection with that question.

Taking up the present will, in view of the foregoing principles, it does not appear to leave any doubt as to the testator's actual and main intent. The words are:

"Third. All the balance, or whatever may remain then of my estate, real, personal and mixed, I give, devise and bequeath to my beloved wife Leonora whom I desire to be the real owner thereof, and for her only proper use, benefit and behoof during her natural life, or so long as she remains my widow with full permission to her to use and live therefrom as her necessities may require, and she to have the full ownership thereof, the same as I now have, and have had during my natural life.

"Fourth. When my beloved wife dies, my will is whatever may then remain of my estate, real, personal or mixed, I desire that the same remaining portion, if any, be given to my beloved daughter Mary."

The gift to the widow is of the estate, she to be "the real owner thereof," and "with full permission to her to use and live therefrom as her necessities may require." And she is to have "the full ownership thereof the same as I now have, and have had during my natural life." It is plain that he meant her to have whatever her necessities should require, even to the extent of the entire estate, as he had himself undoubtedly had during his lifetime. And this idea he expressed distinctly three separate ways. And she was the judge of what her necessities should require: Lininger's Appeal, 110 Pa. 398, 1 Atl. 722. The gift is expressly of the estate, real, personal and mixed, blended together, and no distinction made. There was no difference in the testator's own ownership and control over the real and the personal estate during his life, and there is nothing to indicate an intention to make a difference in hers after his death. There was no limit put on her use. If she needed the whole, she was to have the whole. But it is plain that he did not think she would need the whole, ⁶⁰ and expected that there would be something left, and this residue, be it much or little, he gave to his daughter. The terms of this latter gift are as explicit as those of the first. When the wife dies "whatever may then remain of the estate, real, personal or mixed, I desire that the same remaining portion, if any, be given to my daughter." No distinction is made again between the

real and the personal estate, and an equal power to consume is implied in the expressed doubt "if any" as to there being any unconsumed residue of either.

The appellant does not have a fee simple, for she could not make a valid devise of what may be left at her death, as that would go under the testator's will to his daughter. But appellant has an unlimited power to consume, and as said in the very analogous case of *Kennedy v. Pittsburg etc. R. R. Co.*, 216 Pa. 575, 65 Atl. 1102, the power to consume real estate necessarily includes the power to convey. Her deed, therefore, will convey a good title.

Judgment reversed and judgment directed to be entered for the plaintiff on the case stated.

If an Estate in Fee is Devised in One Clause of a Will in clear and decisive terms, it cannot ordinarily be cut down or taken away by raising a mere doubt in some subsequent clause, or by some other inference therefrom: *Platt v. Brannan*, 34 Colo. 125, 114 Am. St. Rep. 147; *Gannon v. Albright*, 183 Mo. 238, 105 Am. St. Rep. 471; *Sevier v. Woodson*, 205 Mo. 202, 120 Am. St. Rep. 728. However, a devise in fee may be restricted by subsequent words in the will: *Hill v. Gianelli*, 221 Ill. 286, 112 Am. St. Rep. 182. Thus a devise and bequest in favor of the testatrix's brother and her nephew and niece, share and share alike, accompanied by a direction that the share of the brother be invested for his benefit during his natural life and for the benefit of his wife and his issue after his death, does not give the brother a fee in his share, but cuts his estate down to one for life: *Mee v. Gordon*, 187 N. Y. 400, 116 Am. St. Rep. 613.

FARNER v. MASSACHUSETTS MUTUAL ACCIDENT ASSOCIATION.

[219 Pa. 71, 67 Atl. 97.]

INSURANCE, ACCIDENT.—Death from the Bite of a Dog is death from an accident, and not death from sickness or disease, within the meaning of a policy providing for certain payments in case of death from accident and for other and different payments in case of death from sickness or disease. (p. 622.)

INSURANCE, ACCIDENT—"Immediately Disabled."—A man whose hand is bitten by a dog and thereupon at once bandages it, and its use is for the moment interfered with, and who continues to suffer increasing pain for two weeks, when death results, is "immediately disabled" within the meaning of those words as used in a policy of accident insurance. (p. 622.)

Action upon a policy on the life of the insured. He had been bitten on the hand by a dog as the result of some one's

pinching the dog's tail while it was being held on the lap of the insured. He died two weeks later from the effect of this biting.

There were two provisions of the policy, one insuring "from loss through bodily personal injuries caused solely through accidents," under which two thousand dollars were to be paid, and the other for weekly indemnity not exceeding twenty-six weeks for loss through any sickness or disease. It was claimed by the defendant that the death of the insured was due to inoculation with some poisonous generating germ from the dog's tooth or saliva, and hence not attributable to accident. Verdict in favor of the plaintiff for the amount due under the accident provision. The defendant appealed.

John R. Geyer and John E. Fox, for the appellant.

C. H. Backenstoe and William M. Hain, for the appellee.

⁷⁵ Per CURIAM. The claim of the appellant that the death of the insured ⁷⁶ should be classed under the "health provisions" and not under the "accident provisions" of the policy can hardly be made seriously. The policy was prima facie an accident policy, and the insured died from the bite of a dog, certainly an accident, not a disease. The proximate cause of the death was the bite, and the way in which it operated to produce death, whether by hemorrhage or lockjaw or blood poisoning, was a medical detail which did not affect the material fact of death resulting from the accident.

The other argument, that the insured was not "immediately disabled," is not much better. He was bitten in the thumb, his hand was bandaged at once, and though the gravity of the injury was not at first appreciated, yet the use of his hand was interfered with from the moment and continued to be more and more so, with increasing pain until his death, two weeks later. There was no break in the continuity of the consequences of the injury, and no intervening cause in the resulting disability. Immediately, under such circumstances, does not mean instantly: *Ritter v. Preferred etc. Accident Assn.*, 185 Pa. 90, 39 Atl. 1117.

Judgment affirmed.

A Policy of Insurance Against Death by External Violence and Accidental Means covers the case of one who accidentally cuts his finger by the breaking of a bottle, from which wound blood poisoning ensues and death results: *Central Accident Ins. Co. v. Rembe*, 220 Ill. 151,

110 Am. St. Rep. 235. And death results "proximately and solely from accidental cause," within the meaning of these words as used in an accident insurance policy, where the assured accidentally fell, sustained an abrasion of the skin through which bacteria entered, causing blood poisoning, from which he died: *Cary v. Preferred Accident Ins. Co.*, 127 Wis. 67, 115 Am. St. Rep. 997. Death caused by blood poisoning, superinduced by the bite of an insect, is not the result of "poisoning in any form or manner," or "contact with poisonous substances," within the meaning of an accident insurance policy: *Omberg v. United States Mutual Accident Assn.*, 101 Ky. 303, 72 Am. St. Rep. 413.

KEMPER v. FORT.

[219 Pa. 85, 67 Atl. 991.]

LIBEL AND SLANDER in the Course of Judicial Proceedings. When libelous matter in pleadings is relevant and pertinent, there is no liability for uttering it. (pp. 629, 630.)

LIBEL AND SLANDER in Judicial Proceedings, Doubts Respecting, How to be Solved.—Where there is a question whether matter alleged in a pleading is material, the doubts should be resolved in favor of its relevancy and pertinency. (p. 630.)

ISSUE Means Legitimate Issue.—Under a will directing the disposition of property among the issue of a specified person, legitimate issue only are included. (p. 631.)

LIBEL in Charging Illegitimacy in a Judicial Proceeding.—If the testator directs that in a specified contingency a fund shall be divided among the children of one of his daughters, and the guardian of one of these children petitions for the review of the accounts of the executors, and they, in response, deny the legitimacy of the child represented by such guardian, they are not liable for libel though the charge of illegitimacy is false, if they acted upon information received from a member of the family. (p. 631.)

Action of libel against the executors of Thomas W. Price, deceased. On the trial it appeared that Austin W. Bennett, as guardian of Jesse C. Claggett, filed a petition in the orphans' court to review the account of the executors. The right to maintain the petition was dependent on the ward's being a child of the testator's daughter, Mary S. Claggett. The libelous matter was contained in an answer to this petition made by the executors, in which they alleged that the ward represented by the guardian was an illegitimate child of Mary S. Claggett, and averred that this was alleged by its father and admitted by the mother. The court instructed the jury to return a verdict for the defendant, and the plaintiff appealed.

Joseph Gilfillan, W. E. Chapman and George S. Graham, for the appellant.

Henry Budd and R. D. Maxwell, for the appellee.

⁸⁷ BROWN, J. The libelous matter of which the appellant complains appears in two answers in the orphans' court of Philadelphia county to petitions filed by Austin W. Bennett, guardian of Jesse C. Claggett, for a review of the accounts of Thomas R. Fort, Jr., the appellee, and William S. Price, executors and trustees under the will of Thomas W. Price, deceased, and for an order to set aside the sale of certain real estate made by them. Thomas W. Price, the father of the appellant, died in 1895. At that time she was the wife of Jesse C. Claggett, and by her father's will the sum of fifty thousand dollars was given to his executors in trust, the income to be paid to her during life, and at her death to be devoted to the maintenance of her "issue" for a certain time, after which there was to be an equal division of the principal "to and among the children" of the said Mary S. Claggett. In 1900 she was divorced from her husband, Jesse C. Claggett, and was subsequently married to L. S. Kemper. In the answers filed in the orphans' court by the two executors and trustees there was an averment that Jesse C. Claggett was the illegitimate child of the said Mary S. Claggett, as she has "confessed both by word of mouth and by writing," and, in view of this confession and other facts ⁸⁸ known to the respondents, they denied the right of the said Jesse C. Claggett to take under the bequest in the will of the said Thomas W. Price, deceased, and of his guardian to ask for the citations.

On the trial it appeared that the allegation of the illegitimacy of Jesse C. Claggett, Jr., was false. It was shown, however, that Jesse C. Claggett, the former husband of appellant, had told the appellee that the child was not his, but another's, and that his wife had so admitted to him. This information was conveyed by Claggett to the appellee as a result of an investigation instituted by him upon being informed by Thomas Claggett, the brother of Jesse C. Claggett, that the latter was illegitimate, and, therefore, not interested in the estate of Thomas W. Price. Thomas Claggett notified Fort that he was the sole party in remainder after his mother's death, and gave further notice to him as executor and trustee to see to it that Jesse C. Claggett was not permitted to share in the trust

estate. It was as the result of this notice that Fort set inquiries on foot in relation to the legitimacy of Jesse C. Claggett, Jr., and, in the course of his investigation, the statement of the boy's illegitimacy was made to him by the appellant's former husband. The information acquired by Fort was communicated to his counsel and his cotrustee, who was also a member of the bar, and by the advice of their counsel, and with the consent of William S. Price, the alleged libelous statement was set forth in the answers. On this state of facts the court directed the jury to find in favor of the defendant, holding that whether the allegation of illegitimacy was true or false, it was, under the undisputed facts, privileged, and for making it in the answers the defendant was not responsible to the plaintiff.

In England, as far back as the time of Coke, anything said or written in legal proceedings was absolutely privileged. In Cutler and Dixon, Coke's Reports, part 4, page 14, it was adjudged, "that if one exhibits articles to justices of the peace against a certain person, containing divers great abuses and misdemeanors, not only concerning the petitioners themselves, but many others, and all this to the intent that he should be bound to his good behavior; in this case the party accused shall not have for any matter contained in such articles any action upon the case, for they have pursued the ordinary course of ⁸⁹ justice in such case; and if actions should be permitted in such cases, those who have just cause of complaint would not dare to complain for fear of infinite vexation." And on the same page, in Buckley and Wood, "It was resolved per totam curiam, that for any matter contained in the bill that was examinable in the said court, no action lies, although the matter is merely false, because it was in course of justice." In King v. Skinner, Lofft, 55, on a motion to quash the indictment against the defendant, who, as one of his majesty's justices of the peace, was charged with having said to a grand jury before him in the general sessions of the county, "You are a seditious, scandalous, corrupt and perjured jury," Lord Mansfield remarked: "Neither party, witness, counsel, jury or judge, can be put to answer, civilly or criminally, for words spoken in office. If the words spoken are opprobrious or irrelevant to a case, the court will take notice of them as a contempt, and examine on information. If anything of mala mens is found on such

inquiry, it will be punished suitably." In comparatively recent times, in *Revis v. Smith*, 18 Com. B. 126, 25 L. J. C. B. 195, 2 Jur., N. S., 614, 4 Week. Rep. 605, it was held that no action will lie against a man for a statement made by him, whether by affidavit or viva voce, in the course of a judicial proceeding, even though it be alleged to have been made "falsely and maliciously, and without any reasonable or probable cause." That case was followed by *Henderson v. Broomhead*, 4 Hurl. & N. 579, 28 L. J. Ex. 360, 5 Jur., N. S., 1175, 7 Week. Rep. 492, Ex. Ch., and it was there said by Crompton, J.: "No action will lie for words spoken or written in the course of any judicial proceeding. In spite of all that can be said against it, we find the rule acted upon from the earliest times. The mischief would be immense if the person aggrieved, instead of preferring an indictment for perjury, could turn his complaint into a civil action. By universal assent it appears that in this country no such action lies. Cresswell, J., pointed out, in *Revis v. Smith*, 18 Com. B. 126, 25 L. J. C. B. 195, 2 Jur., N. S., 614, 4 Week. Rep. 605, that the inconvenience is much less than it would be if the rule were otherwise. The origin of the rule was the great mischief that would result if witnesses in courts of justice were not at liberty to speak freely, subject only to the animadversion of the court. The attempts to obtain redress for defamation having failed, an effort was made in *Revis v. Smith* to sustain ⁹⁰ an action analogous to an action for malicious prosecution. That seems to have been done in despair. The rule is inflexible that no action will lie for words spoken or written in the course of giving evidence." Another case that may be cited is *Seaman v. Netherclift*, L. R. 1 C. P. D. 540, 2 C. P. D. 53, 46 L. J. C. P. 128, 35 L. T. 784, 25 Week. Rep. 159, C. A., where it was said by Lord Coleridge, C. J.: "Now, a long course of authorities, of which perhaps the best known, as the most remarkable, is the case of *Astley v. Younge*, 2 Burr. 807, 2 Ld. Ken. 536, has decided that no action of slander can be brought for any statement made by the parties either in the pleadings or during the conduct of the case. The law is so stated very clearly by Lord Eldon in *Johnson v. Evans*, 3 Esp. 32, 6 R. R. 809; it is so stated also, not indeed with absolute certainty, in a note to the well-known case of *Hodgson v. Scarlett*, 1 Barn. & Ald. 232, 19 R. R. 301, the author of which note, we learn from Baron Alderson in *Gibbs v. Pike*, 9 Mees. & W. 351, 1 D.,

N. S., 409, 12 L. J. Ex. 257, 6 Jur. 465, to have been Mr. Justice Holroyd himself. But I conceive the law on this point to be now quite certain, although most men of any experience in the profession must have seen many instances in which judicial proceedings have been made by parties to them to serve the ends of private malignity. It is equally certain, however, nor has any question ever been raised, that the privilege of parties is confined to what they do or say in the conduct of the case."

Upon a review of the English authorities the rule, as deduced from them in Starkie on Slander and Libel, section 213, is that, "On the grounds of public policy, no action, either for slander or libel, can be maintained against a judge, magistrate or person presiding in a judicial capacity, of any court or other tribunal, judicial or military, recognized by and constituted according to law; nor against suitors, prosecutors, witnesses, counsel or jurors, for anything said or done, relative to the matter in hand, in the ordinary course of a judicial proceeding, investigation or inquiry, whether civil or criminal, by or before any such tribunal, even if it be false and malicious, and without reasonable and probable cause; and the same with regard to statements contained in affidavits, pleadings and other proceedings in the usual and regular course of procedure." In section 196, it is said by the same learned author: "As to defamatory statements and other publications made in the course of proceedings in courts of justice; by the general policy of the law, the occasion ⁹¹ is such that it not only repels the presumption of malice, but, as it appears, excludes all evidence of malice; and allows the occasion and circumstances to supply an absolute and peremptory bar to an action of slander or libel in respect of any such statements or publications. And the reason is founded on the principle that 'the law will rather suffer a private mischief than a public inconvenience'; and that persons engaged in the administration of the law, or who bring offenders to justice, or who do or seek justice in respect of wrongs or injuries suffered, or give evidence as to any such, or make defenses thereto, may be unfettered in the discharge of duties of such paramount public importance; and may not be deterred from so doing by the fear of actions of defamation. And accordingly the law, without regard to the question of intention, and on grounds of obvious policy, repels the claim to damages in respect of any publica-

tion, whether oral or written, made in the ordinary course of a judicial proceeding, whether civil or criminal; and this rule applies to judges, juries, witnesses, suitors and prosecutors, in respect of anything stated by them in the course of a judicial proceeding." In some of the English cases, under a qualification of this rule, protection is given from a slander or libel suit to counsel or a party to a cause for what may be said or written in it (outside of the pleadings) only when the same be pertinent to it.

Some of the courts in this country—among them those of Indiana, Maryland, Texas and Washington—have followed the English rule, that for any defamatory matter appearing in pleadings no action can be maintained, the immunity being absolute. In *Bartlett v. Christhlf*, 69 Md. 219, 14 Atl. 518, it is said: "This privilege, protecting against a suit for libel or slander, is founded upon what would seem to be a sound public policy which looks to the free and unfettered administration of justice, though as an incidental result it may, in some instances, afford an immunity to the evil disposed and malignant slanderer. . . . It is better, therefore, where the statements are false and knowingly false, to leave the party injured to the redress which the criminal court may apply, than to open the door for the institution of civil suits which may be successfully used as an efficient means to obstruct, the full and fearless pursuit and administration of justice"; and, in *Runge v. Franklin*, 72 Tex. 92 585, 13 Am. St. Rep. 833, 10 S. W. 721, 3 L. R. A. 417: "We believe it is and ought to be the law that proceedings in civil courts are absolutely privileged. Citizens ought to have the unqualified right to appeal to the civil courts for redress without the fear of being called to answer in damages for libel." After reviewing the authorities in support of this view, Townshend, in his work on Libel and Slander, section 221, subscribes to it as follows: "The right of appealing to the civil tribunals is more extensive than the right of appealing to the criminal tribunals. In a civil action, whatever the complainant may allege in his pleading as or in connection with his grounds of complaint can never give a right of action for libel. The immunity thus enjoyed by a party complaining extends also to a party defending; whatever one may allege in his pleadings by way of defense to the charge brought against him or by way of countercharge, counterclaim or setoff, can never give a right of action for libel. The rule as thus laid

down has been doubted by some, and it has been said that if the tribunal to which the complaint be made has no jurisdiction of the subject matter, or if the defamatory matter be irrelevant to the matter in hand, or if the party complaining or defending maliciously inserts defamatory matter in his pleading, in such cases the party aggrieved may maintain his action for slander or libel. Notwithstanding the dicta to the contrary, we believe the better and the prevailing opinion to be, that for any defamatory matter contained in a pleading in a court of civil jurisdiction, no action for libel can be maintained; the power possessed by courts to strike out scandalous matter from the proceedings before them, and to punish as for a contempt, is considered a sufficient guaranty against the abuse of this privilege; but whatever may be the reason, it seems certain that where there is a perversion of the right, 'the policy of the law steps in and controls the individual right of redress.' "

Other courts in the United States have not followed the foregoing view. In *McLaughlin v. Cowley*, 127 Mass. 316, it was held that defamatory statements not pertinent or material to the issue are not privileged; and in *Garr v. Selden*, 4 N. Y. 91, the New York court of appeals decided that whether the matter alleged in the pleadings was privileged depended upon whether it was pertinent or material. A most exhaustive opinion is found in *Johnson v. Brown*, 13 W. Va. 71, and, ⁹³ after a review of all the authorities, it was held that "the public policy, on which is based this absolute exemption from suit for libelous matters contained in the proceedings, or spoken in a regular course of judicial proceedings, is not violated by the qualification, that matter complained of must be pertinent, even though it be contained in the pleadings in the cause; and that the rule that it must be pertinent, which is applied to the words of counsel, or to other proceedings in a case, to make them absolutely privileged, should also on reason and authority be applied to the pleadings of parties." In *Wilson v. Sullivan*, 81 Ga. 238, 7 S. E. 274, the alleged libelous matter was contained in a sworn bill asking for an injunction. In an action for damages the court thus generalizes the law: "All charges, all allegations and averments contained in regular pleadings addressed to and filed in a court of competent jurisdiction, which are pertinent and material to the redress or relief sought, whether legally sufficient to obtain

it or not, are absolutely privileged. However false and malicious, they are not libelous. This privilege rests on public policy, which allows all suitors (however bold and wicked, however virtuous and timid) to secure access to the tribunals of justice with whatever complaint, true or false, real or fictitious, they choose to present, provided only that it be such as the court whose jurisdiction is involved has power to entertain and adjudicate. The alleged libelous matter in the present case, being contained in a bill praying for an injunction, was relevant and material; consequently, absolutely privileged."

We are inclined to the view that, for false and malicious defamatory allegations appearing in pleadings filed in a court having jurisdiction of what is set forth in them, there is absolute immunity from a suit for libel at the instance of the defamed party only when the defamatory words are relevant and pertinent to the matter or matters to be inquired into by the court; but whether this rule or that of absolute immunity is the correct one, we are not called upon to decide in this case, for the authorities, though differing as to when immunity is absolute, are uniform that when alleged libelous matter in pleadings is relevant and pertinent, there is no liability for uttering it. Public policy requires this, even if at times the privilege of immunity for false and malicious averments in ⁹⁴ pleadings is abused. Justice can be administered only when parties are permitted to plead freely in the courts and to aver whatever ought to be known without fear of consequences, if a material and pertinent averment should not be sustained. Wrong may at times be done to a defamed party, but it is *damnum absque injuria*. The inconvenience of the individual must yield to a rule for the good of the general public.

Where the question of the relevancy and pertinency of matters alleged in pleadings is to be inquired into, all doubt should be resolved in favor of relevancy and pertinency. In the present case the averment of illegitimacy was clearly pertinent. The testator, Thomas W. Price, directed that upon the death of his daughter the income for a while, and ultimately the principal, should go to her "issue," to her "children." That under the common law these words mean legitimate issue and children cannot be questioned, and the testator is presumed to have so used them: *Ellis v. Houstoun*, L. R. 10 Ch. D. 239; *McNaughtan's Trust*, 35 L. T. 774. The averments of illegitimacy would not be pertinent if the question

was as to the right of Jesse C. Claggett to take or inherit from his mother, for under the act of 1855 illegitimates take from their mothers; but appellant's children will take nothing from her under the will of her father. They take under it directly from him, and when he designated the issue or children of his daughter as his legatees, he must be understood as having meant legitimate issue or children. When notified by Thomas Claggett that the right of Jesse C. Claggett to participate in the estate of the father of the appellant was questioned, the appellee properly questioned it in the answers filed. The assignments of error are all overruled and the judgment is affirmed.

THE LIABILITY FOR LIBEL OR SLANDER IN THE COURSE OF JUDICIAL PROCEEDINGS.

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I. Scope of the Note.

We purpose in this note to treat of the liability to civil action of persons who utter and publish libelous or slanderous words as a part and in the course of judicial proceedings, which also requires us to consider what proceedings are judicial or quasi-judicial within the meaning of the rules which we shall state, what persons are entitled to the protection of their privilege, and against whom such privilege may be invoked. We shall not, however, consider any question of pleading, evidence or practice arising in actions attempting to assert a liability supposed to exist for slanders or libels so occurring, nor shall we consider what publication, in addition to that occurring in the judicial proceeding, may exist without creating any civil liability, except to state, as we now do, that it must by no means be inferred that because a litigant, counsel or witness may be privileged in the publication or uttering of a libel or slander in the course of a judicial proceeding, that his privilege extends beyond that proceeding and entitles him to immunity for other publications made either before or after and in no way involved in the proceeding itself: *Brown v. Globe P. Co.* (Mo.), 112 S. W. 462; *Dancaster v. Hewson*, 2 Man. & R. 176, 6 L. J. (O. S.) K. B. 311; *Flint v. Pike*, 6 D. & R. 528, 4 Barn. & C. 473, 3 L. J. (O. S.) 278, 28 R. R. 335.

II. The English Rule.

This rule is simple and easily stated. The courts of that country have deemed the absolute freedom of litigants, counsel, witnesses and all others required to speak or write in the course of a judicial proceeding as of paramount importance, and do not admit that any liability can exist to a civil action for words, whether spoken or written, in the course and as a part of such a proceeding: *King v. Skinner*, Lofft, 55; *Astley v. Younge*, 2 Burr. 807, 2 Ld. Ken. 536; *Johnson v. Evans*, 3 Esp. 32, 6 R. R. 809; *Kennedy v. Hillaird*, 10 Ir. C. R. R. 195, 1 L. T. 578; *Munster v. Lamb*, L. R. 11 Q. B. D. 588, 52 L. J. Q. B. 726, 49 L. T. 252; 32 Week. Rep. 248, 47 J. P. 805, C. A.; *Henderson v. Broomhead*, 4 Hurl. & N. 579, 28 L. J. Ex. 360, 5 Jur., N. S., 1175; 7 Week. Rep. 492, Ex. Ch.; *Revis v. Smith*, 18 Com. B. 126, 25 L. J. C. P. 195, 2 Jur., N. S., 614, 4 Week. Rep. 605; *Scott v. Stanfield*, L. R. 3 Ex. 220, 37 L. J. Ex. 155, 18 L. T. 572, 16 Week. Rep. 911; *Dawkins v. Lord Rokeby*, L. R. 8 Q. B. 255, 45 L. J. Q. B. 8, L. R. 7 H. L. 744, 33 L. T. 196, 23 Week. Rep. 931; *Seaman v. Netherclift*, L. R. 1 C. P. 540, 2 C. P. D. 53, 46 L. J. C. P. 128, 35 L. T. 784, 25 Week. Rep. 159, C. A. In the principal case the statement is made that the courts of Indiana, Maryland, Texas and Washington have adopted the English rule. We believe this statement to be inadvertent and not sustained by any of the authorities cited in its support. In truth, we have discovered no American case going further than to deny the existence of civil liability when the de-

famatory matter complained of was irrelevant to any issue involved in the judicial proceeding in which it was uttered or published.

III. The Protection of Relevancy.

a. The General Rule.—Whether the defendant sought to be held liable for an alleged slander or libel uttered by him in the course of a judicial proceeding was a party, witness, attorney, judge, juror or agent of one of the parties, the general rule is that if the matter uttered was relevant, it is privileged: *Lawson v. Hicks*, 38 Ala. 279, 81 Am. Dec. 49; *Hollis v. Meux*, 69 Cal. 625, 58 Am. Rep. 574, 11 Pac. 248; *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937; *Goslin v. Cannon*, 1 Harr. 3; *Wilson v. Sullivan*, 81 Ga. 238, 7 S. E. 274; *Hardin v. Comstock*, 2 A. K. Marsh. 480, 12 Am. Dec. 427; *Forbes v. Johnson*, 11 B. Mon. 48; *Monroe v. Davis*, 26 Ky. Law Rep. 728, 82 S. W. 450; *Lescale v. Joseph Schwartz Co.*, 118 La. 718, 43 South. 385; *Hoar v. Wood*, 3 Met. 193; *Brown v. Globe P. Co. (Mo.)*, 112 S. W. 462; *Gilbert v. People*, 1 Denio, 41, 43 Am. Dec. 646; *Garr v. Selden*, 4 N. Y. 91; *Cook v. Hill*, 5 N. Y. Super. Ct. 341; *Woodman v. Kidd*, 25 App. Div. 254, 49 N. Y. Supp. 301; *Prescott v. Tousey (21 Jones & S.)*, 53 N. Y. Super. Ct. 56; *Kemper v. Fort*, 219 Pa. 85, ante, p. 623, 67 Atl. 991, 13 L. R. A., N. S., 820; *Hart v. Baxter*, 47 Mich. 198, 10 N. W. 198; *Lea v. White*, 4 Sneed, 111; *Shadden v. McElwee*, 86 Tenn. 146, 6 Am. St. Rep. 821, 5 S. W. 602; *Crockett v. McLanahan*, 109 Tenn. 517, 72 S. W. 950, 61 L. R. A. 914; *Runge v. Franklin*, 72 Tex. 585, 13 Am. St. Rep. 833, 10 S. W. 721, 3 L. R. A. 417; *Johnson v. Brown*, 13 W. Va. 71; *Jennings v. Paine*, 4 Wis. 358; *Hodgson v. Scarlett*, 1 Barn. & Ald. 232, 19 R. R. 301; *Fairman v. Ives*, 5 Barn. & Ald. 642, 1 D. & R. 252, 1 Chit. 85, 24 R. R. 514; *Flint v. Pike*, 4 Barn. & C. 473, 6 D. & R. 528, 3 L. J. (O. S.), K. B. 272, 28 R. R. 335. “To the catalogue of absolutely privileged communications belong all words spoken or written by the court, the parties, or the counsel, in the due course of judicial proceedings, which may be relevant. The relevancy, or pertinency, of the calumnious matter is indispensable to its perfect and absolute freedom from all actionable quality; and being relevant, it can give rise to no civil responsibility, no matter how great the malignity or malice from which it may have originated”: *Lawson v. Hicks*, 38 Ala. 279, 81 Am. Dec. 49. “A party to a judicial proceeding may, by himself and counsel, write or say anything of or concerning the case, or of a witness who testifies in the case, that is pertinent and material to the matter in controversy, and, he cannot be held to answer for scandalous words, unless, under pretense of pleading his case, he designedly wanders from the point in question and maliciously heaps slander upon the party whose conduct or evidence is under consideration; and so long as it can be said that such party confines himself to that which is pertinent and material, he is under no obligation to show that his words were absolutely true; and cannot

be made to answer for maliciously saying what the law permits him to say": *Morgan v. Booth*, 13 Bush, 480. If the matter in a pleading or affidavit is pertinent or material, "the law will not allow its truth or innocency to be drawn into question in an action for libel. It would not in that case be necessary to deny malice, as the law does not permit a party to allege, in this form of action, that the publication was false or malicious": *Garr v. Selden*, 4 N. Y. 91. "The law is well settled that a counsel or party conducting judicial proceedings is privileged in respect to words or writings used in the course of such proceedings reflecting injuriously upon others, when such words and writings are material and pertinent to the questions involved; and that, within such limit, the protection is complete, irrespective of the motive with which they are used; but such privilege does not extend to matter having no materiality or pertinency to such questions. This is necessary to a thorough, searching investigation of truth. Should those engaged in the management of causes before courts be placed in fear of prosecutions for slander for reflections cast upon the credibility of parties and witnesses, and their defense made to depend upon the truth of what is said, trials of questions of fact, depending upon the credibility of witnesses, would be far less likely to lead to as correct results as in cases where no such embarrassment was felt. In the latter, the court and jury will have their attention called to every consideration having a tendency to enable them to arrive at the truth. This tends to promote an intelligent administration of justice. To secure this is of much greater importance than to prevent the evils arising from reflections cast upon parties or witnesses": *Marsh v. Ellsworth*, 50 N. Y. 309.

b. **Limitations and Exceptions.**—It is very easy to imagine a libel or slander uttered in the course of judicial proceedings entirely relevant to the issue and yet so entirely inexcusable that immunity in a civil action seeking indemnity therefor shocks our sense of justice, as where the maker of a promissory note written and signed by himself denies its existence and charges another with its forgery, and does this, not because of any infirmity in his memory, but for the purpose of avoiding what he knows to be a just liability. Against this view, it may be answered that, conceding there is no civil liability, he is subject to a prosecution for perjury, and upon conviction, to severe punishment, and that it will always be so difficult to ascertain whether an allegation or argument made in the progress of an action, or testimony given therein, if false, was willfully so, that sound public policy may best be promoted by denying liability and giving the witnesses and litigants the utmost freedom, lest, otherwise, the administration of justice may be seriously embarrassed. Hence the decisions on the one hand making the immunity absolute where the utterance is relevant, and on the other, affirming the liability to exist where the utterance is in bad faith and the occasion is employed as an opportunity for defamation. We have already shown

that in *Garr v. Selden*, 4 N. Y. 91, the position was upheld that if a matter in a pleading is material, the law will not permit the defamed party to allege in an action of libel that it is untrue. There are a few other decisions which, while not founded upon similar reasoning, seem to sustain the same conclusion: *Lawson v. Hicks*, 38 Ala. 279, 81 Am. Dec. 49; *Hollis v. Meux*, 69 Cal. 625, 58 Am. Rep. 574, 4 Pac. 248; *Kidder v. Parkhurst*, 3 Allen, 393; *Shelfer v. Gooding*, 47 N. C. (2 Jones) 175; *Johnson v. Brown*, 13 W. Va. 71; *Seaman v. Netherclift*, L. R. 1 C. P. D. 540. It must be admitted, however, that many of the decisions relied upon on both sides of this controversy are inconclusive, but we think that the slight weight of authority is to the effect that the mere relevancy of a slander or libel does not necessarily entitle the guilty party to immunity, but that it merely raises a presumption in his favor, which the defamed person may overcome by showing that the defamatory words were not uttered in good faith, but maliciously, without a belief in their truth, or at least without a probable cause for such belief: *Eccles v. Shannon*, 4 Harr. 193; *Rainbow v. Benson*, 71 Iowa, 301, 32 N. W. 352; *Comfort v. Young*, 100 Iowa, 627, 69 N. W. 1032; *Pierce v. Oard*, 23 Neb. 828, 37 N. W. 677; *Hill v. Miles*, 9 N. H. 9; *Cole v. Grant*, 18 N. J. L. 327; *Mower v. Watson*, 11 Vt. 536, 34 Am. Dec. 704; *White v. Nichols*, 3 How. 266, 11 L. ed. 591.

IV. The Liability for Irrelevancy.

The English decisions are understood as giving the parties, witnesses and counsel absolute freedom of speech not restricted to matters or questions relevant to the issue, and hence no action for libel or slander is maintainable in that country for words, whether oral or written, employed in the course of judicial proceedings: *Munster v. Lamb*, L. R. 11 Q. B. D. 588, 52 L. J. Q. B. 726, 49 L. T. 252, 32 Week. Rep. 248, 47 L. P. 805, C. A.; *Seaman v. Netherclift*, 1 C. P. D. 540, 2 C. P. D. 53; 46 L. J. C. P. 128, 35 L. T. 784, 25 Week. Rep. 159, C. A.; *Harrison v. Broomhead*, 4 Hurl. & N. 579, 28 L. J. E. 360, 5 Jur., N. S., 1175; 7 Week. Rep. 492, Ex. Ch.; *Revis v. Smith*, 18 Com. B. 126, 25 L. J. C. P. 195, 2 Jur., N. S., 614, 4 Week. Rep. 506; *Scott v. Stanfield*, L. R. 3 Ex. 220, 37 L. J. Ex. 155, 18 L. T. 572, 16 Week. Rep. 911; *Dawkins v. Lord Rokeby*, L. R. 8 Q. B. 255, 45 L. J. Q. B. 138, L. R. 7 H. L. 744, 33 L. T. 196, 23 Week. Rep. 936. The courts of the United States, with equal unanimity, maintain the opposite view—one which makes inquiry into the relevancy of the evidence necessary in every case. We shall show that, as to a witness, he is justified in assuming that a question asked him by counsel and not objected to by the adverse party, or, if so objected to, allowed by the court, is relevant, and that it is his duty to answer, and hence that he cannot be held liable on the ground that the question was irrelevant if his answer is responsive thereto: *Post*, VIII, d. As to the parties and their counsel, it is probable that, though the question is not as a matter of law relevant, yet if

it is such as they had reasonable cause to believe relevant, they are protected to the same extent as if, after proper argument, its relevancy had been affirmed: *Lawson v. Hicks*, 38 Ala. 279, 81 Am. Dec. 49; *Wallis v. New Orleans & C. R. Co.*, 29 La. Ann. 66; *Vinas v. Merchants' Mut. Ins. Co.*, 33 La. Ann. 1265; *White v. Carroll*, 42 N. Y. 161, 1 Am. Rep. 503; *Aylesworth v. St. John*, 25 Hun, 156. On the other hand, in the absence of reasonable belief in the relevancy, or where it is clear that no such belief can be entertained, a person uttering a libel or slander may be held liable, whether he did so as a party, attorney or witness, subject, as a witness, to the exception of answers responsive to the questions submitted to him by counsel and not disallowed by the court: *Wyatt v. Buell*, 47 Cal. 624; *Jones v. Forehand*, 89 Ga. 520, 32 Am. St. Rep. 81, 16 S. E. 262; *Grant v. Haynes*, 105 La. 304, 29 South. 708, 54 L. R. A. 930; *McLaughlin v. Cowley*, 127 Mass. 316, 131 Mass. 70; *Sherwood v. Powell*, 61 Minn. 614, 52 Am. St. Rep. 614, 63 N. W. 1103; 29 L. R. A. 153; *Hyde v. McCabe*, 100 Mo. 412, 13 S. W. 875; *Gilbert v. People*, 1 Denio, 41, 43 Am. Dec. 646; *Hastings v. Lusk*, 22 Wend. 410, 34 Am. Dec. 330; *Ring v. Wheeler*, 7 Cow. 725; *Mower v. Watson*, 11 Vt. 536, 34 Am. Dec. 704; *Clemmons v. Danforth*, 67 Vt. 617, 48 Am. St. Rep. 836, 32 Atl. 626; *Jennings v. Paine*, 4 Wis. 358; *Union Mut. L. Ins. Co. v. Thomas*, 83 Fed. 803, 28 C. C. A. 96; *Harlow v. Carroll*, 6 App. D. C. 128; *King v. McKissick*, 126 Fed. 215. The following cases are fairly illustrative of the applications of this rule in the United States: In a proceeding before arbitrators to appraise property and state an account between landlord and tenant, the landlord in a communication to one of the arbitrators stated that the tenant had already stolen two bales of cotton and that he wished to get him off the premises before any more were stolen. These words were held not to be privileged, where it did not appear that the accounts between the parties embraced the cotton alleged to be stolen or any part of it, or that any question concerning them was relevant to the business or matter being submitted to arbitration: *Jones v. Forehand*, 89 Ga. 520, 32 Am. St. Rep. 81, 16 S. E. 262. A like conclusion was reached where, in an application for an extension of time to file a transcript, the applicant, going beyond the facts material to procure the order, intimated that his attorney had drawn an answer containing admissions which ought not to have been made, and that such attorney had entered into a collusive agreement with the attorneys of the other party: *Wyatt v. Buell*, 47 Cal. 624.

In an action brought to recover damages alleged to have been sustained by the plaintiff in consequence of her employing one *McLaughlin* as her agent, because of a recommendation made to her by the defendant to the effect that such *McLaughlin* was a trustworthy person, when the defendant well knew that *McLaughlin* had immediately put to death, after its birth, an illegitimate child born to him by one *Sarah Clark*, the attorney who inserted this allegation

in the complaint was subsequently sued for libel by McLaughlin, and sought to justify on the ground that he inserted such allegation in the complaint, believing it to be true. The court held that, as the libel related to matters not mentioned in the recommendation given for McLaughlin and did not negative the truth of any such representations, and was not necessary nor material to full and complete presentation of the case in which damages were asked for, a justification was not established. "The ground of action," said the court, "was not strengthened by adding them, nor did they furnish any basis for enhancing the damages which might be recovered. They were not pertinent to the action, and were struck out of the declaration; by the court, on motion of Moulton. They contain charges against the present plaintiff of criminal conduct of the grossest character. To hold that such statements, thus uncalled for and irrelevant, are privileged, as part of pleadings in the cause, would be to disregard the salutary modification of the English rule which has been made by the American courts, and is stated in *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279. The defendant stands, therefore, as to liability to action on account of these statements, precisely as if he had published them in a newspaper, and cannot justify, by showing his belief that they were true, the sources of his information, or his instructions from his client. It is only when words are published on an occasion which makes them privileged that the belief of the publisher that they are true can be shown": *McLaughlin v. Cowley*, 127 Mass. 316, 131 Mass. 70.

In a suit for moneys collected after the mutual dissolution of a partnership, the defendant admitted the agreement, but alleged that the plaintiff failed utterly to perform his contract of partnership, "and spent his time in consorting with idlers and people of bad character, and used the office of the partnership as a place of assignation in business hours during the temporary absence of defendant from said office." An action of libel having been brought, the complaint showing the libelous words above quoted was demurred to on the theory that their insertion in the answer was absolutely privileged, but the court was of the opinion "that the alleged libel was wholly gratuitous, irrelevant and immaterial"; that "the statements did not relate or pertain to any matter in issue between the parties, and, although purporting to be pleaded as a counterclaim, it utterly failed to state even the substance of a cause of action against the plaintiff": *Sherwood v. Powell*, 61 Minn. 479, 52 Am. St. Rep. 614, 63 N. W. 1103, 29 L. R. A. 153.

An affidavit having been filed on a motion to require plaintiff to give security for costs, alleging that affiant believed the plaintiff to be insolvent, the plaintiff's attorney filed a counterclaim denying the insolvency and alleging that the affidavit in support of the motion was "a corrupt, voluntary and willful case of false swearing." The attorney was held liable to an action of libel, the court saying: "The

general rule is that an affidavit filed in the course of judicial proceedings is not actionable as libelous if fairly relevant to the issue, or responsive to some fact apparently bearing on the issue to which it is directed, assuming, of course, that the court has jurisdiction of the premises. If an irrelevant charge, otherwise libelous, is contained in such an affidavit, it may be the basis of an action for libel if shown to have been maliciously made, without an honest belief that it was relevant to the issue, based upon reasonable grounds for such belief. The nature of the irrelevant charge itself (with reference to the actual issues in the case wherein it occurs) may sometimes furnish evidence of the want of such belief, but where it does not, the question of affiant's belief in the relevancy of the charge becomes, generally, one of fact to be determined by the triers of the facts. No action for libel can be maintained upon a charge contained in an affidavit filed in such a proceeding, where the charge is either relevant to the issue, or is believed (upon reasonable grounds) to be so by the affiant. Whether any other action will lie for a false charge so made, if instigated by malice and without probable cause, is a question not now before us. In the case at bar it will be observed that the affidavit of defendant, which forms its groundwork, contains, first, a denial of the allegations of fact in the motion for security for costs; and, secondly, a charge that the affidavit of the plaintiff here, supporting that motion, was a 'corrupt, voluntary, and willful case of false swearing.' A majority of the members of the court are agreed that the defamatory matter in question, contained in the second part of the affidavit, is not sufficiently relevant (to the issue raised by the motion) to afford a privilege to affiant; that, consequently, the question whether or not the affiant made such charge maliciously, without believing it to be relevant, and without reasonable or probable grounds for such belief, is one of fact, which should have been submitted for trial if denied by the defendant; and that the allegations of the petition herein sufficiently and fairly present a theory for a recovery by plaintiff, if established by his evidence": *Hyde v. McCabe*, 100 Mo. 412, 13 S. W. 875.

In an action of trespass for entering the close of the plaintiff, and taking, killing, and otherwise injuring sheep, the declaration alleged that the defendant was reported "to be fond of sheep, bucks and ewes, and of wool, mutton and lambs," and "in the habit of biting sheep," and that if guilty, "he ought to be hanged or shot." The plaintiff in the first action was held answerable on the ground that the matters inserted by him in the declaration were in no respect relevant or material, and were obviously thrown in to scandalize and annoy the defendant, and the court said: "It would be lamentable, if irrelevant, gratuitous and malicious attacks could be excused, because inserted in a declaration upon other and distinct causes of action, and with which the vituperative charges had no connection whatever": *Gilbert v. People*, 1 Denio, 41, 43 Am. Dec. 646.

A physician having presented his claim against an estate, one of the heirs at a meeting of the commissions for the allowance of claims stated that all the charges therein, except ten visits to his mother, were false and fraudulent, and added, "This isn't the first time he has made up an account, either. He made up one against me of between forty and fifty dollars for which he hadn't made a visit, and I paid it, and I can prove it." An action for slander having been brought based upon the defamatory words above quoted, the plaintiff requested the court to charge the jury that if the words spoken were substantially as charged in the declaration and were spoken of the plaintiff touching his profession and business, they were actionable in themselves, and the verdict should be for him. The court refused to so instruct, but did tell the jury that the words were actionable unless privileged, and that if they found that the witness in testifying said more than was necessary to say to secure a proper contest of the plaintiff's bill, still the plaintiff could not recover unless he established that it was spoken maliciously. On appeal, it was held that if the words spoken were neither pertinent nor material to the subject matter under investigation, they were actionable. The court, after referring to various decisions upon the subject, added: "The only subject matter for the consideration of the commissioners, the defendant's counsel, and the other heirs was the claim of the plaintiff for professional services. The only interest which he or the other heirs had was to defeat the allowance of that portion of it which they thought unjust. For this purpose he might, if he had reasonable grounds, characterize a portion of the claim as false and fraudulent, and be protected by the occasion. But when he proceeded to say, 'This isn't the first time he has made up an account, either. He made one up against me of between forty and fifty dollars, for which he hadn't made a visit, and I paid it, and I can prove it,' he stated what had no relation to the claim presented by the plaintiff; what the other heirs had no interest in; what was between himself and the plaintiff personally; what he claimed to have personal knowledge of. He made a charge, wholly disconnected with the claim presented by the plaintiff, and with his own interest and the interest of the other heirs therein—a charge which was actionable, which he does not claim to be true, or that he had reasonable grounds to believe to be true, either by his testimony or his pleadings. Under the circumstances, the occasion did not privilege nor protect him in making the charge": *Clemmons v. Danforth*, 67 Vt. 617, 48 Am. St. Rep. 836, 32 Atl. 626.

In an action upon a policy of life insurance the insurance company presented the defense that the alleged deceased was still living, and that the plaintiff and her attorneys in the action had no knowledge or information that the assured was dead, but were carrying out an agreement or conspiracy for the purpose of defrauding the company. An action for libel was brought by one of the attorneys based upon

the alleged libelous matter, and it was claimed to be privileged as pertinent to the issue, but the court was of opinion that such was not the case, that the only issue in the action was whether the insurance company was liable upon the policy, and that instead of merely relying upon its defense that the insured was still living, it "attempted to asperse the character of the attorneys who were conducting the suit, by charging them with libelous matter, which, if true, added in no way to the force of its allegation that the event upon which alone its liability was to attach had not occurred, to wit, the death of the assured": *Union Mut. L. Ins. Co. v. Thomas*, 83 Fed. 803, 28 C. C. A. 96.

To a bill in equity filed by a woman to recover possession of a shawl claimed by her to have been deposited with the defendant as security for the payment of indebtedness, the answer stated that "respondent was informed by the detective who had been employed to look up complainant's antecedents and past career that she was a procuress and engaged in other unlawful practices, and was of no veracity or reputation." Complainant brought an action of libel against the defendant Carroll and also against his solicitor, and proved the filing of the answer and that the matter complained of had been struck out by the court as irrelevant, impertinent and scandalous. No testimony was offered on the part of the defendants, but the court instructed the jury to return a verdict in their favor, to which the plaintiff excepted. On appeal, the action of the court was sustained on other grounds, but it held that the matter complained of was too irrelevant to be privileged: *Harlow v. Carroll*, 6 App. D. C. 128.

In an application to perpetuate testimony to be used to rebut alleged fraudulent claims against an executor's settlement of the estate of a decedent, the applicant alleged that the parties were asserting a claim against the estate "through the false, fraudulent, and malicious representations" of one F. D. King, an attorney. An action having been brought by him for this libelous statement, it was held that he was entitled to recover on the ground that such statement was wholly irrelevant and immaterial to the pleadings, and that reference to him could not be considered as having "any such material or sufficient relevancy to the issues in the petition as to make it a privileged occasion": *King v. McKissick*, 126 Fed. 215.

V. The Question of Malice.

The effect of malice in actions for slander or libel occurring in the course of judicial proceedings is reasonably inferable from what has already been said. In the first place, litigants, it would be easy to establish, are often in a frame of mind toward one another not improperly characterized as malicious, and this feeling is too frequently participated in by their counsel and witnesses, and if malice alone were sufficient to destroy the immunity usually accompanying

these proceedings, their privilege would be of little protection. If the words used are pertinent, he who uses them cannot be held liable alone on the ground that they are malicious as well as false: *Lawson v. Hicks*, 38 Ala. 279, 81 Am. Dec. 795; *Myers v. Hodges*, 53 Fla. 197, 44 South. 357; *Rainbow v. Benson*, 71 Iowa, 301, 32 N. W. 352; *Forbes v. Johnson*, 11 B. Mon. 48; *Gaines v. Aetna L. Co.*, 104 Ky. 695, 47 S. W. 884; *Monroe v. Davis*, 118 Ky. 806, 82 S. W. 450; *Burke v. Ryan*, 36 La. Ann. 951; *Barnes v. McCrate*, 32 Me. 442; *Maulsby v. Reifsnyder*, 69 Md. 143, 14 Atl. 505; *Hunckel v. Voeniff*, 69 Md. 179, 9 Am. St. Rep. 413, 14 Atl. 500, 17 Atl. 1056; *Bartlett v. Christhlf*, 69 Md. 219, 14 Atl. 518; *Link v. Moore*, 32 N. Y. Supp. 461, 84 Hun, 118; *Nissen v. Cramer*, 104 N. C. 574, 10 S. E. 676, 6 L. R. A. 730; *Lauder v. Jones*, 13 N. D. 525, 101 N. W. 907; *Lea v. White*, 4 Sneed, 111; *Ruohs v. Backer*, 6 Heisk. 395, 19 Am. Rep. 598; *Cooley v. Galyon*, 109 Tenn. 1, 97 Am. St. Rep. 823, 70 S. W. 607, 60 L. R. A. 139; *Gorsuch v. Swan*, 109 Tenn. 36, 97 Am. St. Rep. 836, 69 S. W. 1113; *Crockett v. McLanahan*, 109 Tenn. 517, 72 S. W. 950, 61 L. R. A. 914; *Runge v. Franklin*, 72 Tex. 585, 13 Am. St. Rep. 833, 10 S. W. 721, 3 L. R. A. 417; *Abbott v. National Bank*, 20 Wash. 552, 56 Pac. 376; *Johnson v. Brown*, 13 W. Va. 71; *Jennings v. Paine*, 4 Wis. 358; *Calkins v. Sumner*, 13 Wis. 193, 80 Am. Dec. 738; *Revis v. Smith*, 18 Com. B. 126, 25 L. J. C. P. 195, 2 Jur., N. S., 614, 4 Week. Rep. 506.

Under no circumstances can a recovery be sustained unless the words employed were, in contemplation of law, malicious, and this remains true though they were irrelevant: *Myers v. Hodges*, 53 Fla. 197, 44 South. 357; *Hawks v. Bright*, 51 La. Ann. 79, 24 South. 615. Where the words complained of were employed in the course of a judicial proceeding, the presumptions are in favor of the person employing them, either that they were privileged or were not used in bad faith or through malice: *Dada v. Piper*, 41 Hun, 254; *Warner v. Paine*, 2 Sand. (4 N. Y. Super. Ct.) 195; *Briggs v. Byrd*, 34 N. C. 377; *Kemper v. Fort*, 219 Pa. 85, ante, p. 623, 67 Atl. 991, 13 L. R. A., N. S., 820. The presumption that the libelous matter is not malicious is not overcome by the proof or admission that it is untrue: *Coogler v. Rhodes*, 38 Fla. 240, 56 Am. St. Rep. 170, 21 South. 109; *Myers v. Hodges*, 53 Fla. 197, 44 South. 357; *Conroy v. Pittsburg Times*, 139 Pa. 334, 23 Am. St. Rep. 188, 21 Atl. 154, 11 L. R. A. 725. Therefore, there must be evidence tending to show actual malice: *Gardemal v. McWilliams*, 43 La. Ann. 454, 26 Am. St. Rep. 195, 9 South. 106; *Sands v. Robinson*, 12 Smedes & M. 704, 51 Am. Dec. 132; *Kent v. Bongartz*, 15 R. I. 72, 2 Am. St. Rep. 870, 22 Atl. 1023. Probably malice may be inferred from the language itself where it is clearly impertinent and needlessly harsh, but if pertinent, and therefore privileged, he who uses it cannot be held liable because he employed coarse language and words peculiarly and unreasonably offensive: *Burdette v. Argile*, 94 Ill. App. 171; *Hart v. Baxter*, 47 Mich.

198, 10 N. W. 198; Warner v. Paine, 2 Sand. (4 N. Y. Super. Ct.) 195; Astley v. Younge, 2 Burr. 867, 2 Ld. Ken. 536; Hodgson v. Scarlett, 1 Barn. & Ald. 232, 19 R. R. 301.

VI. What Proceedings are Judicial.

a. General Classification of Judicial Proceedings for the Purposes Herein Considered.—The necessity that judicial, or quasi-judicial, proceedings shall be free and untrammelled, and that every person shall have the right to freely present, and, if possible, establish a cause of action or of defense, though, in so doing, he offers, and to the extent necessary for the proceeding, publishes, a libel or slander, is so universally conceded that it is far more difficult to discover decisions affirming proper exceptions to the rule than decisions announcing and applying it. Judicial proceedings for the purposes here under consideration include (1) inquiries and disclosures proper and often indispensable to the discovery of facts upon which the cause of action or of defense is to be founded; (2) the setting forth of these facts in pleadings, affidavits, and other formal complaints or answers, generally in writing, to the end that issues may be made or tendered and evidence become admissible; (3) the giving and drawing out of such evidence at the trial; (4) the making of such arguments as may be proper under such pleadings and evidence; (5) whatever language may be employed in the decision of the cause; and (6) such proceedings as may be taken after that decision, together with the pleadings and other testimony relevant thereto.

b. Necessity of There Being a Court of Competent Jurisdiction.—As to inquiries made and disclosures in response thereto for the purpose of ascertaining whether an action or proceeding shall be commenced or defended, it is difficult to conceive how the question of the competency of the court to entertain or try the charge or defense can be the subject of consideration, nor, in our judgment, ought any witness or other person, acting in good faith, be required to determine, at his peril, whether the tribunal to which he complained or in which he gave testimony actually had jurisdiction to determine the matters involved in the pleadings or evidence. Still it must be admitted that a few cases considering the matter have apparently taken a different view. Where a physician was sued for libel consisting of statements made by him to the effect that he and another physician had examined the plaintiff and become acquainted with the state of his health and mental condition, and that he was a fit person to be sent to a lunatic asylum, and accompanied this statement by an affidavit sworn to before justices of the peace, who thereupon issued a certificate of commitment, and the person committed brought an action setting out these facts in the complaint, the defendant demurred thereto, and the demurrer was overruled on the ground that it did not appear affirmatively from the complaint that

the justices or court to which the certificate was presented had jurisdiction of the special proceeding, and that, being a special proceeding, jurisdiction could not be presumed. The court said: "Where a man is called to testify, or even makes an affidavit, in a cause depending in a court of competent general or ordinary jurisdiction and proceeding according to the course of the common law, he may not be required to know or to prove that all the facts existed, or all the steps have been taken, which were necessary to confer jurisdiction in the particular case. But where a man intervenes voluntarily in a special proceeding not known to the common law, and not resulting in a judgment according to its forms, he must see that jurisdiction is acquired, and that there is in reality a proceeding in court, before he can claim the privilege of a witness for libelous charges against another. I am of opinion that the complaint in this action does not contain enough to show that the libelous publication which it sets forth was uttered in the course of a judicial proceeding duly instituted before a magistrate who had jurisdiction, and that therefore the demurrer was properly overruled": *Perkins v. Mitchell*, 31 Barb. 461. At an early date in South Carolina, an action of libel was brought, founded on a charge made by defendants against the plaintiff to different officers of the militia sitting as a court of inquiry, accusing the plaintiff of larceny and other offenses. The defendants pleaded justification, and the trial judge held their plea sufficient. On appeal it was held that the court of inquiry did not have jurisdiction to make any inquiry except at the request of the accused, and hence that the complaint in which the libelous charge was contained was presented to a court not having jurisdiction of it, and that the justification could not be sustained: *Milam v. Burnside*, 1 Brev. 295. If we can safely follow these decisions, then every person prosecuting a charge, or, perhaps acting as a witness, before a court of special jurisdiction, is subject to the old rule still existing in some courts, that the jurisdiction of such a court is not presumed, and that, when sued for libel, they must affirmatively establish the jurisdiction of the court in which they filed their pleading or charge or gave their testimony.

c. Charges and Complaints not Used nor Intended to be Used.— We shall hereafter show that investigations and communications intended to be in aid of judicial proceedings are privileged to the same extent as those proceedings themselves, though no action or proceeding has as yet been instituted. Such communications must, however, be made in good faith and be intended to be employed in the judicial proceeding. If one makes a libelous communication to a magistrate consisting of charges that might properly be the subject of investigation by him, yet if there is no prosecution and no intent to prosecute, there is no privilege, and the communication may sustain an action of libel or slander accordingly as it is oral or written: *Miller v. Nuckolls*, 77 Ark. 64, 113 Am. St. Rep. 112, 91 S. W. 759, 4

L. R. A., N. S., 149; *Liske v. Stevenson*, 58 Mo. App. 220; *Marshall v. Gunter*, 6 Rich. 419. In this connection, it is proper to here call attention to the fact that this question is often incidentally presented when the alleged libel consists in the publication of judicial proceedings, for, conceding the circumstances to be such as would justify a proceeding if judicial, yet it cannot reach the stage of being judicial in this sense when it has not been presented and may never be presented for judicial consideration. Thus, if a complaint or other plea is proper to be used as such, and when filed, the libelous statements therein are protected as privileged, such protection does not exist in advance of such filing. A publication of a judicial proceeding, if fair and impartial, is privileged, but a complaint or other pleading in a civil action which has never been presented to a court for its action is not a judicial proceeding within the rule, and its publication, if it contains libelous matter, can only be justified by showing that it is true: *Cowley v. Pulsifer*, 137 Mass. 392, 50 Am. Rep. 318; *Nixon v. Despatch P. Co.*, 101 Minn. 309, 112 N. W. 258, 12 L. R. A., N. S., 188. If, however, the pleading has been presented to the court, which has so far acted upon it as to make a special order that defendants appear and plead and show cause why they should not be joined, this action of the court is a judicial proceeding and the subject of a privileged report, although the case has not yet been finished: *Kimball v. Post P. Co. (Mass.)*, 85 N. E. 103.

d. Statements Made to Parties or Counsel in the Course of Preparation of a Cause for Trial.—It would be idle to hold that parties and their counsel are privileged in the course of judicial proceedings as to statements made by them and relevant thereto, and yet that they could not prosecute inquiries and procure testimony necessary to support their cause of action or of defense, or that a witness is privileged in statements made while under examination as such, but is liable for disclosing to the parties or counsel matter to which he so testified. Hence, whether the proposed proceeding is to be civil or criminal, one who is called upon for any information relative thereto may freely answer, and though his answer, if not connected with such a proceeding, might subject him to an action for slander or libel, such cannot be the case when he merely discloses what he will testify to if called at the trial: *Schultz v. Strauss*, 127 Wis. 325, 106 N. W. 1066; *Vogel v. Gruaz*, 110 U. S. 311, 4 Sup. Ct. Rep. 12, 28 L. ed. 158; *Watson v. Jones*, 74 L. J. P. C. 151, [1905] App. Cas. 480, 93 L. T. 489.

e. Pleadings.

1. Complaints in Civil Actions.—Charges, however libelous, if made either in a complaint or declaration at law or in a bill in chancery are, of course, made in judicial proceedings and, at least, when relevant, are privileged: *Wilson v. Sullivan*, 81 Ga. 238, 7 S. E. 274; *Strauss v. Meyer*, 48 Ill. 385; *Randall v. Hamilton*, 45 La. Ann. 1184, 14 South. 73, 22 L. R. A. 649; *Dunn v. Southern Ins. Co.*, 116 La.

431, 40 South. 786; Bartlett v. Christhilf, 69 Md. 219, 14 Atl. 518; Sherwood v. Powell, 61 Minn. 479, 52 Am. St. Rep. 614, 63 N. W. 1103, 29 L. R. A. 153; Jones v. Brownlee, 161 Mo. 258, 61 S. W. 795, 53 L. R. A. 445; Crockett v. McLanahan, 109 Tenn. 517, 72 S. W. 950, 61 L. R. A. 914; Abbott v. Bank of Commerce, 20 Wash. 552, 56 Pac. 376; McGehee v. Ins. Co. of North America, 112 Fed. 853, 50 C. C. A. 551; Wilkins v. Major, Rap. Jud. Que. 22 C. S. 264.

2. **Answers in Civil Cases.**—These pleadings, it needs no argument or citation of authorities to show, must be privileged to the same extent as complaints at law and bills in chancery: Ash v. Zweitusch, 57 Ill. App. 157, 159 Ill. 455, 42 N. E. 854; Gaines v. Aetna Ins. Co., 104 Ky. 695, 47 S. W. 884; Lanning v. Christy, 30 Ohio St. 115, 27 Am. Rep. 431; Trotman v. Dunn, 4 Camp. 211.

3. **Charging Crime.**—Charges of crime, whether oral or written, if made for the purpose of instituting or aiding a criminal prosecution are privileged, whether made to the prosecuting attorney, the grand jury, or a court or judicial officer having jurisdiction to inquire into the truth of the charges and to punish the accused if found guilty, or to require him to appear before some other officer or tribunal for trial: Reid v. McLendon, 44 Ga. 156; Francis v. Wood, 75 Ga. 648; Burdette v. Argile, 94 Ill. App. 171; McDavitt v. Boyer, 169 Ill. 475, 48 N. E. 317; Harstock v. Reddick, 6 Blackf. 255, 38 Am. Dec. 141; Rainbow v. Benson, 71 Iowa, 301, 32 N. W. 352; Bunton v. Worley, 4 Bibb, 38, 7 Am. Dec. 735; Kidder v. Parkhurst, 85 Mass. (3 Allen) 393; Morrow v. Wheeler & Wilson M. Co., 165 Mass. 349, 43 N. E. 105; Graham v. Cass Circuit Judge, 108 Mich. 425, 66 N. W. 348; Briggs v. Byrd, 34 N. C. 377; Vausse v. Lee, 1 Hill, 197, 26 Am. Dec. 168; Sanders v. Rollinson, 2 Strob. 447; Vogel v. Gruaz, 110 U. S. 311, 4 Sup. Ct. Rep. 12, 28 L. ed. 158; Johnson v. Evans, 3 Esp. 32, 6 R. R. 809; Fowler v. Homer, 3 Camp. 294, 13 R. R. 807. When a charge has been made and the person charged is subject to arrest, the pointing of him out as the proper person to be arrested, like the referring of the original charge, is in aid of a judicial proceeding, and equally incapable of sustaining an action for slander: Shufflebottom v. Allday, 5 Week. Rep. 315.

4. **Affidavits.**—At various stages of the proceeding, whether civil or criminal, it may become necessary to present some question of fact for the consideration of the court either before or after the entry of the final judgment therein. When such an affidavit is made by one of the parties, it may be considered as analogous to a pleading by him, and when made by a third party, it is properly regarded as evidence given by him. In either event, it is privileged as to the libelous matter therein to the same extent as if it were a pleading by the party or the giving of testimony by the witness at the trial. This rule has been very properly applied to affidavits to procure search warrants: Bailey v. Dodge, 28 Kan. 72; distress warrants: Bailey v. Dean, 5 Barb. 297; writs of attachment: Hibbard & Co. v. Ryan, 46

Ill. App. 313; or used in applications for alimony: *Rall v. Donnelly*, 56 Ill. App. 425; or for the custody of children: *Wilkins v. Hyde*, 142 Ind. 260, 41 N. E. 536; or the payment of money: *Hawk v. Evans*, 76 Iowa, 593, 14 Am. St. Rep. 247, 41 N. W. 368; or for the purpose of impeaching a witness: *Conley v. Key*, 98 Ga. 115, 25 S. E. 914; and also to every species of relevant affidavits: *Gompas v. White*, 54 J. P. 22; *Doyle v. O'Doherty*, Car. & M. 41; *Henderson v. Broomhead*, 4 Hurl. & N. 569, 28 L. J. Ex. 360, 5 Jur., N. S., 1175, 7 Week. Rep. 492, Ex. Ch.; *Revis v. Smith*, 18 Com. B. 126, 25 L. J. Ch. 195, 2 Jur., N. S., 614, 4 Week. Rep. 506; *Kennedy v. Hilliard*, 10 Ir. C. L. R. 195, 1 L. T. 568. It is not material that the affidavit was given voluntarily in the sense that the affiant did not appear in response to process or the command of any court, but merely answered relevant questions addressed to him by or on behalf of a litigant, the substance of which answers being reduced to writing and verified in the form of an affidavit: *Beggs v. McCrea*, 62 App. Div. 39, 70 N. Y. Supp. 864.

5. **Bills of Particulars.**—If a party is ordered to furnish a bill of particulars, his compliance with the order cannot sustain an action of libel against him, though it results in his making libelous statements referring to one not a party to an action, as where, in an action of libel, the defendant pleads that the plaintiff is a woman of bad character as to chastity, and had lived with various persons as their mistress, and, being ordered to file a bill of particulars specifying the names of the persons with whom she had so lived, in complying with the order, specified in the bill that she lived with one P. The latter thereupon brought an action of libel, and, in dismissing the cause on the pleadings without a trial and determining that the action was not maintainable, the court said: "Can words written which are necessary to comply with the terms of such an order be malicious, or can malice be predicated of what is so written? I think not. The service of the bill of particulars was not for the benefit of the defendant in that action. It did not aid his defense, but was required by the court for the protection of the plaintiff there. It was given under compulsion, and every presumption of malice which the law implies from written or spoken words is rebutted by the existence of such facts. Nor can the allegation in the bill of particulars be considered irrelevant. The order granting the bill of particulars was an adjudication in that suit that the defense was relevant, and that for the plaintiff's protection the particulars of the defense must be specified": *Perzel v. Tousey*, 52 N. Y. Super. Ct. (20 Jones & S.) 79.

VII. Quasi-judicial Proceedings.

a. **For Disbarment of Attorneys.**—Inquiries and complaints having for their purpose the disbarment of attorneys, whether they take place in court or not, fall within the rules respecting judicial proceed-

ings, and protect the persons making charges and giving testimony on the trial thereof: *Lilley v. Roney*, 61 L. J. Q. B. 727.

b. Proceedings in Military Tribunals.—The investigations of charges against officers or men are of quasi-judicial character, and for that reason are privileged both with respect to preliminary inquiries to ascertain the facts and the testimony given and the accusations made on the trial of the charges: *Jekyll v. Moore*, 2 Bos. & P., N. S., 341, 6 Esp. 63; *Dawkins v. Rokeby*, 45 L. J. Q. B. 8, L. R. 7 H. L. 744, 33 L. T. 196, 23 Week. Rep. 931.

c. Proceedings Before the Interstate Commerce Commission.—In *Duncan v. Atchison etc. R. Co.*, 72 Fed. 808, 19 C. C. A. 202, it appeared that the plaintiff had instituted proceedings before the interstate commerce commission, and the defendant in his answer, filed before the same body, had made certain statements concerning the plaintiff which the latter deemed libelous and on account of which he brought the action. Judgment was given for the defendant, and the plaintiff appealed. The court held that the action was not maintainable, resting its judgment chiefly on section 47 of the Civil Code of California, declaring a privileged communication to be one made in any legislative or judicial proceeding or in any other official proceeding authorized by law; but we have no doubt that even in the absence of the statute relied upon, the conclusion must have been the same.

d. Extradition Proceedings.—There is no doubt that a proceeding before the governor of the state for the extradition of an alleged fugitive from justice is of a quasi-judicial character, and hence protects communications made and other proceedings had in the course thereof: *Brown v. Globe P. Co. (Mo.)*, 112 S. W. 462.

VIII. Persons Entitled to Protection.

a. The Parties.—It may be taken for granted, without any citations of authorities, that the protection from actions for libel and slander here under consideration applies to all the parties to an action, irrespective of whether they appear as plaintiffs, defendants, interveners, or otherwise.

b. Agents of the Parties Other than Their Attorneys.—Agents of either of the parties to the action or other proceedings, acting within the scope of their agencies and powers, are privileged to the same extent as their principals. This is true not merely with respect to the next friend or other person who appears in an action on behalf of a party (*Ruohs v. Backer*, 53 Tenn. (6 Heisk.) 395, 19 Am. Rep. 598), but also with respect to any other agent who is representing his principal at the trial or at any other stage of the proceedings. A somewhat extreme application of this rule was made in North Carolina. An action against a corporation was on trial, and though it was represented by counsel, there was also present its manager, who, while a witness of the adverse party was giving his testimony, inter-

rupted the proceeding by declaring that such testimony was a lie. The witness afterward brought an action for slander. At the trial the court instructed the jury that the defendant, if he was representing the defendant in the former action, had the right to contradict the witness and was not liable to an action for slander, unless he took advantage of the occasion to speak words maliciously, and that the proof must show that the words were spoken maliciously, and that under the circumstances surrounding their utterance the law would not presume malice from the use of the words themselves. Under this instruction the jury returned a verdict for the defendant, and the plaintiff appealed. The appellate court, in affirming the judgment, among other things, said: "It was conceded on the argument, and at all events it is settled law, that one who appears in person, in his own behalf or on behalf of another, or counsel representing a party on the trial of an action, may say, in the progress of the trial, anything in reference to the character or conduct of the opposing party or witnesses that is relevant or pertinent to the question or issue before the court or jury, without incurring any liability whatever in an action for slander"; and referring specially to the character in which the defendant appeared in the former action, the court added: "There can be no doubt that, as an acknowledged agent of a defendant corporation, he enjoyed all the privileges of an actual party. This court held that a master, not an attorney, had a right to appear for his slave, and insist that what a plaintiff had sworn in reference to a slave was false, and that an action could not be maintained against him for slander in charging that the testimony was false: *State v. Leigh*, 20 N. C. (3 Dev. & B.) 126." *Nissen v. Cramer*, 104 N. C. 574, 10 S. E. 676, 6 L. R. A. 780.

c. *Attorneys and Counsel.*—Attorneys and counsel employed in a cause are at every stage thereof entitled to an immunity from prosecutions for slander and libel at least equal to the parties themselves. This rule applies not only to pleadings and their preparation, but also to words spoken in argument, whether oral or written, and also to all inquiries made in the preparation for trial: *Lestern v. Thurmond*, 51 Ga. 118; *Stewart v. Hall*, 83 Ky. 375; *Stackpole v. Hennen*, 6 Mart., N. S., 481, 17 Am. Dec. 187; *Maulsby v. Reifsnider*, 69 Md. 143, 14 Atl. 505; *Ring v. Wheeler*, 7 Cow. 725; *Sickles v. Kling*, 60 App. Div. 515, 69 N. Y. Supp. 944; *Youmans v. Smith*, 153 N. Y. 214, 47 N. E. 265; *Sickles v. Kling*, 31 Misc. Rep. 287, 64 N. Y. Supp. 252; *Hastings v. Lusk*, 22 Wend. 410, 34 Am. Dec. 330; *Shelfer v. Gooding*, 47 N. C. 175; *Gattis v. Kilgo*, 128 N. C. 402, 38 S. E. 931; *Davis v. McNees*, 27 Tenn. (8 Humph.) 40; *Munster v. Lamb*, 52 L. J. Q. B. 726, 11 Q. B. D. 588, 49 L. T. 252, 32 Week. Rep. 248, 47 J. P. 805, C. A.; *Hodgson v. Scarlett*, 1 Barn. & Ald. 232, 19 B. R. 301; *Needham v. Dowling*, 19 L. J. C. P. 9; *Markday v. Ford*, 5 Hurl. & N. 792, 29 L. J. Ex. 404, 6 Jur., N. S., 587, 2 L. T. 514, 8 Week. Rep. 586. The only limitation imposed by any of these cases is, that the words spoken

be relevant. There may, indeed, be decisions which assume that the privilege of counsel is absolute, but if so, they are not in accord with reason nor the weight of authority. Counsel has not an unlimited license to abuse any and every one in or out of the cause. What he says must be reasonably related to some issue in the cause or some matter in which he is required to act or advise, and for an entirely irrelevant defamation, he is answerable because it is not in the course of his duty: *Carpenter v. Ashley*, 148 Cal. 422, 83 Pac. 444; *Stackpole v. Hennen*, 6 Mart., N. S., 481, 17 Am. Dec. 187; *Maulsby v. Reifsnider*, 69 Md. 143, 14 Atl. 505; *Sickles v. Kling*, 30 Misc. Rep. 37, 61 N. Y. Supp. 647.

d. *Witnesses.*—Witnesses, whether parties to the action or proceeding or called in behalf of one of such parties, are, in giving their testimony, privileged to at least the same extent as a party or his attorney: *Chambliss v. Blau*, 127 Ala. 86, 28 South. 602; *Fagan v. Fries*, 30 Ill. App. 236; *McNabb v. Neal*, 88 Ill. App. 571; *Hutchinson v. Lewis*, 75 Ind. 55; *Baldwin v. Hutchinson*, 8 Ind. App. 454, 35 N. E. 711; *Smith v. Howard*, 28 Iowa, 51; *Sebree v. Thompson*, 31 Ky. Law Rep. 642, 103 S. W. 374; *Hunckel v. Voneiff*, 69 Md. 179, 9 Am. St. Rep. 413, 14 Atl. 500, 17 Atl. 1056; *Acre v. Starkweather*, 118 Mich. 214, 76 N. W. 379; *Verner v. Verner*, 64 Miss. 321, 1 South. 479; *Newfield v. Copperman*, 42 N. Y. Super. Ct. 302; *McLaughlin v. Charles*, 60 Hun, 239, 14 N. Y. Supp. 608; *Beggs v. McCrea*, 62 App. Div. 39, 70 N. Y. Supp. 864; *Lauder v. Jones*, 13 N. D. 525, 101 N. W. 907; *Cooper v. Phipps*, 24 Or. 357, 33 Pac. 985, 22 L. R. A. 836; *Thompson v. McCready*, 194 Pa. 32, 45 Atl. 78; *Cooley v. Galyon*, 109 Tenn. 1, 97 Am. St. Rep. 823, 70 S. W. 607, 60 L. R. A. 139; *Asteley v. Younge*, 2 Burr, 807, 2 Ld. Ken. 536; *Seaman v. Netherclift*, 46 L. J. C. P. 128, 2 C. P. D. 53, 35 L. T. 784, 25 Week. Rep. 159, C. A. In one respect the privilege of a witness extends beyond that of counsel, for it is not the business of a witness to consider whether the subject under inquiry is relevant or not. This is strictly the province of counsel and of the court, and if no objection is made to a question, or being made, is overruled, it is the duty of a witness to assume that it is relevant, and therefore to answer it, and for his answer when responsive to the question he cannot be held liable in a civil suit: *Hendrix v. Daughtry*, 3 Ga. App. 481, 60 S. E. 206; *Terry v. Fellows*, 21 La. Ann. 375; *Barnes v. McCrate*, 32 Me. 442; *Sheppard v. Bryant*, 191 Mass. 591, 78 N. E. 394; *Acre v. Starkweather*, 118 Mich. 214, 76 N. W. 379; *Crecelius v. Beirman*, 59 Mo. App. 513; *Calkins v. Sumner*, 13 Wis. 193, 80 Am. Dec. 738. But the weight of authority is to the effect that the privilege of a witness is not absolute. Doubtless, if the answer is reasonably pertinent, or from all the circumstances he can reasonably be believed to have thought it pertinent and responsive, he is not liable to a civil action therefor: *Steinecke v. Marx*, 10 Mo. App. 581; *Lamberson v. Long*, 66 Mo. App. 253. The presumptions are in his favor: *Cooper v.*

Phipps, 24 Or. 357, 33 Pac. 985, 22 L. R. A. 836. He is not entitled, however, to abuse his position by making it a means of defamation, and where his answers are clearly impertinent and manifestly uttered for the purpose of defamation, he is liable: *Nix v. Caldwell*, 81 Ky. 293, 50 Am. Rep. 163; *Barnes v. McCrate*, 32 Me. 442; *Lamberson v. Long*, 66 Mo. App. 253; *Shadden v. McElwee*, 86 Tenn. 146, 6 Am. St. Rep. 821, 5 S. W. 602; *Cooley v. Galyon*, 109 Tenn. 1, 97 Am. St. Rep. 823, 70 S. W. 670, 60 L. R. A. 139; *Dawkins v. Rokeby*, L. R. 8 Q. B. 255; L. R. 7 H. L. 744; 45 L. J. Q. B. 8, 36 L. T. 196; 23 Week. Rep. 931.

e. **Jurors and Judges.**—All persons occupying a judicial or quasi-judicial office or position are absolutely privileged with respect to whatever they utter, whether oral or written, in the course of their deliberation or otherwise in the performance of their duties: *Trimbel v. Morrish*, 152 Mich. 624, 116 N. W. 451; *Spalding v. Vilas*, 161 U. S. 483, 16 Sup. Ct. Rep. 631, 40 L. ed. 780; note to *Tryon v. Pingree*, 67 Am. St. Rep. 422; *Dawkins v. Paulet*, 9 Best & S. 768, L. R. 5 Q. B. 94, 39 L. J. Q. B. 53, 21 L. T. 584, 18 Week. Rep. 336; *Thomas v. Chilton*, 2 Best & S. 475, 31 L. J. Q. B. 139, 8 Jur., N. S., 795, 6 L. T. 320. In truth, it is doubtful whether a case can be imagined in which they will be held civilly liable, however unfair or malicious their action may be, and however impertinent the questions they are called upon to determine: *Scott v. Stansfield*, L. R. 3 Ex. 220, 37 L. J. Ex. 155, 18 L. J. Ex. 572, 16 Week. Rep. 911. The question of the liability of a juror came before the supreme court of Vermont in somewhat extreme and peculiar circumstances. The slanderous words were uttered by the defendant while a member of a jury to which a cause had been submitted for their verdict. In the trial of this cause there was a conflict between the testimony given by the plaintiff and that of another witness, and it hence became necessary for the jury to consider to which credence should be given. There had been no attack on the defendant's character or his reputation for veracity, but one of the jurors, in giving to his fellow-jurors his reasons for wishing to join in a verdict against the defendant, made statements impugning his honesty, and these statements became the ground upon which a recovery was sought in an action of slander. The defendant in that action asked the court to instruct the jury that what he had said while acting as a juror was privileged, or if not absolutely privileged, was *prima facie* so, and that if he acted honestly and in the belief that he was properly discharging his duty, he was not liable. The court refused to so instruct, and the jury returned a verdict in favor of the plaintiff, upon which judgment was entered. This judgment was reversed on appeal, the appellate court saying: "A jury participate in the trial of a cause in obedience to the requirement of law, and may be coerced to perform that service. It is a public duty; and, if sometimes, in the discussions of the jury-room, they do not indulge in the same pertinency of remark

and comment concerning the cause submitted to them as the court, they are presumed to act as conscientiously, and with reference to the evidence before them. Within the limits of their functions, and for the purpose of deciding a disputed question of fact, they possess peculiar powers adapted to that end, which are of a judicial nature, requiring the exercise of deliberation and judgment. Whenever duties of this nature are imposed by law upon a party, the due execution of which depends upon belief and the exercise of the judgment, there is an exemption from responsibility by civil action for the manner in which those duties are performed, or even the motives which influence it. This is the general rule applicable to cases which concern the administration of justice between party and party; and upon principle, a juror, while acting as a part of a court, is entitled to the benefit of this rule of impunity, in respect to what he says in the jury-room concerning the cause, which also applies to the judge, or to a grand juror, or member of a legislative body, and he should be subject to no greater risk or hazard. Acting upon oath, and when, as the present case shows, there was a conflict in the testimony, the defendant no doubt entertained a decided opinion, and as a juror he was called upon to express it, as he had a right, as well as the grounds or reasons of it, to his fellows, in justification of his view of the case. A jury trial is rare these days, as all experience shows, in which a question of veracity or credibility does not arise involving somewhat the character for truth and reliability of a witness or party, and this is just what occurred in the case alluded to. Whenever this is the case, jurors no doubt discuss the question submitted to them under the influence of more or less feeling, but they are answerable for it only to their own consciences. 'The place protects them,' and this was the ancient common law, unless they gave a false verdict, when they were proceeded against in a very different manner, as they may be now, for misconduct in the discharge of their duty': *Dunham v. Powers*, 42 Vt. 1.

IX. Persons Against Whom the Privilege may be Successfully Invoked.

It is not material of whom the libelous or slanderous words were uttered, provided their utterance occurred in the course of a judicial proceeding and were relevant to some issue involved therein. The supreme court of Tennessee in one case made a distinction between the libel or slander of a party or witness in a proceeding and the libel or slander of a third person, holding that in the latter case the privilege could not be sustained unless it was shown that the utterance was with probable cause, reasonably creating a belief in the mind of the speaker or writer that what he said was true, and hence rebutting any inference of malice: *Ruohs v. Backer*, 6 Heisk. 395, 19 Am. Rep. 598. This decision, in so far as it places a stranger to the proceeding in any different position from a party thereto, or a coun-

sel or witness therein, is not merely opposed to the weight of authority, but has been overruled in the state where made. Of course, a statement concerning a third person may be more clearly irrelevant than if made of a person whose character or conduct was involved in the proceedings, and considered from that point of view may render the defamer more clearly liable. There are, however, many instances in which one not a party to a proceeding, nor a witness nor attorney therein, may be legitimately assailed, as where, in a suit for divorce, it becomes necessary to name the party claimed to be guilty of misconduct with the erring spouse, or, in a suit or action involving conspiracy or fraud, it becomes necessary to connect other persons with some of the parties to the action. In all such cases the privilege rests upon the same grounds, and is maintained to the same extent as where the person defamed is a party to the action or a witness or attorney therein: *Jones v. Brownlee*, 161 Mo. 258, 61 S. W. 795, 53 L. R. A. 445; *Link v. Moore*, 84 Hun, 118, 32 N. Y. Supp. 461; *Cooley v. Galyon*, 109 Tenn. 1, 97 Am. St. Rep. 823, 70 S. W. 607, 60 L. R. A. 139; *Crockett v. McLanahan*, 109 Tenn. 517, 72 S. W. 950, 61 L. R. A. 914; *Johnson v. Brown*, 13 W. Va. 71; *Henderson v. Broomshead*, 4 Hurl. & N. 569, 28 L. J. Ex. 360, 5 Jur., N. S., 1175; 7 Week. Rep. 492, Ex. Ch.

X. The Louisiana Rule.

The decisions of the supreme court of Louisiana on this subject are not easily understood, for among them are those apparently affirming the liability to civil action on much the same grounds as in other cases of libel and slander: *Kelley v. Lafitte*, 28 La. Ann. 435; *Wiel v. Israel*, 42 La. Ann. 955, 8 South. 826; others using language so broad as to indicate the total denial of liability when the words used were pertinent: *Gardemal v. McWilliams*, 43 La. Ann. 454, 26 Am. St. Rep. 195, 9 South. 106; and still others which attempt to explain the former without making the law of the state more easy for our comprehension: *Randall v. Hamilton*, 45 La. Ann. 1184, 14 South. 73, 22 L. R. A. 649; *Youree v. Hamilton*, 45 La. Ann. 1191, 14 South. 77. A statute of the state declares that no client or person shall be held liable for any slanderous or libelous words uttered by his attorney at law, but attorneys shall be themselves liable for any slanderous or libelous words uttered by them. This, however, does not exempt parties from liability for matter inserted in a pleading by their instruction.

The final result of the decision, we believe, however, not to differ substantially from that reached in the other states. Liability existed for libelous or slanderous utterances when not relevant to the issue or pertinent to the occasion: *Wimbish v. Hamilton*, 47 La. Ann. 246, 16 South. 856; and also even when pertinent if made without probable cause to believe in their truth, but, on the other hand, litigants are not to be precluded from introducing any defense or cause of

action in which they in good faith believe and where their action is free from personal malice: *Monroe v. Weston L. Co.*, 49 La. Ann. 594, 21 South. 742; *Lescalle v. Joseph Schwartz Co.*, 116 La. 293, 40 South. 708; *Dunn v. Southern Ins. Co.*, 116 La. 431, 40 South. 786; *Lescalle v. Joseph Schwartz Co.*, 118 La. 718, 43 South. 385.

COMMONWEALTH v. RAMUNNO.

[219 Pa. 204, 68 Atl. 184.]

AUTREFOIS ACQUIT, Plea of as a Defense to a Charge not Complete or Provable When the Former Conviction was had.—On the trial of an indictment for murder, the defense of a prior conviction for assault and battery with intent to kill does not support the plea of former conviction, if at the time of such conviction the person assaulted had not died. (pp. 655, 656.)

MURDER—Removing the Accused from the Penitentiary for the Purpose of Trial.—A person placed on trial for murder cannot complain of such trial or his subsequent conviction on the ground that he was illegally taken from the penitentiary for the purpose of being tried. (p. 656.)

Raymond E. Brown, Jacob L. Fisher and William L. McCracken, for the appellant.

James V. Murrat, district attorney, for the appellee.

206 BROWN, J. At the April sessions, 1906, of the court of quarter sessions of Jefferson county, Dominic Ramunno, the appellant, and Gemaro Mezzanotti were indicted for having committed an assault upon Julius Sleziwicz, with intent to kill him, and, having been convicted by a jury, were each sentenced, on April 23, 1906, to pay a fine of one hundred dollars and undergo an imprisonment in the penitentiary for a period of seven years. They were duly committed to the warden of that institution on April 26, 1906. On the day following, April 27th, Sleziwicz died from the effect of their assault upon him, and subsequently an information was made against them, charging them with having murdered him. On a writ of habeas corpus, issued out of the court of common pleas of Jefferson county, at the instance of the district attorney, they were brought back to the county by the high sheriff, to whom the warden of the penitentiary had surrendered them in obedience to the writ directed to him; and, after the warrant in which they were charged with murder had been served upon them, they were committed to the county jail to await the action of the grand jury. On January 16, 1907, they were indicted for the murder of Sleziwicz,

and subsequently tried together and convicted—Ramunno, of murder of the first degree, and Mezzanotti of murder of the second degree. From the judgment of death pronounced upon the former we have this appeal.

Upon the arraignment of the prisoners, a motion was made to quash the indictment against them on the ground that the court had no jurisdiction to try them, as they had been brought within it without their consent and, therefore, illegally, at the instance of the district attorney by a writ of habeas corpus. This motion was overruled, and, having been directed to plead, ²⁰⁷ they pleaded in bar of the indictment against them their conviction of the felonious assault upon Sleziwicz, averring that by such conviction they had been put in jeopardy and punished for their offense. To this plea the commonwealth demurred, and the demurrer having been sustained, the trial proceeded on the general issue. In a motion in arrest of judgment and for a new trial, the exceptions taken to the court's jurisdiction and the plea of former jeopardy were renewed.

In the court below as we gather from the opinion overruling the motion in arrest of judgment and denying a new trial, counsel for the prisoners urged that the plea of *autrefois* convict was a bar to the indictment under the constitutional provision that "No person shall, for the same offense, be twice put in jeopardy of life or limb." On this appeal we are told that they were misunderstood by the trial judge, as the prisoners' plea was not based upon the constitutional protection against a second jeopardy, but upon the common-law rule that no one shall be punished twice for the same offense, and upon section 30 of the act of March 31, 1860 (Pub. Laws, 427), which provides that, "In any plea of *autrefois* acquit, or *autrefois* convict, it shall be sufficient for any defendant to state, that he has been lawfully convicted, or acquitted, as the case may be, of the offense charged in the indictment." The constitutional provision against being placed in jeopardy twice for the same offense, found in the Declaration of Rights, is but a recognition of the humane rule of the common law, and a plea of former conviction is good under either. Section 30 of the act of 1860 merely provides for the simplification of the plea when made.

When the appellant and Mezzanotti were indicted and tried for assaulting Sleziwicz, he was still alive. Though they had intended to kill him, their murderous intention had not

been effected, and it would not have been if he had survived the assault; but his assailants had committed a crime for which the law invoked punishment, and when it was inflicted the only crime for which they could then be punished was felonious assault. They had not then committed murder, for their victim had not died. The law could not then have said that he would die, and their trial for the offense then committed was not to be indefinitely postponed in view of a mere contingency that what they had done might be followed, as the ²⁰⁸ direct and intentional result of their act, by the other and distinct crime of murder. When they were tried in 1906, they were tried for the only offense they had committed up to that time. When they were tried in 1907 for murder, it was for an offense of which they were guiltless in the preceding year. Murder is committed only when the victim of the assault dies. How, then, could the plea of *autrefois convict* have been successfully pleaded in bar of the indictment for murder when no murder had been committed at the time of the former conviction? Authorities not only uniform, but without number, sustain the view of the trial judge that the prisoners had never before been in jeopardy or punished for the crime of murder. It would be an affectation of research to attempt to cite them, all recognizing the rule as laid down in 4 Blackstone's Commentaries, 336: The plea of former acquittal or former conviction must be upon a prosecution for the same identical act and crime. Courts in England and this country have without exception announced the principle that unless the first indictment was such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first can be no bar to the second. "When the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, the plea of *autrefois acquit* is generally good, but not otherwise": *Hilands v. Commonwealth*, 114 Pa. 372, 6 Atl. 267. The evidence in support of the indictment for murder could not have secured a conviction of that crime on the first indictment, charging only assault upon a person then living. The innumerable authorities sustaining the court below are to be found in Stephen's Criminal Law, 173, Wharton's Criminal Pleading and Practice, 8th ed., sec. 476, 1 Bishop's Criminal Law, sec. 1059, 12 Cyclopaedia of Law and Procedure, 284, and 17 American and English Encyclopedia of Law, 600. In *State v. Littlefield*,

70 Me. 452, 35 Am. Rep. 335, the plea made by this appellant was made by the defendant there, and it was said: "At the time of the first prosecution and conviction the defendant had not committed the crime with which he is now charged. True, the force had been inflicted upon the body of Morton, but his death had not ensued. The force was acting to produce its effect, and the defendant was as much responsible for its natural and necessary result as if he had all the while been pressing it ²⁰⁹ upon the body of his victim. When death was caused by that force, a new and distinct crime was consummated by the defendant, of which he was not before guilty, and for which he could not have been convicted at the time of the first prosecution. The offenses are not the same in fact, and therefore are not identical." To have overruled the commonwealth's demurrer to the prisoner's plea of former jeopardy would have been error, to the wrong of the commonwealth.

On the prisoner's other contention, not much ought to be said, for nothing can be said in support of it. At all times he was within the commonwealth. By its process he had been committed to one of its penal institutions for a violation of one of its laws. It not only did not object to his being brought into the jurisdiction of one of its courts to answer a more serious charge than the one upon which he had been committed, but asked, at the instance of a district attorney representing it in his district, that his body should be produced, to be subjected to punishment upon a charge which he was called to answer, different and distinct from that for which he had formerly been convicted. The warden of the penitentiary having him in custody made no question as to the commonwealth's right to take him away; and, under the circumstances, when he reached the jurisdiction in which he was to be tried for the most serious offense known to the law, it was none of his concern how he got there. A prison is not a place of refuge for a criminal. It is for his punishment, to which he is involuntarily committed, and the same power that commits him can take him from it when in the interest of justice he should be transferred elsewhere to answer for his misdeeds.

The assignments of error are overruled. The judgment is affirmed and the record remitted for the purpose of execution.

The Identity of Offenses in a Plea of Former Jeopardy is the subject of an extended note to *People v. McDaniels*, 92 Am. St. Rep. 89.

CUNNINGHAM v. FIRST NATIONAL BANK.

[219 Pa. 310, 68 Atl. 731.]

BANKING—Right of Indorser to Recover Money Paid on a Forged Indorsement, When Lost by His Laches.—If a bank, on the presentation to it of a check drawn by one of its depositors having indorsed thereon the name of the payee, credits such check to the bank from which it had been received, and charges the amount to the drawer, and the latter, on being informed of the forged indorsement, fails for six weeks to notify the bank, and in the meantime the bank so receiving credit becomes insolvent, so that no recovery can be enforced against it, the bank on which the check was originally drawn is not liable to repay the amount thereof to its depositor, because his laches deprived it of the means of obtaining indemnity from the bank so credited with the amount of the check. (p. 658.)

Assumpsit by a depositor against a bank to recover the amount of a check charged against him on a forged indorsement of the payee. The defendant offered evidence tending to show that the Delmont National Bank, which had presented the check and been credited with the amount thereof, was insolvent and had paid no dividends, but the evidence was excluded on the objection of the plaintiff. Verdict and judgment for plaintiff and defendant appealed.

John P. Blair and James S. Campbell, for the appellant.

John A. Emery and J. N. Banks, for the appellee.

313 STEWART, J. The Bank of Pittsburg accepted a check for two thousand seven hundred dollars drawn by the plaintiff on the First National Bank of Indiana, the defendant, payable to the order of C. M. Johnston, and bearing what purported to be an indorsement by the payee and a subsequent indorsement by one McQuaide. The Bank of Pittsburg, having an open account on its books with the Delmont National Bank, presumably at the direction of the last indorser, credited the latter bank with the amount of the check, and, having indorsed it with an express guaranty of the genuineness of the prior indorsements, forwarded it to the Bank of Indiana, where it was charged up against the deposit account of the drawer. The check had never been in the hands of the payee; it had been left by the drawer in the hands of his attorney to be delivered over to the payee for or upon the satisfaction of a certain mortgage. Instead of

being so applied the check, with a forged indorsement of the payee's name, was presented to the Bank of Pittsburg, and was by it accepted and credited to the account of the Delmont National Bank, of which McQuaide, the plaintiff's attorney, was president. A year later, May 1, 1906, Johnston, the payee, told the plaintiff that he had not indorsed the check. To assure himself that he had drawn the check payable to the order of Johnston and not to the order of his attorney, plaintiff the same day procured the check, and upon examination found that it was payable to Johnston's order, and that it bore an indorsement purporting to be Johnston's. Six weeks thereafter he exhibited the check to Johnston, who positively repudiated the indorsement. The same day the plaintiff notified the Indiana bank of the forgery, and made demand for reimbursement. This brief statement of the facts is sufficient for an understanding of the only assignments of error in the case which it is necessary to consider.

In view of plaintiff's admission that he was informed by Johnston as early as May 1, 1906, that he had not indorsed the check which plaintiff then knew was drawn payable to Johnston's order, and that he had not notified the defendant bank of such denial for six weeks thereafter, defendant offered evidence ³¹⁴ to show, first, that the Delmont Bank is insolvent; second, that between May 1, 1906, when plaintiff was notified by Johnston that he had not indorsed the check, and June 15th following, when plaintiff notified the Indiana Bank of the forgery, the Bank of Pittsburg had in its hands funds of the Delmont National Bank sufficient to reimburse it on account of its acceptance of the forged check. The purpose of the offer was to afford ground for the contention that the Bank of Pittsburg, which, because of its guaranty of the genuineness of the indorsements, was liable over to the defendant bank, had been prejudiced by negligence of the plaintiff in failing to promptly notify the defendant bank of the forgery; this on the theory that the defendant bank, in order to hold the Pittsburg bank, was bound to interpose to plaintiff's demand against it whatever equities the former had. The offer was rejected because, as stated in the opinion filed refusing a new trial, the effect of it would be to make the Delmont Bank an indorser of the check, whereas in fact its name does not appear in connection with the check and it was a stranger to the transaction. But the liability of the Delmont Bank on the check was not a question in the case; whatever liability it was

under to the Bank of Pittsburg was for money which had been paid or credited to it by mistake, and to which it had no claim. That the Pittsburg Bank would have the right to charge back on its books the credit given the Delmont Bank on this forged indorsement cannot be questioned. The latter had received a credit to which it was not entitled, for which it had given nothing, and the withholding of it by correction on the books of the Pittsburg Bank could not in any way have prejudiced the Delmont Bank. The latter was never in position to demand the credit; the Pittsburg Bank, on discovery of the forgery, could successfully have resisted any attempt to enforce such credit. With the evidence in, the question would have been for the jury to decide, under proper instructions, whether facts necessary to establish negligence on the part of the plaintiff to the prejudice and loss of the Pittsburg Bank had been made out. Since the evidence should have been admitted, the fifth and sixth assignments of error must be sustained.

Judgment reversed, and venire facias de novo awarded. 4

The Rights and Remedies of the several parties when a forged check has been paid are discussed in the note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 889; and the liability of one receiving payment of a check on a forged indorsement is discussed in the note to *First Nat. Bank v. Bank of Rutherford*, 94 Am. St. Rep. 641. For subsequent decisions on these questions, see *Wellington Nat. Bank v. Robbins*, 71 Kan. 748, 114 Am. St. Rep. 523, and cases cited in the cross-reference note thereto. If, in an action by a depositor to recover of a bank money alleged to have been paid on forged checks, it appears that the forgeries were made by a confidential clerk of the depositor, who intrusted him with the balancing of his bank and account-books, and that the bank was not negligent in honoring the checks, the depositor cannot recover of the bank. He alone is responsible for his failure to examine the checks after payment and to reject them within a reasonable time: *Meyers v. Southwestern Nat. Bank*, 193 Pa. 1, 74 Am. St. Rep. 672; and see the cases cited in the cross-reference note thereto. A bank depositor is under obligation to the bank to examine within a reasonable time, or have examined by some competent person, in good faith and with ordinary care, the account rendered in his passbook and the vouchers returned, and to report any errors discovered. Failing in this, he is negligent, and may be held liable for the payment of a forged check: *First Nat. Bank v. Richmond Electric Co.*, 106 Va. 347, 117 Am. St. Rep. 1020.

RANNEY v. BYERS.

[219 Pa. 332, 68 Atl. 971.]

TRUST, DECLARATIONS OF and Their Sufficiency.—The essential elements of a declaration of trust are the subject matter of the trust and the designation of the cestui que trust and of his right or interest in the subject matter. (p. 660.)

TRUST, DECLARATION OF—Writing.—A trust need not be created by a writing, but is required by statute to be manifested by a writing, signed by the party holding the title thereof. If in writing, it need not be expressed in any particular form of words, nor need the word "trust" or "trustee" be used, but the language used must be such as to disclose with certainty the purpose to create the trust. (pp. 660, 661.)

TRUST, DECLARATION OF, Instance of Sufficient.—A paper showing the place and date of its execution, purporting to be a memorandum and agreement and stating that the agreement with Mr. B. is that the money invested by him in "the place" is to be placed to his credit and bear interest until paid, and when the principal and interest are paid, the residue of the property is to belong to C. W. R. and W. B. R., and duly signed, is sufficient to satisfy the requirements of the statute respecting declarations of trust. (pp. 661, 662.)

TRUST, DECLARATION OF—Parol Evidence to Identify Subject Matter of.—A declaration of trust specifying the "Byers Place" as the subject matter thereof is sufficient, and parol evidence is admissible to show what was included in the place so named. (p. 665.)

Suit to declare a trust. Decree for the complainants and the defendant appealed.

J. Norman Martin and Leonard M. Uber, for the appellant.

R. A. Winternitz and Gregory & Dickey, for the appellees.

³³⁴ MESTREZAT, J. The learned trial judge was right in holding that the writing signed by Byers was a sufficient declaration of trust under the act of April 22, 1856 (Pub. Laws, 532, 2 Purd., 13th ed., 1757), and in entering a decree in conformity with the prayer of the bill.

As has been frequently said, the essential elements of a declared trust are the subject matter of the trust, the designation of the cestui que trust, and the right or interest of the cestui que trust in the subject matter of the trust. It need not be created by writing, but is required by the statute to be "manifested by writing signed by the party holding the title thereof." If in writing, the declaration need not be expressed in any particular form of words; even the words "trust" or "trustee" need not be used, but the language employed must be such as to disclose with certainty the purpose to create a

trust. It may be couched in any language which is sufficiently expressive of the intention to create a trust: *Smith's Estate*, 144 Pa. 428, 27 Am. St. Rep. 641, 22 Atl. 916.

The paper signed by Byers and delivered to plaintiffs, the declaration of trust in this case, is as follows:

"THE BYERS PLACE,

"J. P. BYERS.

DR. CR.

"NEW CASTLE, PA., Aug. 3, 1896.

"Memoranda and agreement.

"The arrangement with Mr. Byers is this: All money invested by him in the Byers place to be placed to his credit, and to bear interest from the date credit is given until paid. When the total principal and interest is paid in full then the residue or remaining property to belong to C. W. and R. B. Ranney.

J. P. BYERS."

335 It will be observed that this paper sets out a subject matter, designates the cestuis que trust, and their right or interest in the subject matter. The subject matter is the "Byers Place," the cestuis que trust are C. W. and R. B. Ranney, and they are the owners of the whole property. This declaration is, apparently at least, sufficient to meet the requirements of the statute of 1856. In fact, as we understood, it is conceded that it does contain all the requisites demanded by the statute except the subject matter is not named, or, rather, it is not sufficiently described to meet the requirements of the statute. It is contended that there is "nothing contained in the alleged declaration of trust that couples Byers Place with the lands described in the deed from Adam Treser to John P. Byers." But the declaration unquestionably names a subject matter. From the wording of the instrument itself, "Byers Place" is well known and its existence recognized by Byers himself. The instrument is written and dated at "The Byers Place," and the body of it declares the "Byers Place" to be the subject in which Byers has invested his money for which he is to have a credit, and that when the principal and interest of the money thus invested by him are paid the "remaining property to belong to C. W. and R. B. Ranney." Can there be any doubt that Byers and the Ranneys knew when the instrument was executed and delivered, and now know what the "Byers Place" is, what real estate it includes, where it is situated, and that a decree of the court containing

a like description would be sufficient to locate the property? It is a matter of common knowledge that residential and other real estate property is frequently given some name by which it is known is described in written instruments, and is recognized by everyone familiar with the property. Many written agreements for the sale of real estate contain no better or fuller description of the property than the name by which it is generally known in the community, and for a court to hold that such name is an inadequate description is to give an opportunity to every dishonest vendor or vendee to evade his contract. A court of equity should be slow in announcing a doctrine that would produce such results. While the statute of 1856 is most salutary legislation and its enforcement will unquestionably prevent fraud as well as perjury, yet, as has ³³⁶ been frequently said, it must not be made a means of aiding anyone to perpetrate a fraud. Here, as we have observed, all the parties interested in the trust know the property, the subject matter, involved. Byers used the name in the declaration which he signed as the one appropriate to and correctly describing the property. It was the name he recognized as descriptive of the property which he declared he held for the Ranneys. He should not now be permitted to say that the name means nothing, is descriptive of no property, and is not sufficient to describe the real estate in dispute.

If, however, the name used in the writing to designate the subject of the trust is not sufficient to identify or locate the property, is parol evidence admissible for that purpose? It is true, as we have frequently held, that a declaration of trust is condemned by the statute unless all its essential elements are in writing. Parol testimony is not admissible to establish any essential part of the declaration. But when the writing is complete in itself, stating the subject matter, designating the cestui que trust and his interest in the subject matter, there is no reason why parol evidence should not be received to identify and locate the subject of the writing. The distinction between parol evidence when offered for the latter purpose and when offered for the purpose of naming or designating the subject matter of the contract is of vital importance and determines its admissibility. While as we have seen, in creating a trust, it is essential to its validity that the writing designate the subject matter, no language or form of words, however, has been prescribed by the statute, the simple requirement being that the subject, as stated, be definite and certain.

When, therefore, the instrument names a definite subject, it satisfies the statute, and parol evidence is admissible to identify or locate it on the ground. This rule is recognized alike in text-books and in the decisions of the courts. In Stephen's Digest of the Law of Evidence (art. 91, pl. 4), it is said: "In order to ascertain the relation of the words of a document to the facts, every fact may be proved to which it refers or may possibly have been intended to refer, or which identifies any person or thing mentioned in it." In his work on the Law of Evidence (c. 19, sec. 1194), Mr. Taylor says: "Passing now to the consideration of the second description ³³⁷ of evidence, which is admissible in explanation of written instruments, it may be laid down as a broad and distinct rule of law that extrinsic evidence of every material fact, which will enable the court to ascertain the nature and qualities of the subject matter of the instrument, or, in other words, to identify the persons and things to which the instrument refers, must of necessity be received." Mr. Greenleaf (Greenleaf on Evidence, Lewis' ed., sec. 266) states the rule applicable to the admission of parol evidence under the statute of frauds as follows: "It is to be observed that the statute does not require that the trust itself be created by writing, but only that it be manifested and proved by writing; plainly meaning that there should be evidence in writing, proving that there was a trust and what the trust was. . . . In all these cases, it seems now to be generally conceded that parol evidence, though received with great caution, is admissible to establish the collateral facts (not contradictory to the deed, unless in case of fraud) from which a trust may legally result."

Turning, now, to our own cases, it will be seen that for at least three-quarters of a century a like doctrine as to the admission of parol evidence has prevailed in this state. In *Bertsch v. Lehigh Coal Nav. Co.*, 4 Rawle, 130, it is held, as stated in the syllabus, that parol evidence may be given to explain a written agreement, so far as to give locality and identity to the subject matter of it, and apply the contract to it. In delivering the opinion, Mr. Justice Kennedy says (p. 139): "As often as written agreements fail to describe by metes and bounds the lands contracted for, and to give a precise location to them, the omission is always supplied, and the application of the agreements made to the lands by the introduction of parol evidence, which has ever been considered competent; otherwise, in most cases the agreements could never

be carried into effect." In *Gould v. Lee*, 55 Pa. 99, Chief Justice Woodward, delivering the opinion, says (p. 108): "Parol evidence is not admissible to alter or contradict what is written, upon the very obvious principle that the writing is the best evidence of the intentions of the parties; but parol evidence has many times been received to explain and define the subject matter of written agreements. Herein is no contradiction."

³³⁸ *Ferguson v. Staver*, 33 Pa. 411, was an ejectment, and the court held that the subject matter of the writing was within the statute of frauds. In delivering the opinion of Chief Justice Lowrie, in speaking of the contract in that case, says (p. 413): "Its subject matter is an essential part of it—and without it, there is no contract. If the subject matter, the land, be described, we admit evidence in order to apply the description to the land; but we cannot admit parol evidence, first, to describe the land sold, and then to apply the description." *Smith's Appeal*, 69 Pa. 474, was a bill filed to restrain the defendant from entering upon certain premises and cutting and removing the timber therefrom. It was held that the contract was not within the statute of frauds. Williams, J., delivering the opinion, said (p. 480): "Equally unfounded is the objection that the contract is incomplete in its terms. It sets out the parties and the consideration, and sufficiently describes the subject matter—'said land is all that piece bought of Rose by Thomas Smith and Porter Fleek'—certum est quod certum reddi potest. If the subject of the contract is described, parol evidence is admissible to apply the description to the land: *Ferguson v. Staver*, 33 Pa. 411." *Phillips v. Swank*, 120 Pa. 76, 6 Am. St. Rep. 691, 13 Atl. 712, was an ejectment, and it was there held that the contract upon which the title depended was not ineffective under the statute of frauds. In delivering the opinion, Mr. Justice Clark says (p. 85): "It is true, a written contract, in order to comply with the statute (of frauds), must be in some sense self-sustaining. 'It would be mere folly,' as was said in *Morris v. Stephens*, 46 Pa. 200, 'to make a conveyance to my next door neighbor, or to the person now sitting at the table with me, by this description, instead of by name; the law would hardly be expected to enforce such a conveyance in the face of a statute which requires conveyances to be in writing and to be self-sustaining, with the exception only of such necessary uncertainty as is involved in

their application to persons named and things described.' There is, as intimated in the language of the case referred to, a necessary uncertainty in writings, involved in their application, not only to persons but to things described therein. If there are two or more persons of the same name, it may be necessary by parol to fix the identity of the person intended, ⁸³⁹ or the thing concerning which the parties propose to contract may be described in such general terms as to require parol proof to identify the particular subject of the contract. It is quite impossible in most cases so to describe land as to avoid the necessity of parol proof for its identification; for whether it be described by metes and bounds, by monuments erected upon the ground, or by adjoiners, its identification necessarily becomes a subject of parol proof."

Under this well-recognized doctrine, sustained alike by text-writers and decided cases, we think that, if necessary, parol evidence was admissible to identify and locate the "Byers Place," the subject matter of the declaration of trust. The name used in the declaration describes the property, the subject of the trust. Parol evidence is not admissible to show what real estate the settlor or cestui que trust intended to be included in the trust. Had the settlor in the declaration not described the land, or given any name by which it was known or recognized, or had referred to it in such general terms as to make no one of several pieces of property applicable to the trust, parol evidence could not have been introduced to determine the subject of the trust. On the other hand, when the settlor does describe the property by a name, recognized by himself and the cestuis que trust, as well as by other persons in the community, parol evidence will be admitted to apply the description to the land. This is simply identifying the property made the subject of the trust by the declaration, and not establishing the subject matter of the trust by parol evidence. It is not proving an essential part of the declaration by parol—that cannot be done—but simply identifying or locating the subject, an essential part of the declaration.

We have examined the cases cited in the appellant's brief to support his contention that parol testimony is not admissible to identify or define the "Byers Place," the subject matter of this trust, but the facts of none of these cases sustain the position. In *Mellon v. Davison*, 123 Pa. 298, 16 Atl. 431, the real estate described in the writing "was a lot of ground fronting about one hundred and ninety feet on the

P. R. R. in the twenty-first ward, Pittsburg, Pa.” There was no description of any particular lot. There might have been one dozen or one hundred lots fronting on the railroad owned by Davison at that ⁸⁴⁰ time, and hence it was not a description of any lot. To admit parol testimony to show which of these lots was the subject matter of the trust would have been to admit it for the purpose of showing the subject matter of the trust. In *Hammer v. McEldowney*, 46 Pa. 334, the property was described in the writing as “the houses on Smithfield Street.” This is open to the same objection as the description in the writing in the Mellon case. In such cases parol testimony could not apply the subject matter, because no subject matter was named. To refer to a property as a lot on Smithfield street or as a lot of ground on the Pennsylvania railroad is not to describe any particular lot, and hence parol testimony could not identify it.

The learned judge was fully justified in entering the decree which he made. It is molded so as to do justice between the parties in carrying out the trust which Byers assumed, and he is, therefore, not in a position to complain. It gives him all he is entitled to in a court of equity.

The decree of the court below is affirmed.

The Creation of Trusts in Land by Parol is the subject of a note to *Insurance Co. v. Waller*, 115 Am. St. Rep. 774. The general rule is that an express or direct trust cannot be established by parol evidence: *Kinley v. Kinley*, 37 Colo. 35, 119 Am. St. Rep. 261. Constructive trusts, however, are not within the statute of frauds: *Parker v. Catron*, 120 Ky. 145, 117 Am. St. Rep. 575; *Crossman v. Keister*, 223 Ill. 69, 114 Am. St. Rep. 305.

The Intent of a Donor to Create a Trust Need not be Expressly Declared; it may be inferred from the powers conferred: *Meek v. Briggs*, 87 Iowa, 610, 43 Am. St. Rep. 410.

HOSKINS v. SOMERSET COAL COMPANY.

[219 Pa. 373, 68 Atl. 843.]

CONTEMPT, Judgment for, Conclusiveness of.—In an action to recover damages for the false imprisonment of the plaintiff, a judgment showing that the imprisonment was authorized as a punishment for contempt of court is conclusive against the plaintiff, though the court discharged him on the payment of costs. (pp. 667, 668.)

Alexander King, for the appellant.

W. H. Koontz, W. H. Ruppel, J. G. Ogle and Charles F. Uhl, Jr., for the appellee.

374 FELL, J. This was an action to recover damages for false imprisonment. From the record of the common pleas, offered in evidence by the plaintiff, it appeared that an injunction had been issued by the court restraining the defendants named in the bill and all other persons from the time when they should have knowledge of the injunction from interfering with the works and the employés of the Somerset Coal Company, the defendant in this action. Upon petition supported by affidavits that the plaintiff and others, with a full knowledge of the injunction, had intentionally and defiantly violated it, a rule was granted to show cause why they should not be attached for contempt. After a hearing at which the plaintiff was present, and while the case was pending and undetermined, a second petition was presented to the court in which it was alleged that the plaintiff had further violated the injunction. On this petition an attachment was issued, and the plaintiff was arrested by the sheriff and confined in the county jail. On the return day of the writ he was given a hearing, and it was found that he had violated the injunction and was in contempt. The order made was: "We do not now impose upon the said John Hoskins any fine, but direct that upon the payment of the costs he be discharged from the custody of the sheriff."

A nonsuit was entered for the reasons, among others, that **375** the decree of the court in the contempt proceedings was binding on a court of co-ordinate jurisdiction. In Williamson's Case, 26 Pa. 9, 67 Am. Dec. 374, it was said: "A sentence for contempt is not essentially different from any other judgment, decree or sentence. It is a matter adjudicated, and it belongs to the very essence of governmental order that

it cannot be reviewed except by the court that pronounced it, or by its official superior." In *Doyle v. Commonwealth*, 107 Pa. 20, the relator was discharged by one court of common pleas from arrest under an attachment issued by another court. It was said in the opinion: "It is very evident that this is substantially a review and reversal of the judgment on which the writ of attachment was based, and the question is whether one court can modify or set aside the judgment of another court of co-ordinate jurisdiction. If it can, the most deplorable consequences would likely ensue; we have no hesitation in saying that no such power exists." The order of the court discharging the plaintiff on payment of costs was not, as argued, a discharge because of the failure to make out a case against him; it was in effect a sentence to pay the costs following an adjudication that he was in contempt.

The judgment is affirmed.

The Malicious Prosecution of criminal charges is the subject of a note to *Ross v. Hixon*, 26 Am. St. Rep. 127; a malicious prosecution of civil actions is the subject of a note to *McCormick Harvesting etc. Co. v. Willan*, 93 Am. St. Rep. 454.

HENDERSON v. CONTINENTAL REFINING COMPANY.

[219 Pa. 384, 68 Atl. 968.]

CHILDREN, Contributory Negligence of, When a Question for the Jury.—A boy seven years of age cannot be held guilty of contributory negligence by the court as a matter of law. (p. 671.)

TRESPASSER upon the Lands of Another, Who is not.—If a company owns and operates a refinery on the west side of a public road and also owns land on the east side thereof, upon which are two houses occupied by its tenants, fronting upon the road and separated by a vacant lot, and the side door and approach to one of the houses opens upon the vacant lot, and opposite to such door is a gate entering on the yard of the other house, and the children of the neighborhood use the lot as a playground, a boy seven years of age who undertook to visit a playmate whose parents lived in one of the houses, and kept along and over the vacant lot, there being over it a path which had been used for years as a playground for children, cannot be regarded as a trespasser. (p. 671.)

PARENTS, When will not be Guilty of Contributory Negligence.—Parents of a boy seven years of age cannot be held guilty of contributory negligence as a matter of law because they allowed him to go around upon the streets in the vicinity of his home and to visit a neighbor's house, though near by was machinery attractive to children and which might prove dangerous to him. (p. 672.)

LAND OWNERS, Liability of for Injuries Inflicted on a Child by Dangerous Machinery.—In an action by the parents of a boy who, at the age of seven years, was killed by coming in contact with dangerous machinery operated and unguarded on the premises of the defendant on a lot where children were accustomed to gather and play, a compulsory nonsuit is erroneous. The cause should be submitted to the jury under proper instructions. (p. 672.)

Trespass to recover damages for the death of plaintiff's son. A judgment of nonsuit was entered on motion of the defendant, and the plaintiff appealed.

Peter M. Speer and John M. McGill, for the appellants.

William J. Breene and Edmond C. Breene, for the appellees.

386 POTTER J. The only question presented for review by this appeal is whether the learned trial judge erred in refusing to take off the judgment of compulsory nonsuit entered by him at the close of the plaintiffs' evidence, upon the trial of this case. The injury for which damages are claimed was the death of a boy seven years of age, caused, as is alleged, by the negligence of the defendant company in failing to cover or guard a piece of pumping machinery, located upon a vacant lot adjacent to the highway. It is apparent from the description of the pumping machinery, with its revolving cogwheels and attachments, that it would be dangerous for anyone to come in contact with it while in motion, and there is testimony in the case that it is customary to guard or cover similar machines. The defendant company owns and operates an oil refinery, **387** near Oil City, on the westerly side of a public road. It also owns land on the easterly side of the same road, upon which are located two houses belonging to the company and occupied by its tenants. These houses front upon the road, and are separated by vacant ground some forty or fifty feet in width, also belonging to the defendant. The side door and porch of the southerly house opens directly upon the vacant lot, and opposite to it is a gate entering the yard of the northerly house. Between this door and gate there was formerly a path which was used to pass from one house to the other. The vacant lot extended westwardly to the road and eastwardly to Oil Creek. It was level with the road and was not fenced in. It appears from the testimony that the lot was used for a common, and the children of the neighborhood had used it as a playground. Plaintiffs, who are the parents of the boy

who was killed, at one time lived in the southerly house, but moved elsewhere some time before the accident. About July 1, 1903, the defendant company placed upon this vacant lot the pumping machinery in question, and located it at a point midway between the two houses, and on the path connecting them, or very close to it. Between the road and the pump, about twenty or twenty-five feet from the latter, was a gas engine used to operate it, and connected with it by a belt.

On July 20, 1903, about 4 o'clock in the afternoon, the seven year old son of plaintiffs went to the house north of the lot where the pumping machinery, generally called the power, was located as described, seeking a playmate who lived there. He went in the front way from the road, saw his friend's father, who told him his son was not at home, and then passed out by the side gate into the lot. He was seen a few minutes later standing a few feet from the power, looking at it. In some way which is unexplained, as no one saw him at the moment of the accident, he was caught in the machinery, carried around and thrown down upon the ground. One of his legs was so badly injured as to make amputation necessary, and he died the same night from the shock and loss of blood.

The trial judge seems to have been impressed with the idea that the boy climbed upon the machinery, for the sake of having a ride upon the revolving power, but we do not find anything in the evidence to indicate that such was the fact. At most, ³⁸⁸ it was but an inference, and as such it was for the jury to draw. No one saw the boy climb upon the machine. Just before the accident he was seen standing near the power; when next seen he was falling to the ground. How he became involved in the machinery, whether by climbing upon it or by standing too near, is only a matter of inference. The age of the boy precluded his being held guilty of contributory negligence as matter of law by the court. Whether or not he exercised, under the circumstances, the degree of care commensurate with his age, was for the jury.

We do not think the facts in this case bring it within the line of the decisions in which it is held that the land owner owes no duty of protection to those who may be upon the premises. Under the circumstances it can hardly be said that the child was where he had no right to be. The entire tract of land, including the two houses, and the ground between them, belonged to the defendant company. As has already been noted, one of the houses was built with a side door

and porch opening directly upon the vacant lot, and from the other house, a gate placed in the fence opened from that side directly into the lot. The door provided upon one side and the gate upon the other, certainly was sufficient to indicate to tenants in the houses, to their families and guests, an implied permission, or invitation, to enter upon and cross the vacant lot. As a matter of fact, under this permission it was used for years to such an extent that a path was worn across the lot between the two houses. The lot was also permitted to be used as a playground for the children of the tenants in the houses and by other children. After permitting this use of the property for several years, the defendant company, according to the testimony, erected this dangerous piece of machinery right upon, or close to, the pathway between the two houses. It did not inclose or guard the machinery, nor did it shut up the door or the gate leading from the houses to the lot. It seems to have done nothing to give notice that the permissive use of its land as a passageway and playground was to be discontinued. Upon the day of the accident plaintiff's son went to the home of the tenant living in the northern house, upon a lawful errand, to see a member of the family. On leaving, he passed through the side gate onto the lot; the existence of ³⁸⁹ the gate being apparently an invitation to him to go out in that way. His attention would be naturally attracted to the curious machinery located on or near the path and but a few feet away. A fair inference is, that heedlessly, or without appreciating the danger, the child ventured too near, and was injured. Under these circumstances, he cannot fairly be regarded as a mere trespasser. The lot was really an appurtenance to the two houses, and was a part of the curtilage. It was not only so used by the occupants of the houses and their visitors, but it was expected that it should be so used, because of the arrangements made to enter upon it from the sides of the houses. The language which counsel for defendant company cite as defining the term "invitation" seems to fit very closely the facts of this case, so that the inference may well be drawn that the child "entered the premises because he was led to believe that they were intended to be used by visitors, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the place was adapted and prepared or allowed to be used." In *Kay v.*

Pennsylvania R. R. Co., 65 Pa. 269, 3 Am. Rep. 628, Justice Agnew said: "Duties grow out of circumstances, the authorities tell us, and that which in one case would be an ordinary and proper use of one's rights may, by a change of circumstances, become negligence and a want of due care. . . . If, therefore, an owner of property has been accustomed to allow to others a permissive use of it, such as tends to produce a confident belief that the use will not be objected to, and therefore to act on the belief accordingly, he must be held to exercise his rights in view of the circumstances so as not to mislead others to their injury, without a proper warning of his intention to recall his permission."

As to the suggestion that the parents were guilty of contributory negligence, they could not be so held as matter of law, merely because they allowed a seven year old boy to go around by himself upon the streets in the vicinity of his home, or to visit a neighbor's house. At most, the question would be for the jury: *Enright v. Pittsburg Junction R. R. Co.*, 204 Pa. 543, 54 Atl. 317. The same may be said as to the contention that the parents were negligent in not warning the boy to keep away ³⁹⁰ from the machinery. It was not so clear a duty that the court could declare it as a matter of law: *Herron v. Pittsburg*, 204 Pa. 509, 93 Am. St. Rep. 798, 54 Atl. 311.

We are of the opinion that under every aspect of this case, it should have been, under proper instructions, submitted to the jury.

The judgment is reversed with a procedendo.

The Liability of Owners of Property to Children who are injured while trespassing thereon is discussed in the note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 416. There has been a most deplorable tendency on the part of some courts in recent years to exonerate corporations for all responsibility for keeping their premises in a needlessly dangerous condition to children who may go thereon without right: *Thompson v. Baltimore etc. R. R. Co.*, 218 Pa. 444, 120 Am. St. Rep. 897; *Walker v. Potomac R. R. Co.*, 105 Va. 226, 115 Am. St. Rep. 871; *Fitzmaurice v. Connecticut Ry. etc. Co.*, 78 Conn. 406, 112 Am. St. Rep. 159; *Wheeling etc. R. R. Co. v. Harvey*, 77 Ohio St. 235, 122 Am. St. Rep. 503.

One Who Maintains Dangerous Instrumentalities or appliances on his premises of a character likely to attract children in play, or permits dangerous conditions to remain thereon after knowledge that children are in the habit of resorting thereto for amusement, is liable to child non sui juris who is injured therefrom, even though a trespasser: *Mattson v. Minnesota etc. R. R. Co.*, 95 Minn. 477, 111 Am. St. Rep. 483.

It is not Negligence, as a Matter of Law, for Parents to permit a child, six years of age, to go unattended on a public street which is crossed by two lines of tracks of a steam railway running nearly at a right angle to the street: Serano v. New York etc. R. R. Co., 188 N. Y. 156, 117 Am. St. Rep. 833.

CARROLL'S ESTATE.

[219 Pa. 440, 68 Atl. 1038.]

CHILDREN, Adoption of.—The only methods of the adoption of children known to the law of Pennsylvania are those prescribed by its statutes, and are by petition to, and decree of, a court of common pleas, or by a deed fully executed and recorded. (p. 675.)

CHILDREN, Common-law Adoption of.—The adoption of children was unknown to the common law. (p. 675.)

CHILDREN, Parol Adoption of.—A child cannot be adopted by parol. (p. 675.)

CHILDREN, Adoption of—Wife, When not Affected by.—A wife is not a party to, nor in any way bound by, the adoption of a child by her husband when she does not join in the proceedings therefor. (p. 675.)

CHILD, Adoption of, Measure of Damages for Breach of Contract to Adopt.—The measure of damages for the breach of a contract to adopt a child is the value of the services performed, or the outlay incurred, on the strength of the promise to adopt. (p. 676.)

CHILD, Damages for Failure to Adopt.—A widow or her estate cannot be held answerable for the value of the services of a child on the ground that her husband had promised to adopt it, but did not keep his promise, and the child, relying on the promise, became an inmate of the house and lived and performed services therein while both husband and wife were alive. (p. 676.)

CHILDREN, Adopted, Presumption that Services of were Performed for the Adopting Parent.—If a child adopted by a husband renders household services, they are presumed to have been rendered for and on account of the adopting father and not of his wife. (p. 676.)

A MARRIED WOMAN cannot Make a Binding Contract by parol for the adoption of a child. (p. 676.)

ADOPTION OF CHILD, Dependence of, and of the Right to Inherit, on the Statutes.—The right to take property by devise or descent is a statutory and not a natural right, and where it is claimed that the adoption carries with it a right to inherit property, it must appear, to support the claim, that the provisions of the statute have been strictly followed. (p. 676.)

Appeal from a decree sustaining exceptions to an adjudication in the estate of Martha J. Carroll, deceased.

Am. St. Rep., Vol. 123—43

Thomas H. Benner, for the appellant.

John P. Hunter, for the appellee.

443 POTTER, J. This case was presented to the orphans' court as resting upon two grounds: First, that claimant was the adopted child of the decedent, Martha J. Carroll; and, second, that if she was not an adopted child there had been a contract with decedent for her adoption, under which claimant was **444** entitled to recover the proportion of the estate which would have gone to her had she been duly and regularly adopted. The auditing judge found that while under regular proceedings, in accordance with the statute, in the court of common pleas, the claimant had been adopted by D. W. C. Carroll, as his child, yet his wife, Martha J. Carroll, was not in any way a party to those proceedings, and that claimant therefore acquired no rights as a child or heir of the wife. It appeared from the evidence that claimant was not legally adopted, even by the husband, until some five years after she had become an inmate of his household; and the auditing judge was of the opinion that the presumption was that the terms of any parol agreement which may have been made between Mrs. Carroll and the mother of claimant with regard to an adoption of the child were fulfilled in the proceedings which were taken by the husband, and that it was accepted in full performance thereof. He was also controlled, in reaching his conclusions, by the fact that if any contract was made between Mrs. Carroll and the mother of claimant it was invalid, because the father of claimant was not a party to it, and because Mrs. Carroll, being a married woman, was at that time incompetent to so contract. There was no evidence of any services rendered by the claimant to Mrs. Carroll, and, therefore, no recovery could be had upon that ground. The auditing judge therefore dismissed the claim and awarded the estate to the collateral kindred of Mrs. Carroll. Upon exceptions to his decree it was overruled, and the court in bank entered a new decree awarding the estate to the claimant, Mrs. Hemmick, upon the ground that there was, in the opinion of the majority of the court, sufficient evidence to support the conclusion that a parol contract of adoption had been made by Mrs. Carroll, and that if the claimant was not adopted by the wife as well as by the husband, she ought to have been, and that it was the intention of Mrs. Carroll that she should be.

The only methods of adoption of children known to the law of Pennsylvania are those prescribed by the act of May 4, 1855 (Pub. Laws, 430, sec. 7), as re-enacted by the act of May 19, 1887 (Pub. Laws, 125, sec. 1), and the act of April 2, 1872 (Pub. Laws, 31, sec. 2). The former provides for adoption by petition to, and decree of, the court of common pleas; and the latter for adoption ⁴⁴⁵ by deed duly executed and recorded. While the act of 1872 refers to "the common-law form of adopting a child by deed," yet the authorities are uniform to the effect that adoption was unknown to the common law, whether by deed or otherwise: *Ballard v. Ward*, 89 Pa. 358; *McCully's Appeal*, 10 Week. Not. Cas. 80; *Session's Estate*, 70 Mich. 297, 14 Am. St. Rep. 500, 38 N. W. 249; *Butterfield v. Sawyer*, 187 Ill. 598, 79 Am. St. Rep. 246, 58 N. E. 602, 52 L. R. A. 75. We know of no authority for the proposition that, in the state of Pennsylvania, a child may be adopted by parol. The doctrine of *Peterson's Estate*, 212 Pa. 453, 61 Atl. 1005, does not justify any such conclusion. In that case, the adoption was not in parol, nor was there any effort to show that it was; it was under the petition of both the husband and wife, and the decree of the court. It is definitely pointed out in the opinion that the petition was the act of both husband and wife, and that both had signed it before the court passed upon it. The question there was whether or not the wife was actually a party to the proceedings in adoption, and it was held that she was. That her act in signing the petition which had been drawn for the husband alone, and afterward used for both husband and wife without making all the proper verbal changes, raised the presumption that she intended to make herself a party to it, and that this presumption was reinforced by the prayer that the adopted child shall have "all the rights of a child and heir of the petitioners," putting it distinctly in plural. It is clearly to be implied from the opinion in *Peterson's Estate* that if the wife had not been in any way a party to the petition or to the statutory proceedings, there would have been no adoption by her. There is no pretense in the present case that the wife was in any way a party to the proceedings, or that she made any attempt to adopt by deed. As there could be no adoption in any other way, the claim of Mrs. Hemmick, to inherit as a child of Mrs. Carroll, has no basis on which to rest.

As to the right to recover damages for a breach of contract to adopt, the measure of such damages is correctly stated by the auditing judge, as being the value of the services performed, or outlay incurred on the strength of the promise: *Kauss v. Rohner*, 172 Pa. 481, 51 Am. St. Rep. 762, 33 Atl. 1016; *Pollock v. Ray*, 85 Pa. 428; *Graham v. Graham's Exrs.*, 34 Pa. 475. In the present case there was no evidence of services rendered by the claimant to ⁴⁴⁶ decedent. Whatever services were shown to have been rendered by her were in the lifetime of decedent's husband, the father by adoption, and while she was an inmate of his household, or when she came from her own home to nurse him in his last illness. For these services the decedent was not responsible. It appears, too, that decedent lived only nine months after her husband's death, and there is no evidence of any services rendered to her by the claimant, during that time. Claimant was married in 1881, and then left the home of her adopted father, and it does not appear that she rendered any service in his house after that time, except when she returned at various times for the express purpose of nursing him. Even had she rendered other household services, the presumption would, of course, be that they were on account of her adopted father, and not for the wife.

The alleged parol contract was said to have been made about the year 1865, and at a time when Mrs. Carroll was married and living with her husband. She could make no lawful or binding contract of this nature at that time. Nor do we see any evidence sufficient to constitute ratification. The declarations relied upon for that purpose are all consistent with her recognition of claimant as the adopted child of her husband. So is her treatment of claimant as a child, and the children of claimant as the grandchildren of decedent. The personal attitude of the inmates of a family toward an adopted child, as regards the family relation, is a matter entirely for the parties. But the matter of inheritance is entirely under the regulation of the law. The right to take property by devise or descent is the creation of the law, and not a natural right. The legal act of adoption carrying with it the right to inherit is purely statutory, and the statute must, in cases where its provisions are applied, be strictly followed.

We are satisfied that the conclusions of the auditing judge were correct, and that Mrs. Hemmick has no claim upon the estate of Mrs. Carroll.

The decree of the orphans' court is reversed, and it is now considered and adjudged that the decree of the auditing judge be affirmed.

Mitchell, C. J., dissents.

The Adoption by One Person of the Child of Another is the subject of a note to *Van Matre v. Sankey*, 39 Am. St. Rep. 210. It is said that a decree of adoption is binding only upon the parties before the court and their privies, and may be attacked collaterally on habeas corpus by one in interest who is neither a party nor privy to it: *Beatty v. Davenport*, 45 Wash. 555, 122 Am. St. Rep. 937. Though notice to the natural parent is usually necessary, to confer jurisdiction on the court (*Schlitz v. Roenitz*, 86 Wis. 31, 39 Am. St. Rep. 873), it is competent for the legislature to dispense with notice, at least in case the parent has abandoned the child (*Parsons v. Parsons*, 101 Wis. 76, 70 Am. St. Rep. 894; *Nugent v. Powell*, 4 Wyo. 173, 62 Am. St. Rep. 17), or has been found guilty of adultery and divorced for that reason: *In re Williams*, 102 Cal. 70, 41 Am. St. Rep. 163.

The Adoption by One Person of the Children of Another was unknown to the common law of England, but it was recognized by the law of Rome and many other ancient nations. Statutes of adoption are by some courts construed strictly against the adopted child, but the act of adoption is construed liberally in his favor: *Hockaday v. Lynn*, 200 Mo. 456, 118 Am. St. Rep. 672.

Another's Child cannot be Adopted except pursuant to the decree of a competent court, made in conformity with the statute. Hence the custom of Indians, which makes one caring for an abandoned child its adopted parent, and gives to it all the rights and privileges of a natural child, does not amount to an adoption: *Non-She-Po v. Wa-Win-Ta*, 37 Or. 213, 82 Am. St. Rep. 749.

MORROW v. HIGHLAND GROVE TRACTION COMPANY.

[219 Pa. 619, 69 Atl. 41.]

DEDICATION to Public Use by Plat.—It is not necessary that the word "park" or "public square" be stamped on a plat of lots in order to operate as a grant to the public; if the intention to dedicate it to public use can be clearly discerned, whether from words to that effect or from symbols, or from the position and relation of the open spaces on the map or plat, it is sufficient. (p. 680.)

DEDICATION of Property as a Public Road, Boundary of.—If lots are sold according to a plat on which a square appears designated as "Alliquippa Grove," with serpentine paths through it and with the announcement to purchasers that a grove had been set out as a public park, the lands so designated become a public park, and purchasers of lots according to such plan may maintain suit to enjoin the use of the grove for any other purpose. (p. 681.)

PUBLIC GROVE or Square, Laches in Claiming that Property is.—If a parcel of land is dedicated as a public grove or square, the fact that owners of adjacent lots, who have a right to insist on the dedication, do not object to the use of the property for years by the German Turnverein, does not show such laches as precludes such lot owners from maintaining a suit to enjoin the use of the grove for private purposes. (p. 682.)

PUBLIC GROVE or Square, Who may Maintain Suit to Enjoin Use of for Private Purposes.—The owners of lots purchased in reliance upon a plat designating a parcel of land as a public grove or square and their successors in interest are proper persons to maintain a suit to enjoin the use of the property for private purposes. (p. 682.)

Appeal from a decree dismissing a bill to enjoin the use, as private property, of lands which have been dedicated as a public grove or square.

Thomas Patterson and I. L. Jones, for the appellants.

T. C. Noble, for the appellee.

⁶²⁰ POTTER, J. It appears from the history of this case that the plaintiffs are the owners of certain lots of ground in the Highland ⁶²¹ Grove Plan of lots in the eighth ward of the city of McKeesport; that they, or some of them at least, purchased lots from former owners of the ground by whom it had been laid out in a plan of several hundred building lots, and the plan of lots placed on record on August 9, 1873, in the recorder's office of Allegheny county. On said plan is an open square marked "Alliquippa Grove," colored in green, with serpentine paths through it. In April, 1889, more than fifteen years after the plan was laid out and placed on record, and after a large number of lots had been sold, the remaining portion of the plan became vested in the Highland Land Company, Limited, and that concern, in March, 1893, proceeded to revise the plan, and changed the representation of the open square marked "Alliquippa Grove" to four large spaces shown as H, I, J and K, and changed also the arrangement of the lots, making certain rows to front on the open space, and laying out additional streets marked "Park Way" at each end of the open space.

The defendant, which is a street railway company, built in June, 1901, a car-barn, sand-shed and tracks upon portions of what had been, under the revised plan J and K, and which was originally part of the space known and marked as "Alliquippa Grove." The plaintiffs, who had purchased lots at various times in both plans, filed this bill to enjoin the defend-

ant company from interfering with the public use of said open square, and to obtain the removal of the obstructions placed thereon. The court below dismissed the bill upon the ground that there was not sufficient evidence of a dedication to public use, and because of laches on the part of plaintiffs. It appears from the testimony that when the lots were sold it was represented that the ground marked "Alliquippa Grove" was set apart as a public park. It was so announced by the auctioneer at a public sale of the lots, and was so stated to various purchasers who bought at private sale, both before and after the title had been conveyed to the Highland Land Company. The management of the land company also, at one time, put a wire fence around the square to indicate it was a park, with stile openings at each corner of the square, and placed benches in it. The testimony was conflicting as to the extent of the use made of the ground by the public, but it was ⁶²² shown that it was frequently used for Sunday school and other picnics, and also at times for religious meetings.

An inspection of the plan according to which the original sales of lots were made clearly indicates to us that the ground marked "Alliquippa Grove" was intended to be a public square. The other ground in the plan is divided into numbered lots, while this is not; nor are the streets plotted as running through it, but instead, winding and curving walks lead to the streets, and the intervening spaces are colored green. The only fair inference which could be drawn by any intending purchaser who looked at this plan would be that these winding walks and colored spaces were intended to indicate an open park, or breathing place, to be preserved for the use of purchasers of lots and the public generally. "Where the owner of real property lays out a town upon it, and divides the land into lots and blocks, intersected by streets and alleys, and sells any of the lots with reference to such plan, he thereby dedicates the streets and alleys to the use of the public. . . . On the same principle, the owner will be held to have dedicated to the public use such pieces of land as are marked on the plat or map as squares, courts or parks. . . . Nor is the irrevocable character of the dedication affected by the fact that the property is not at once subjected to the uses designed": 13 Cyc. Law & Pr. 458.

We do not attach any significance to the fact that the word "grove" is used on the plan, rather than the word "park." The intention of the owners to dedicate a breathing space

when they prepared and recorded the plan is manifest. It is common knowledge that a grove is the nucleus of a park or pleasure ground for the people. The Century Dictionary defines a grove as "a group of trees of indefinite extent, but not large enough to constitute a forest; especially such a group considered as furnishing shade for avenues and walks." And the Standard Dictionary defines a park as "an open square or plaza, usually containing shade trees and seats." In speaking of a park, the present chief justice said, in *Laird v. Pittsburg*, 205 Pa. 1, 54 Atl. 324, 61 L. R. A. 502: "No doubt the idea of open air and space with the land kept in grass and trees, as if approximately in the state of nature, still inheres in the general understanding of the word, but it is no longer the dominating ⁶²³ thought as it formerly was. . . . The trimming away of thickets and underbrush, the substitution of regular pathways paved and perhaps railed and artificially lighted, which would have been incongruous to our forefathers, now enter into the accepted idea of a park." A natural grove, set apart and cared for as above indicated, becomes quickly, what to the common understanding is a park, which in a definition adopted by this court in *Commonwealth v. Hazen*, 207 Pa. 52, 56 Atl. 263, is "a piece of ground set apart and maintained for public use, and laid out in such a way as to afford pleasure to the eye as well as opportunity for open air recreation." It is not necessary that the word "park" or public square be stamped upon a plan of lots, in order to operate as a grant to the public. If the intention to dedicate to public use can be clearly discerned, whether from words to that effect or from symbols, or from the position and relation of the open spaces upon the map or plan, it is sufficient, "When, from the position and relations of any open space in the town, it is apparent that it was intended to be public property, or for the public use, the dedication of such space to the public, is as perfect as if the name or purpose were indicated by the written word; and after the sale of lots, made under such dedication, it can neither be revoked nor limited in its extent, on the ground of a supposed excess of the dedication, beyond the requirements of the public. The proprietor will have lost all power over the subject, and the only power of the court is to ascertain and establish the fact and extent of the dedication": *Rowan's Exrs. v. Portland*, 8 B. Mon. (Ky.) 232.

And in the case of *Pittsburg v. Epping-Carpenter Co.*, 194 Pa. 318, 45 Atl. 129: "Property may be dedicated for public use by plans indicating that purpose. Such dedication becomes irrevocable when the interest of third persons is acquired by sale of lots or acceptance for the public by public use or municipal action. Acceptance by the public need not be immediate, but may be made when public necessity or convenience arises. As a corollary to this proposition it follows that it is not necessary that the public use the entire property dedicated. Any public use of part of the property, indicating a purpose to accept the gift, fixes the public right to the whole. When the ⁶²⁴ public right has been acquired, it cannot be lost by nonuser or by municipal action not expressly authorized by law. Any occupation of the property inconsistent with the public right is a nuisance, and no length of time will legalize a public nuisance."

The authorities seem to be uniform to the effect that the same principles apply to the dedication of public streets, and public squares or parks. In either case, the purpose may be gathered from the designation or marks given by the owner to the land upon the map or plan. In *Commonwealth v. Connellsville Borough*, 201 Pa. 154, 50 Atl. 825, we held that the words "public square" or "public ground," when used upon a plat of ground, established an unrestricted dedication of public use.

In the present case, the second or revised plan of lots adopted and recorded by the Highland Land Company, Limited, in 1894, is no less indicative of an intention to preserve the ground in question as a public square. The plan is not so ornamental, but the space is preserved and the arrangement of the adjoining lots is changed so as to front them upon it, and cross-streets on each end are opened, and designated as "Park Ways." Surely, anyone buying lots under this plan would have the right to rely upon the intention plainly manifested to treat this ground as a public square. The very least that can be said of the recorded plans is that they were sufficient to put any intending purchaser upon notice that the ground in question had been dedicated to public use, and the testimony abundantly establishes the fact that any inquiry of the lot holders, such as complainants and others, would have shown that they purchased upon the faith of representations made to them at the time that the ground designated upon the plan as "Alliquippa Grove" was to be preserved as

a public park. The testimony is ample to sustain the claim that the owners of the ground, from the time the plan of lots was laid out down to 1903, always considered this ground in question as public ground. We see nothing in the permissive use of part of the ground for a few years by the German Turnverein which militates against this use. The right to give them any exclusive control, even for the purposes of public entertainment, was questionable, but such use was temporary and has long since been surrendered.

⁶²⁵ It is also contended that the complainants here cannot maintain their bill because the right to the use of the park is in the public, and, further, because they have been guilty of laches. But the principle contended for here by the appellee, in both of these respects, was considered and decided adversely to the claim now made by it, in the late case of *Garvey v. Harbison-Walker Refractories Co.*, 213 Pa. 177, 62 Atl. 778, where, in an ample opinion by our brother Mestrezat, the right of an individual lot holder in a plan of lots to prevent the obstruction of a street is fully maintained. It is there also clearly pointed out that in such cases the law does not afford an adequate remedy, and the lot owner is entitled to a remedy in equity that will restore him to the enjoyment of his rights. It has long been settled that obstructions upon public highways or public ground are nuisances, and are of the class of cases in which the equitable remedy by injunction may be sought: *Hacke's Appeal*, 101 Pa. 245. In the present case we are unable to agree with the conclusion reached by the court below. We think the evidence from the face of the plans, and the declarations and continuous conduct of the owners of the ground in their dealings with purchasers of lots, all point unmistakably to the fact of dedication of the ground known and marked as "Alliquippa Grove" to public use, as an open square or park. We can see no justification whatever for the attempt on the part of the defendant company to seize and appropriate to its own use this property which belongs to the public.

The plaintiffs were entitled to the relief prayed for in the bill, and the defendant company should be required to remove its car-barn, tracks and other property from the public ground.

The decree of the court below dismissing the plaintiffs' bill is reversed and the bill is reinstated, and it is ordered that the record be remitted to the court below for further proceedings in accordance with this opinion.

The Dedication of Property to a Public Use is discussed in the notes to *State v. Trask*, 27 Am. Dec. 559; *Whitesides v. Green*, 57 Am. St. Rep. 749. If an owner of land lays off a town thereon, and makes a map of the townsite, showing it to be divided into streets, alleys, blocks, lots, and public squares, and then sells the land with reference to such map, he thereby makes an irrevocable dedication of the space, as represented on the map as streets, etc., to the use of the public, although there is no municipal corporation in existence at the time which could accept the dedication: *Village of Riverside v. McLain*, 210 Ill. 308, 102 Am. St. Rep. 164; *Roberts v. Mathews*, 137 Ala. 523, 97 Am. St. Rep. 56.

Where a *Public Park* has been laid out and acquired by dedication or prescription, the owners of abutting property acquire a special right in the continuance of the park, of which they cannot be deprived except by due process of law: *Kray v. Muggli*, 84 Minn. 90, 87 Am. St. Rep. 332. They may enjoin the city from using the park for purposes not intended by the terms of the dedication: *Chicago v. Ward*, 169 Ill. 392, 61 Am. St. Rep. 185.

COMMONWEALTH v. CATE.

[220 Pa. 138, 69 Atl. 322.]

MURDER—Evidence of Good Character and Its Effect.—Evidence as to good character of the accused on a trial for murder is admissible as tending to establish innocence, and may, in some cases, create a reasonable doubt which will entitle him to an acquittal. (p. 684.)

MURDER—Good Character of the Accused, Misleading and Erroneous Instruction Concerning.—To add to an instruction that evidence of good character is entitled to the same consideration as other evidence and may give rise to a reasonable doubt where such doubt might not otherwise arise, the further clause that where the jury is satisfied beyond a reasonable doubt of the defendant's guilt under all the evidence, evidence of previous good character is not to overcome the conclusion which follows from that view of the case, is to render the instruction confusing to the jurors and may lead them to disregard the evidence of good character altogether, and is therefore prejudicially erroneous. (p. 684.)

Prosecution and conviction for murder in the first degree. Among the instructions given at the trial were the following:

“Evidence of good character is positive evidence and is entitled to the same consideration as other evidence submitted in the defendant's behalf, and may give rise to the existence of a reasonable doubt where such doubt would not otherwise arise in making it improbable that a man of such character would commit the crime charged. [Where the jury is satisfied beyond a reasonable doubt of the defendant's guilt under all the evidence, evidence of previous good character is not to

overcome the conclusion which follows from that view of the case.]”

Verdict of guilty of murder in the first degree. Appeal by the defendant.

Wooda N. Carr and Alfred E. Jones, for the appellant.

¹³⁹ ELKIN, J. In *Heine v. Commonwealth*, 91 Pa. 145, it was held that “evidence of good character is not a mere make-weight, thrown in to assist in the production of a result that would happen at all events, but is positive evidence, and may of itself, by the ¹⁴⁰ creation of a reasonable doubt, produce an acquittal. In that case the learned court below instructed the jury that “if a man is guilty, his previous good character has nothing to do with the case, but if you have doubt as to his guilt, then character steps in and aids in determining that doubt.” This instruction was held to be error.

In *Hanney v. Commonwealth*, 116 Pa. 322, 9 Atl. 339, it was held that testimony of good character produced at the trial is to be regarded as evidence of a substantive fact, like any other evidence tending to establish innocence, and it ought to be so regarded by both court and jury.

In *Commonwealth v. Cleary*, 135 Pa. 64, 19 Atl. 1017, 8 L. R. A. 301, it was stated as a rule of law in the trial of a criminal charge that evidence of the good character of the defendant is always admissible, and is to be weighed and considered by the jury in connection with all the evidence in the case, and in some instances it may of itself create the reasonable doubt which will entitle the accused to an acquittal. These cases leave no doubt as to the rule of law in this state relating to evidence of good character and how it is to be regarded.

By the fifth assignment of error in the case at bar the appellant complains that the learned court below erred in charging the jury that “where the jury is satisfied beyond a reasonable doubt of the defendant’s guilt under all the evidence, evidence of previous good character is not to overcome the conclusion which follows from that view of the case.” While this instruction might be understood by the legal mind as fairly within the rule above stated, it would be confusing to jurors, and might lead them to disregard evidence of good character altogether, if from all the other evidence they reached the conclusion that defendant was guilty. This would clearly be error. Under these circumstances we can-

not say no harm was done appellant in this respect, although the case in other respects was tried with exemplary care and the rulings of the learned trial judge were fair and impartial. For this reason the judgment must be reversed.

Judgment reversed and a venire facias de novo awarded.

Evidence of Good Character for the purpose of creating a doubt of the defendant's guilt in a criminal prosecution is the subject of a note to *People v. Bonier*, 103 Am. St. Rep. 888.

HOLMES v. PENNSYLVANIA RAILROAD COMPANY.

[220 Pa. 189, 69 Atl. 597.]

PLEADING, Amending by Adding a New Plaintiff—Limitation of Actions.—The limitation upon the right of amendment is that no new cause of action shall be introduced and no new parties brought in after the statute of limitations has become a bar. (pp. 687, 688.)

PLEADING—Amendment by Adding Mother of the Decedent as a Party Plaintiff.—If an action is brought by a father to recover for the death of his minor son, when by the statute a cause of action exists in the father and mother, she may, by amendment, be added as a party plaintiff after the period of the statute of limitations. (p. 688.)

DAMAGES, Measure of for the Loss of a Son.—In an action by parents for the death of a minor son through defendant's negligence, where the father was a sales agent of a company within a certain territory and as such entitled to specified commissions, whether the sales were actually made by him or not, and on account of his illness he placed his son in the same territory, and while employed therein the son was killed, the measure of damages is not the value of the business lost, but the value of the son's assistance in carrying it on. (p. 689.)

Action by William A. Holmes to recover for the death of his son alleged to be due to the defendant's negligence. At the trial the complaint was permitted to be amended, against the objection of the defendant, by adding the mother of the decedent as a party plaintiff. For the purpose of showing the damages suffered by the plaintiffs from the death of their son, evidence was received showing that the father had been employed as sales agent within certain territory for the Medlar & Holmes Company, and being through illness unable to act as such agent, sent his son into the territory, and that while engaged therein, the son met his death, and plaintiffs apparently claimed that because of such death they had suffered damages

to the extent of the commissions lost through the death of the son and which he would have earned had his life continued, and that his earnings would probably have been the same as would the father's had the latter been able to continue the business. On this subject, the following questions were asked, replies made and exceptions taken:

"Q. What were the whole sales made by you in both trips for the Medlar & Holmes Company, in the territory your son was to cover during the season of 1904?

"Objected to.

"The Court: I am not sure that it would not be admissible to show sales made by the company in this territory.

"Mr. Brown: If he did as well as or better than his father had done in the spring, it would be fair to assume I think that he would have done as well or better in the fall.

"Mr. Archibald: 'Q. Can you give us the sales made by the Medlar & Holmes Company in the territory assigned to your son during the year 1904? A. Yes, sir. Q. Please give us those figures?'

"Objected to.

"The Court: Here is a boy who gets his commission on the business done by the company whether he has anything to do with securing the business or not. Is it fair, therefore, to take the average business of the company for years before and since his death?

"Mr. Barnes: The business of the company in this section is obtained by the agent who goes through the section. Now, therefore, while it is said that the boy had an opportunity to take commissions on all sales in the section, the sales for the preceding year were made by this man with his experience and knowledge of the places and the following that he had. It seems to me that it comes back to the same question that we had before, and that you cannot bind the defendant in this way. We have heard that there were two trips in a year and that he had completed one trip.

"The Court: 'Q. I understood that he had not completed the trip. A. He was only commencing his season. Q. What is the average extent of the trip? A. This southern trip was preliminary. I would always make it in about two weeks and then start into my northern territory. Q. How long would it all take? A. His season started in the first of April—April, May and June—about the middle of March is when his real work started in Ohio. Q. And lasted through April, May

and June? A. Yes, and in July it dwindled out, and then his vacation would come, but his real season's work commenced about the 15th of March. He had only done the preliminary work.'

"The Court: Have you figured out those commissions?

"Mr. Barnes: One thousand and eighteen dollars and twenty-five cents.

"The Court: You may offer to show the total sales made for one or two years each way.

"Objected to. Objection overruled. Exception for defendant.

"Mr. Barnes: I object generally because it is incompetent and irrelevant and especially because the testimony already shows that the sales were made in the preceding year in the territory in question by the plaintiff as the sales agent.

"Mr. Archibald: 'Q. Gives us the sales made by the Medlar & Holmes Company in the territory assigned to your son during the year 1904.'

"Objected to as irrelevant and incompetent and especially because the testimony already shows that the sales were made in the preceding year in the territory in question by the plaintiff as the sales agent. Objection overruled. Exception for defendant."

Verdict and judgment for ten thousand five hundred dollars. The defendant appealed.

John Hampton Barnes, for the appellant.

Frank Shunk Brown and Robert W. Archibald, Jr., for the appellees.

¹⁹² FELL, J. This action was brought by a father to recover for the death of his son eighteen years of age, who was killed while a passenger on the defendant's road. It appeared from the testimony at the trial that the deceased was survived by both parents, and a motion to amend the record so as to make the mother a party plaintiff was allowed against the objection of the defendant. The assignments of error relate to the allowance of the amendment and to the measure of damages.

Amendments have been liberally allowed in furtherance of the object of the statutes to relieve against mistakes of either fact or law and in the interest of justice to secure a trial on the merits. But the well-defined limitation of the right of

amendment is that no new cause of action shall be introduced and no new parties brought in after the statute of limitations ¹⁹³ has become a bar. It was said in *Cassel v. Cooke*, 8 Serg. & R. 268, 11 Am. Dec. 610, in relation to the cause of action, that "The true criterion is whether the alteration or proposed amendment is a new or different matter, another cause of controversy, or whether it is the same contract or injury and a mere permission to lay it in a manner which the plaintiff considers will best correspond with the nature of his complaint and with his proof and the merits of his case." This distinction has been observed uniformly in a long line of cases, among the more recent of which are *Grier v. Northern Assu. Co.*, 183 Pa. 334, 39 Atl. 10; *Garman v. Glass*, 197 Pa. 101, 46 Atl. 923; *Wright v. Eureka T. Copper Co.*, 206 Pa. 274, 55 Atl. 978; *Wilkinson v. North East Borough*, 215 Pa. 486, 64 Atl. 734. While a change of parties that involves a substantial change in the cause of action will not be allowed, as the substitution of the heirs of a decedent for the administrator of his estate: *Wildermuth v. Long*, 196 Pa. 541, 46 Atl. 927; or the substitution of a widow as administratrix as plaintiff in an action she had brought in her own right: *La Bar v. New York etc. R. R. Co.*, 218 Pa. 261, 67 Atl. 413; still where the rights of a party are liable to be defeated by having joined too few or too many as plaintiffs or defendants, amendments that would deprive the opposite party of no right have been allowed: *Booth v. Dorsey*, 202 Pa. 381, 51 Atl. 993.

The amendment allowed in this case placed on the record as plaintiffs the persons who were entitled to sue, the right of action being vested by the act of 1855 in both parents. The cause of action remained the same and no change in the allegations or proofs was involved, and the defendant was not in the slightest degree prejudiced by it. Without question a change in the name of partners or the adding of the names of partners omitted by mistake or the name of another administrator or trustee or of a use plaintiff would be allowed after the bar of the statute. The principle on which such amendments are allowed should govern in this case. In *Huntington etc. R. R. Co. v. Decker*, 84 Pa. 419, a widow who had brought an action in her own right to recover for the death of her husband was allowed after the bar of the statute to amend her declaration by naming "the parties entitled in such action," as required by the act of April 26, 1855 (Pub. Laws 309).

The assignments of error that relate to the measure of damages must be sustained. The plaintiff, William A. Holmes, ¹⁹⁴ had for a number of years been the sales agent of two companies in a certain territory, and was entitled to five per cent on all sales made in the territory whether actually made by him or not. His commissions on sales were approximately twelve thousand dollars a year. On account of the plaintiff's illness his son had gone into this territory as his father's representative and had been so employed three months before he was killed. The accounts of both companies were kept as before in the plaintiff's name, but the commissions were paid by one of the companies to his son, who handed them to him. No definite arrangement had been made as to what the son was to receive for his services. Testimony was admitted and the case was submitted to the jury on the theory that the son was entitled to all the commissions earned from sales. There was error in this. The business was the plaintiff's in which his son assisted him. He had created it and controlled it, and owned it as fully and derived as much from it after his son's death as before. His pecuniary loss was not the value of the business, but the value of his son's assistance in carrying it on.

The judgment is reversed with a venire facias de novo.

On Amendments to Pleadings which change the cause of action see the notes to *Flander v. Cobb*, 51 Am. St. Rep. 414; *Stevenson v. Mudgett*, 34 Am. Dec. 158. All that is required in allowing amendments to pleadings is, that a wholly different cause of action, entirely foreign to the original, be not introduced thereby, and that a party be not allowed to strike out the entire substance and prayer of his pleading, and insert a new case by way of amendment: *Frost v. Witter*, 132 Cal. 421, 84 Am. St. Rep. 53. As to whether the cause of action is changed by an amendment which changes one of the parties from his individual capacity to his representative capacity, see *Fleming v. Courtenay*, 98 Me. 401, 99 Am. St. Rep. 414; *Boyd v. United States Mortgage etc. Co.*, 187 N. Y. 262, 116 Am. St. Rep. 599.

When an Amendment to a Declaration sets up no new matter or claim, but merely relates in a different form the cause of action, it relates to the commencement of the suit, and the statute of limitations is arrested at that point. When the amendment introduces a new and different cause of action, it is treated as a new suit, begun at the time when the amendment is filed: Chicago etc. R. R. Co. v. Jones, 149 Ill. 361, 41 Am. St. Rep. 278; *Nelson v. First Nat. Bank*, 139 Ala. 578, 101 Am. St. Rep. 52.

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HEMSCHER v. DOBSON.

[220 Pa. 222, 69 Atl. 669.]

NEGLIGENCE, When not Made Out by the Starting of Machinery.—If a reeling machine at which a girl fourteen years of age is working suddenly starts, and thereby draws in and injures her hand, but there is no showing that the machinery was defective nor what caused it to start, no presumption of negligence on the part of her employer arises, and she cannot recover, there being no showing that any lack of warning or of instruction was the proximate cause of the accident. (pp. 690, 691.)

Action of trespass brought by a girl fourteen years of age to recover for personal injuries suffered by her while in the employment of the defendant. On the trial the court directed a judgment of nonsuit, which being entered, the plaintiff appealed.

Henry J. Scott, for the appellants.

Thomas Earl White, for the appellees.

222 POTTER, J. This is an appeal from the refusal of the court below to take **223** off a judgment of compulsory nonsuit. In the opinion of the trial judge, no negligence upon the part of the defendant was shown. The plaintiff was working upon a reeling machine, which she had stopped, and she states that while she was taking the yarn off the reel, the machine suddenly started, and her hand was drawn in and injured. There was no evidence to show what caused the machine to start. There was neither allegation nor proof of any defect. There was nothing in the nature of the accident suggestive of the conclusion that the employer had fallen short of the obligatory standard of care. The law is well settled that no presumption of negligence on the part of the employer arises from the mere happening of an accident. The present case is distinguishable from *Patterson v. Harrisburg Trust Co.*, 211 Pa. 173, 60 Atl. 265, cited by appellant, in that the machine in that case, during a period of five or six years in which it had been in use, frequently had been known to start up of its own accord, and its liability to do so was well known in the shop, and should have been, to the employer. This placed upon him the duty to warn or instruct employes as to the danger. But in the present case, we find no evidence that the machine had ever started in the way complained of at any previous time. The plaintiff had worked upon the reel from

eight days to two weeks before the accident, and she appeared from her testimony to be very familiar with it. The accident was due solely to the starting of the machine, and there is no testimony to show that the employers were in any way responsible for the starting, or that they had any knowledge, or any reason to anticipate, that the machine was liable to start of its own accord. Nor does it appear how any instruction that was properly called for, under the circumstances, would have avoided the accident. The plaintiff has not shown that any lack of warning or instruction was the proximate cause of the injury. As the trial judge said, this is one of the cases which must be classed among the regrettable and unfortunate accidents, but for which the employer cannot justly be held responsible.

The nonsuit was properly entered, and the judgment is affirmed.

Presumptions of Negligence from the happening of accidents are considered in the note to Cincinnati Traction Co. v. Holzenkamp, 113 Am. St. Rep. 986; and presumptions of the exercise of due care are considered in the note to Chicago etc. Ry. Co. v. Wilson, 116 Am. St. Rep. 108.

The Liability of an Employer to an employé who is injured in the course of his employment by machinery or appliance is discussed in the notes to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 884; Brazil Block Coal Co. v. Gibson, 98 Am. St. Rep. 289.

GANDY v. WECKERLY.

[220 Pa. 285, 69 Atl. 858.]

PROMISSORY NOTE—Defense of Breach of Parol Promise Made to the Maker.—If one is induced to make a promissory note by a parol promise to him that before it falls due it shall be paid out of the proceeds of another transaction, the breach of such promise amounts to a want of consideration and is a defense to an action on the note. Though the note was not procured by fraud nor by any pre-existing intention not to perform the promise, yet if the payee attempts to exact payment without making good his promise, he is thereby guilty of such fraud as precludes his recovery. (p. 694.)

CONTRACTS, Parol Evidence to Vary.—Parol evidence is admissible to alter, vary or contradict a writing if such evidence establishes an oral agreement contemporaneous with the execution of the writing and on the faith of which it was executed. (p. 697.)

AFFIDAVITS OF DEFENSE Need not Show the Evidence to be Adduced.—If an affidavit of defense states that the affiant ex-

pects to be able to prove the facts set out therein, the presumption is that he will do so by proper evidence. He is not required in his affidavit to set forth the manner in which the facts will be proved nor the evidence by which they will be substantiated. (p. 698.)

Action by George S. Gandy against Frank Weckerly on a promissory note. Judgment was given in favor of the plaintiff for want of sufficient affidavit of defense. The defendant appealed.

Alexander Simpson, Jr., for the appellant.

Wayne P. Rambo and Ormond Rambo, for the appellee.

²⁸⁶ BROWN, J. This is an action of assumpsit on a promissory note made by the appellant to the order of the appellee on November 21, 1904, for twelve hundred and fifty dollars, payable one year after date. Judgment was ²⁸⁷ entered in the court below for want of a sufficient affidavit of defense, which was affirmed by the superior court: 34 Pa. Sup. Ct. 79. From the judgment of that court we have this appeal.

Appellant's affidavit of defense, deemed insufficient, is as follows: "At and prior to November 21, 1904, plaintiff was the owner of the majority of the shares of the capital stock of the Emigrant Gulch Consolidated Placer Mines Company, the par value of his shares being about four hundred thousand dollars. Said company was in sore need of money, was threatened with financial disaster for want thereof, which would have resulted in the sacrifice of all or the greater part of plaintiff's investment therein as above. Plaintiff said that he had no money to loan to said company to save his said investment, and thereupon applied to me for that purpose. He proposed to me that if I would loan to said company the sum of twelve hundred and fifty dollars, taking its note therefor at one year, before which time he said it would be easily able to pay it, he would sell to me two hundred shares of its stock for the sum of twelve hundred and fifty dollars and take my note therefor, which note I would not be called upon to pay except out of and from the moneys to be repaid to me by said company in payment of its note held by me as aforesaid. He said that he would make the note to him payable at the expiration of one year, because within that time the note of the company held by me would be paid, but that if from any cause whatever the amount of that note was not paid to me, I would not be called upon by him to pay the note to be given by me to him in payment of said stock. Plaintiff at that time

was president of said company, and knew all about its assets and financial condition, as well as its prospects, and suggested the loan and purchase by me as aforesaid for his own personal advantage to protect his large investments in said company. Relying upon his agreement that I would not be called upon to pay said note until the note given to me was paid, and without which agreement upon his part I would not have purchased said stock or given my note therefor, I accepted his terms as above, loaned the company the sum of twelve hundred and fifty dollars, taking its note therefor as follows:

“ ‘\$1,250.

Philadelphia, Nov. 21, 1904.

“ ‘On demand one year after date we promise to pay to the ~~288~~ order of F. Weckerly Twelve hundred and Fifty /100 Dollars. 570 Bullitt Bldg., Phila.

“ ‘Without defalcation. Value received.

“ ‘EMIGRANT GULCH CONSOLIDATED PLACER
MINES CO.,

“ ‘F. WECKERLY,

“ ‘Treas.

“ ‘No.———. Due Nov. 21, 1905.’

—purchased said stock, and gave to plaintiff my note therefor, being the note in suit. I am still and at all times since its making have been the holder and owner of the note given by said company to me as above set forth, and nothing whatever has been paid on account thereof, though I have frequently made demand for payment thereof, and brought suit therefor in common pleas, No. 4, as of December term, 1905, No. 1851, before this suit was brought. Said company's refusal to pay was really the act of plaintiff who, as president and majority stockholder thereof, wrongfully induced them so to do, and to file an unjust affidavit of defense in said suit brought by me. I at all times have been, and still am ready, and hereby tender to plaintiff my willingness to give him the said note given by said company to me in exchange for the one in suit; or to pay him as soon as I am paid by said company; or to return him said two hundred shares of stock in exchange for the note in suit. But I aver that it would be a fraud to permit plaintiff to violate his agreement with me as above set forth, which was the consideration and inducement for the giving of the note in suit, and recover from me until I have been paid the amount due me by said company. All which facts I aver are true, and I expect to be able to prove them on the trial of this case.”

The defense set up is not that the appellant ought not to be compelled to pay because there was a contemporaneous parol agreement that his obligation was to be enforced only upon certain conditions, and that such agreement was omitted from it by fraud, accident or mistake, but is a clear and distinct averment that he was induced to give the note by a promise, which very naturally might have been made by the appellee, if the circumstances surrounding the giving of the note are correctly stated in the affidavit, and if it was made, it ought, in all good ²⁸⁹ conscience, to be enforced. The inducing promise of the appellee was not intended to be incorporated in the note any more than the stock consideration which the appellant received, but, when the promise was broken, the right of the maker was to defend on its breach, for the same reason that he could defend for failure of consideration. When this defense prevails in a suit between the original parties to an obligation, its terms are not only contradicted, but set aside. Failure of consideration is, nevertheless, a defense, and so is a broken promise, if it induced the obligation.

The affidavit of defense was held to be sufficient by the court of common pleas because it contains no allegation of fraud, accident or mistake in the making of the note, and there is no averment that it was signed by the defendant upon the faith of a promise by the plaintiff that it would not be used by him as a note. It may be conceded that no fraud was practiced upon the appellant by the appellee when he received the note, and that at that time he honestly intended to keep his promise as to how it should be paid; but, however honest and upright his intention may then have been, if, to procure an unfair advantage to himself, he now attempts to exact payment from the appellant in violation of his promise, without which the note would not have been given, he is guilty of a fraud, against which the appellant may defend; and the latter is not defending on the ground that the plaintiff had agreed that he would not use the note as a note, but that he is attempting to use it differently from the use which he promised he would make of it.

The authorities relied upon by the learned judge of the common pleas for directing judgment are *Anspach v. Bast*, 52 Pa. 356; *Phillips v. Meily*, 106 Pa. 536, and *Appleby v. Barrett*, 28 Pa. Sup. Ct. 349. In the first case the question of a promise as the inducement to the execution of the obligation was not involved. The affidavit of defense was held to be in-

sufficient because there was nothing but an averment of a contemporaneous agreement that the note should not mature absolutely in six months, according to its terms. The question here involved was not in that case. The other two, instead of justifying the judgment against the appellant, rather support his defense. In *Phillips v. Meily*, 106 Pa. 536, we said: "The ²⁹⁰ cases in this state in which parol evidence has been allowed to contradict or vary written instruments, may be classed under two heads: 1. Where there was fraud, accident or mistake in the creation of the instrument itself; and 2. Where there has been an attempt to make a fraudulent use of the instrument, in violation of a promise or agreement made at the time the instrument was signed, and without which it would not have been executed. To the latter class belong *Renshaw v. Gans*, 7 Pa. 117; *Rearich v. Swinehart*, 11 Pa. 233, 51 Am. Dec. 540, and *Lippincott v. Whitman*, 83 Pa. 244," and the judgment on the verdict in favor of the defendant was reversed, because there was not "a word to show that the note in controversy was signed by the defendant upon the faith of any assurance or promise on the part of the plaintiff that he would not proceed to collect it." In *Appleby v. Barrett*, 28 Pa. Sup. Ct. 349, in reversing the court below and directing judgment to be entered for want of a sufficient affidavit of defense, it was said: "The affidavit contained no averment that the defendant was induced to sign the note by reason of the oral stipulation, and this was sufficient in itself to warrant the entry of judgment for the plaintiff: *Martin v. McCune*, 8 Pa. Sup. Ct. 84; *Keough v. Leslie*, 92 Pa. 424. The averments of the affidavit do not indicate that any oral agreement was the inducing cause for the signing of the written."

In *Fuller v. Law*, 207 Pa. 101, 56 Atl. 333,—one of the three cases relied upon by the learned judge of the superior court, in sustaining the court below—what was decided, and intended to be decided, was what appears in the syllabus, approved by the member of the court who wrote the opinion: "In an action on a promissory note the defendant will not be permitted by his own testimony alone to contradict the direct promise to pay contained in the note, by proof that the note was given in payment for stock of a corporation, that the note was to be paid out of dividends on the stock, and that no dividends had ever been declared or paid." Law, the defendant, was the only witness called to impeach his obligation, and Mr. Justice Dean said: "Defendant offered no other testimony in support

of the alleged parol agreement, neither sustained nor offered to sustain him by other witnesses or by corroborative circumstances. Surely, the testimony of a single witness, and he the defendant, ought not to be sufficient to contradict and set aside ²⁹¹ his deliberate promise in writing to pay on a fixed day, absolutely, a certain sum of money." In *Homewood People's Bank v. Heckert*, 207 Pa. 231, 56 Atl. 431, the question of the effect of a contemporaneous promise as the inducement to the giving of the obligation was not passed upon because apparently not raised. *Krueger v. Nicola*, 205 Pa. 38, 54 Atl. 494, has no application. The plaintiff there was not allowed to recover, because he had declared on a written agreement, and on the trial, to meet a defense set up, undertook to show a parol contemporaneous agreement on the part of the defendant, without averring or attempting to prove that it had been omitted from the written one by fraud, accident or mistake.

The error into which the common pleas and superior court fell was in failing to distinguish the defense of this appellant on a broken promise which induced him to sign the obligation, and without which he would not have signed it, from that of an attempt to impeach a written instrument by showing a parol contemporaneous agreement varying and contradicting it, without allegation or proof of the omission of such parol agreement from the written one by fraud, accident or mistake. That the defense here made, if supported by proper proof, must prevail, is not to be regarded as an open question. We need cite but three or four of our many cases sustaining it.

"It is agreed that the English rule excluding parol evidence to vary a written contract has not been adopted in this state in all its stringency. The exceptions, indeed, have in many instances almost eaten out the heart of the rule itself; but it is not altogether abolished, as may be seen in *Martin v. Berens*, 67 Pa. 459, where, in an elaborate opinion, our late lamented brother, Mr. Justice Williams, exhaustively states the exceptions to the rule. But from *Hurst's Lessee v. Kirkbride*, decided in 1773—reported by Chief Justice Tilghman in *Wallace v. Baker*, 1 Binn. 610—down to the present time, this court has uniformly held that where at the execution of a writing a stipulation has been entered into, a condition annexed, or a promise made by word of mouth, upon the faith of which the writing has been executed, that parol evidence is admissible, though it may vary and materially change the terms of the contract. Mr. Justice Williams recognizes this in his opinion

in *Martin v. Berens*, 67 Pa. 459, for he says, speaking of the case then before ²⁹² the court: 'Here there is no allegation in either affidavit that the defendants were induced to execute the lease on the faith of the alleged parol agreement.' It would be an affectation of learning to cite all the cases which establish this principle, but to those contained in the argument of the counsel of the plaintiff in error may be added *Miller v. Henderson*, 10 Serg. & R. 290, which is *instar omnium*, but may be noticed as a case on all fours with the one now before the court": *Greenawalt v. Kohne*, 85 Pa. 369. "No principle is better settled than that parol evidence is admissible to show a verbal contemporaneous agreement, which induced the execution of a written obligation, though it may vary or change the terms of the written contract. Therefore, it was competent for the defendant to prove, if he could, that it was agreed before and at the time he signed the bond that it should not be resorted to until after the security of the mortgage was exhausted, and that the security of the mortgage was lost through the plaintiff's negligence": *Juniata Building Assn. v. Hetzel*, 103 Pa. 507. "The existence of a contemporaneous parol agreement between the parties under the influence of which a note or contract has been signed, which is violated as soon as it has accomplished its purpose in securing the execution of the paper, may always be shown when the enforcement of the paper is attempted. It is a plain fraud to secure the execution of an instrument by representations as to the manner in which payment shall be made, differing in important particulars from those contained in the paper, and, after the paper has been signed, attempt to compel literal compliance with its terms, regardless of the contemporaneous agreement without which it would never have been signed at all. Among the more recent cases in which this has been distinctly declared are *Keough v. Leslie*, 92 Pa. 424; *Martin v. Kline*, 157 Pa. 473, 27 Atl. 753; *Martin v. Fridenberg*, 160 Pa. 447, 32 Atl. 429"; *Clinch Valley Coal & Iron Co. v. Willing*, 180 Pa. 165, 57 Am. St. Rep. 626, 36 Atl. 737. "Parol evidence is admissible to alter, vary or contradict a written instrument where such evidence establishes an oral agreement contemporaneous with the execution of the writing and on the faith of which the instrument was executed: *Chalfant v. Williams*, 35 Pa. 212; *Keough v. Leslie*, 92 Pa. 424; *Shughart v. Moore*, 78 Pa. 469. It has also been held that ²⁹³ where, at the execution of a writing a stipulation has been

entered into, a condition annexed, or a promise made by word of mouth, upon the faith of which the writing has been executed, parol evidence is admissible although it may vary and materially change the terms of the contract: *Greenawalt v. Kohne*, 85 Pa. 369": *Fidelity & Casualty Co. v. Harder*, 212 Pa. 96, 61 Atl. 880. Among the latest cases announcing the foregoing rule is *Keller v. Cohen*, 217 Pa. 522, 66 Atl. 862.

Whether the appellant shall be able to sustain his defense by the proper measure of proof is not a question now before us. When he avers that he expects to be able to prove the facts set out in the affidavit of defense, the presumption is that he will do so by proper proof. He is not required in his affidavit of defense to set forth the manner in which the facts therein alleged will be proved, nor the evidence by which they will be substantiated: *Endlich on Affidavits of Defense*, 324; *Bronson v. Silverman*, 77 Pa. 94; *Kaufman v. Cooper Iron Min. Co.*, 105 Pa. 537.

The judgment of the superior court is reversed, as is that of the common pleas, and a procedendo awarded.

Parol Evidence is Admissible to prove that a contract was procured by fraud: *Barrie v. Miller*, 104 Ga. 312, 69 Am. St. Rep. 171; *Dowagiac Mfg. Co. v. Gibson*, 73 Iowa, 525, 5 Am. St. Rep. 697; and parol evidence is admissible for the purpose of proving that a release was signed without knowledge of its contents, and without any intention on the part of the signer to execute an instrument of that character: *Lord v. American Mutual Accident Assn.*, 89 Wis. 19, 46 Am. St. Rep. 815. But, as a general rule, unless fraud or mistake is shown, a contract in writing is conclusively presumed to contain the entire agreement in which all previous negotiations respecting the subject matter have been merged: *Smith v. Vose & Sons Piano Co.*, 194 Mass. 193, 120 Am. St. Rep. 539, and see the cases cited in the cross-reference note thereto. On subsequent parol agreement to vary a writing, see the note to *Harris v. Murphy*, 56 Am. St. Rep. 659.

COMMONWEALTH v. PAESE.

[220 Pa. 371, 69 Atl. 891.]

MANSLAUGHTER, What Necessary to Reduce Homicide to.—To reduce an intentional blow, stroke or wounding, resulting in death, to voluntary manslaughter, there must be sufficient cause of provocation and a state of rage or passion without time to cool, placing the prisoner beyond the control of reason, and suddenly impelling him to the deed. (p. 700.)

HOMICIDE, Provocation for, Question of, When for the Court. When there is no dispute as to facts, the question of whether there was sufficient provocation to reduce a homicide to manslaughter is generally for the court. (p. 701.)

HOMICIDE, Provocation for from Attack upon a Friend.—It is proper for the court on a trial for murder to refuse to instruct the jury that if the decedent made a violent assault and battery on a friend of the accused in his presence, and this assault and attack so excited the passion of the accused as to destroy all self-control, and in this condition of ungovernable rage and without sufficient cooling time, he shot and killed the decedent, the grade of the homicide is clearly manslaughter. (p. 705.)

HOMICIDE—Manslaughter.—To reduce a homicide to voluntary manslaughter, it is necessary that the evidence should take away every evidence of cool depravity of heart or wanton cruelty. (p. 706.)

Indictment and conviction of murder in the first degree. The defendant appealed.

John R. Geyer, John E. Fox and O. G. Wickersham, for the appellant.

John Fox Weiss, district attorney, W. H. Musser and Leroy J. Wolfe, for the appellee.

372 MITCHELL, C. J. Briefly stated, the substance of the case was that three Italians, who had been drinking (but to what extent they were affected by it became a question for the jury), got into an altercation about fares with the conductor and motorman of a car; a fight ensued between one of them, not the appellant, and the motorman, in which the latter, alleged to be much the larger and heavier man, beat the other severely. He then started back to his post at the front of the car when the appellant drew a revolver and fired five shots, stepping forward as he fired each shot. Appellant was tried and convicted of murder of the first degree.

The first assignment of error is that the court refused to affirm the following point: "If the jury believe that the de-

ceased had just made an attack and committed a violent assault and battery upon George Paese, who was much the inferior of the deceased in size and weight, and that this was done in the presence of the defendant, who was the friend and companion of George Paese, and they also find that this attack so excited the passion of the defendant as to destroy all self-control, and that in this condition of ungovernable rage and without sufficient cooling time he shot and killed the person so attacking, the grade of the homicide is clearly but manslaughter."

Before taking up the exact question raised by this point, it may be well to dispose of two smaller matters that were claimed at the argument to be in the case. It was claimed that the deceased kicked the appellant in the stomach as he passed him just before the shooting. The jury found there was no such kicking. It was further claimed that the disparity in size and apparent strength of the two men in the fight ³⁷³ might make the appellant justly apprehensive for the life or grievous injury of his friend, and he might, therefore, intervene to prevent a felony. But the evidence is practically undisputed that the fight was over and the deceased was retiring from the scene when the appellant drew his revolver.

The single question, therefore, remains, whether, conceding the beating to have been such as if inflicted upon the appellant himself would have permitted the jury to reduce the killing to manslaughter, it can have that effect when made upon another merely a friend.

To reduce an intentional blow, stroke or wounding, resulting in death, to voluntary manslaughter, there must be sufficient cause of provocation and a state of rage or passion, without time to cool, placing the prisoner beyond the control of his reason, and suddenly impelling him to the deed. If any of these be wanting—if there be provocation without passion, or passion without a sufficient cause of provocation, or there be time to cool, and reason has resumed its sway, the killing will be murder: *Commonwealth v. Drum*, 58 Pa. 9 (17).

What is sufficient provocation for this purpose has not been exactly defined, and is probably incapable of exact definition, for it must vary with the myriad shifting circumstances of men's temper and quarrels. It is a concession to the infirmity of human nature, not an excuse for undue or abnormal irascibility, and, therefore, to be considered in view of all the

circumstances. It is usually said that the sufficiency of the provocation is for the court. And such is the general rule, but it must not be taken too broadly, but applied to cases where the facts are undisputed or clearly established. Thus, for example, in a case put by Sir Matthew Hale (1 Hale's Pleas of the Crown, 455) and much cited by writers on the subject of provocation, "If A be passing on the street and B meeting him (there being convenient distance between A and the wall) takes the wall of A and thereupon A kills him, this is murder; but if B had jostled A, this jostling had been a provocation, and would have made it manslaughter." But even of this case, assuming the question of sufficiency to be for the court, Russell says, it "probably supposes considerable violence and insult in the jostling": 1 Russell on Crimes, 714. In Hale's time when the streets even of London were rarely paved, "to ³⁷⁴ take the wall" of another meant practically to force the other into the middle of the street with its attendant inconveniences, dirt, etc., and perhaps danger from vehicles and horses. Hence, "to take the wall" of a woman or a man of superior rank was a serious insult, likely in the days when all gentlemen habitually went armed to be promptly followed by the invitation to "draw." The view of it as an insult has its survival to the present day in the canons of politeness in passing a lady on the street, and there were in my younger days and perhaps even yet circumstances and parts of the country where the discourtesy of taking the wall of a lady would provoke resentment and perhaps a breach of the peace from her escort. In the case put by Hale, there might, as indicated by the comment of Russell, be considerable discrepancy and doubt upon the evidence as to the exact facts of the jostling, and these of course would have to be passed upon by the jury necessarily involving their sufficiency as provocation. While, therefore, the sufficiency of the provocation is in general for the court, it may in some cases be so combined with questions of fact as to be for the jury. In the present case there being no disputed facts, the appellant's own point stating them as he claimed them to be, the learned judge was right in ruling upon them as a matter of law.

The next question is whether his ruling was correct. Though the sufficiency of the provocation has not been exactly defined, there are some points in regard to it which are well settled. Thus, no words nor mere gestures, however false, foul or insulting, will free a party killing from the

guilt of murder: Russ. 714. Nor will slight or trivial injuries, though they amount in law to an assault, nor in all cases even a blow: Russ. 715. Chief Justice Agnew, in *Commonwealth v. Drum*, 58 Pa. 9 (17), classes the two offenses together, and says: "Insulting or scandalous words are not sufficient cause of provocation; nor are actual indignities to the person of a light and trivial kind." But in the case before him the alleged provocation was the threat of serious injury and the weapon used in the killing was a knife, and in the sentence quoted he was not dealing with details which the case did not call for, but merely rounding out for the information of the jury his general discussion of the subject. He certainly did not mean to depart ³⁷⁵ from the accepted law, which is thus stated by Foster: "Words of reproach, how grievous soever, are not a provocation sufficient to free the party killing from the guilt of murder. Nor are indecent, provoking actions or gestures expressive of contempt or reproach, without an assault upon the person.

"This rule will, I conceive, govern every case where the party killing upon such provocation maketh use of a deadly weapon, or otherwise manifesteth an intention to kill, or do some great bodily harm. But if he had given the other a box on the ear, or had struck him with a stick or other weapon not likely to kill, and had unluckily and against his intention killed, it had been but manslaughter.

"The difference between the cases is plainly this: In the former the malitia, the wicked, vindictive disposition already mentioned, evidently appeareth; in the latter it is as evidently wanting; the party in the first transport of his passion intended to chastise for a piece of insolence which few spirits can bear. In this case the benignity of the law interposeth in favor of human frailty; in the other its justice regardeth and punisheth the apparent malignity of the heart": Foster's Crown Law, c. 5, of Homicide.

On the other hand, certain circumstances have been held to be sufficient provocation. Thus, in general serious injury immediately inflicted or threatened to wife (or husband), child or servant will, on account of the relationship of the parties, reduce the killing to manslaughter in similar cases as if the injury had been to self. The appellant claims that the same rule should be held in the case of a more distant relation, and even of a friend or companion, and his counsel have presented

a brief of unusual learning and diligence on this point. The fullest discussion to be found is in *Pennsylvania v. Bell*, Add. 156, 1 Am. Dec. 298, tried in 1793, where Judge Addison, after the manner of the time, delivered an elaborate charge, discussing the law in detail and referring to cases. In the course of it he says: "An attack on the person and safety of a friend is a provocation sufficient to extenuate to manslaughter a sudden killing in the peril and defense of this friend." This was said obiter, as there was nothing in the case to which it could apply, but the same view has been stated from time to time by writers of considerable standing. Three cases are constantly cited and ³⁷⁶ reiterated as authority for the doctrine, the *Case of Manslaughter*, 12 Coke, 87, *Huggett's Case*, *Hale's Pleas of the Crown*, 465, Kel. 59, and *The Queen v. Tooley*, 2 Ld. Raym. 1296. Critically examined they afford the doctrine very doubtful support. The *Case of Manslaughter*, 12 Coke, 87, is reported in six lines, thus: "Divers men playing at bowls, two of them fell out and quarreled, the one with another, and the third man, who had not any quarrel, in revenge of his friend struck the other with a bowl of which blow he died; this was held manslaughter for this, that it happened upon a sudden motion in revenge of his friend." The absence of report as to the circumstances and extent of the quarrel, the fact that the fatal blow was struck with an instrument not usually classed as a deadly weapon, etc., make this case of uncertain applicability, and yet it is perhaps the strongest authority for the point it appears to decide.

Huggett's Case is still more uncertain as to the facts. Hale says a press-master with an assistant undertook to press a man for the army, and a stranger interfering, a quarrel took place in which the stranger killed the assistant, and it was held manslaughter only. Kelyng in a fuller report, apparently based on the record of a special verdict, says the assumed press-master and his assistant acted without warrant, and on the stranger interfering and requiring to see the warrant they were shown a paper which they declared to be no warrant, and drew their swords and a fight ensued, in which the pretended press-master was killed. The judges divided, eight against four, holding it to be manslaughter only.

The Queen v. Tooley, 2 Ld. Raym. 1296, was an arrest of a woman on suspicion of a misdemeanor by a constable not in his own parish and without a warrant. The prisoners as-

saulted the constable for the purpose of rescue, but on being shown his staff desisted, and the woman was taken to the roundhouse. Shortly after the prisoners again drew their swords and assaulted the constable, and on one Dent coming to his aid, one of the prisoners killed Dent. It was held by seven judges against five that it was manslaughter only.

Both Huggett's and Tooley's case involved the elements of personal liberty in the right to resist an illegal arrest, and are discussed by Russell and by Wharton under that head: Russell ⁸⁷⁷ on Crimes, bk. 3, sec. 3, p. 732; Wharton on Homicide, c. 8, sec. 295. Both were decided by a divided court, and are severely commented on by Foster, who says they have "carried the law in favor of private persons officiously interposing further than sound reason founded in the principles of true policy will warrant," and "the doctrine advanced utterly inconsistent with the known rules of law touching a sudden provocation in the case of homicide": Crown Law, "Homicide," sec. 10 et seq. Mr. Wharton says: "By this high authority Tooley's case was greatly shaken, and it may now be considered as entirely overruled": Homicide, sec. 296. And that it had been overruled was flatly said by Alderson, J., in *Rex v. Warner*, 1 Moo. C. C. 380, and by Pollock, C. B., in *Regina v. Davis*, Leigh & Cave's C. C. 64.

On this very insufficient foundation the commentators have gone on reiterating the same doctrine, but the most diligent search through Hale, Hawkins, East, Plowden, Russell and Wharton fails to discover any real adjudication to support it, or any other decision than the three already discussed that can be said to really bear upon it.

The American reports furnish but one additional case, and that so clearly against all the precedents as to be of no authority. *Moore v. State*, 26 Tex. App. 322, 9 S. W. 610, was a case of an affray at a saloon with some drunken negroes. Deceased, one of the negroes, got into an altercation and when one, apparently his friend, attempted to persuade him to go home, he went out to his horse and got his gun, warning the others not to approach. While sitting on his horse with the gun lying across his lap, one McAdoo attempted to take the gun, and in the struggle it was discharged and McAdoo killed. The others then fired on deceased and killed him. This was held to be manslaughter, but as the deceased was acting on the defensive and in no way the aggressor at the time the gun was discharged, this ruling cannot be sustained even under

the old English authorities, unless the affray be held to have continued as one transaction until the killing of deceased, a view that the report perhaps permits but does not clearly sustain.

In *State v. Gut*, 13 Minn. 341, the defendant, indicted as one of a lynching party who killed an Indian while in jail, sought to justify on the ground that the Indian had killed his friend, but was held guilty of murder, the court saying: "Had the defendant been present when his friend was killed and under the excitement of the moment and in the heat of passion taken the life of the slayer, it might perhaps be different."

In *Reese v. State*, 90 Ala. 624, 8 South. 818, the defense was that the deceased had killed the defendant's cousin an hour before, but the court said that "did not tend in the slightest degree to mitigate the offense," and a verdict of murder in the first degree was sustained.

These are all the additional cases that the editors of the *American and English Encyclopedia of Law* (2d ed., vol. 21, p. 126) have been able to present.

Courts do not sanction the increase of excuses for taking life, already too numerous, except under compulsion of weighty authority. Such authority has not been found in favor of the doctrine that a mere bystander may interfere to the extent of killing with a deadly weapon in a stranger's quarrel, without being guilty of more than manslaughter. On the contrary, the fact that the annual thousands of homicides in the United States have produced no case in its favor is strongly persuasive that the doctrine beyond the recognized cases of husband and wife, parent and child or master and servant, has no proper place in American jurisprudence. For the protection of the weak and unfortunate and the assertion of the duties of humanity reliance must be had on the ancient and settled right to interfere to prevent a felony, with its well-guarded limitations that the injury to be prevented must be serious, must be imminent and not past, the quarrel in actual progress, and the necessity for the use of a deadly weapon clear of doubt: *Hale's Pleas of the Crown*, 484; *Kilpatrick v. Commonwealth*, 31 Pa. 198. Cases of killing without the use of a deadly weapon and apparently lacking the element of presumed intent to kill, will be governed by the passage from *Foster* already cited.

The second assignment of error is to the portion of the charge defining manslaughter, in which it was said: "Voluntary manslaughter is never attended by legal malice or depravity of heart, that condition or frame of mind before spoken of, exhibiting wickedness of disposition, recklessness of consequences or cruelty. Being sometimes a willful act, as the term 'voluntary' denotes, it is necessary that the circumstances should ³⁷⁹ take away every evidence of cool depravity of heart or wanton cruelty." As stated by the learned judge below in refusing a new trial: "It is contended that the vice in this definition of voluntary manslaughter is contained in the statement that 'it is necessary that the circumstances should take away every evidence of cool depravity of heart or wanton cruelty,' and that this statement of the law puts too great a burden upon the defendant."

That portion of the charge is exactly in the language of Agnew, J., in *Commonwealth v. Drum*, 58 Pa. 9. That charge, as is well known, was prepared by Judge Agnew with great care, and before delivery was submitted to the careful review of Chief Justice Thompson and other justices of this court. Though its language in places partakes of the sentimental style of the older books, it was based largely on Russell on Crimes, the most authoritative modern book on criminal law, and its substantial accuracy has never been challenged. On the contrary, it was intended as a precedent and guide in similar cases and as such has been frequently approved by this court. The very passage now complained of was quoted to the jury by Sterrett, J., when presiding in the oyer and terminer of Allegheny, and was affirmed by this court: *Lynch v. Commonwealth*, 77 Pa. 205. It is too late now to subject it to a mere verbal criticism.

The judgment is affirmed and the record remitted to the court below for the purpose of execution.

If a Homicide is Committed Under Circumstances which render the mind of the accused incapable of cool reflection, and in a sudden fit of anger, he is not guilty of any higher offense than manslaughter: Vann v. State, 45 Tex. Cr. 434, 108 Am. St. Rep. 961; State v. Bowers, 65 S. C. 207, 95 Am. St. Rep. 795. The heat and passion requisite to reduce a homicide from murder to manslaughter must be based on a provocation which the law deems adequate, and must be such that, while it need not dethrone reason entirely, nor shut out knowledge and volition, would naturally destroy the sway of reason and render the mind of an ordinary person incapable of cool reflection and produce what, according to all human experience, may

be called uncontrollable impulses to do violence: *State v. Davis*, 50 S. C. 405, 62 Am. St. Rep. 837. Words of reproach, however, grievous, do not constitute a provocation sufficient to free a person committing a homicide from the guilt of murder: *State v. Gordon*, 191 Mo. 114, 109 Am. St. Rep. 790.

KELLY SPRINGFIELD ROAD ROLLER COMPANY v. SCHLIMME.

[220 Pa. 413, 69 Atl. 867.]

CONDITIONAL SALE, Contract, When Deemed to be and not a Lease.—If a contract, though called a lease, declares that the person designated as lessee received certain road rollers and is to pay for their hire a sum designated in installments, and that the possession and ownership of the property shall remain in the lessor and at the expiration of the lease shall be returned to him, and that in case of the nonpayment at maturity of any of the notes given for such installments, the lessor shall have the right to enter the premises of the lessee and take possession and remove the property, and that if the notes are all paid, the lessee may purchase the property for one dollar and receive a bill of sale, the transaction is not a leasing. (p. 710.)

SALE, CONDITIONAL, Remedies Under do not Include the Retaking of the Property and the Enforcement of the Notes Given Therefor.—Under a contract by which property is placed in the hands of a person designated as lessee and his notes are given payable at different times during the period of thirteen months, and when all are paid the lessee is entitled to the property on the payment of the additional sum of one dollar, the lessor has two remedies. He may, on default of payment of any of the installment notes, affirm the contract and recover upon it and upon subsequent installment notes as they become due, or he may rescind the contract by taking possession of the property as therein provided; but these remedies are not cumulative. Hence, if the property remains in the possession of the lessee for the whole thirteen months, yet if the lessor elects to take and retain possession of the property, he cannot maintain an action upon the promissory notes given therefor, though the contract is named as a lease and the installments represented by the notes designated as rent. (p. 711.)

Two actions of assumpsit upon promissory notes, one being against John Schlimme and the other against the Schlimme Construction Company. The trial court directed a judgment in favor of defendants, and the plaintiff appealed.

G. Rodman Fox and N. H. Larzelere, for the appellant.

Louis M. Childs, for the appellees.

414 MESTREZAT, J. The above cases were tried together in the court below, and as they arise out of the same transac-

tion and the decision of the two cases depends on the same legal principle, we will dispose of them together.

On or about April 15, 1904, the plaintiff company delivered to the defendant, John Schlimme, two steam road rollers. They remained in his possession until November 1, 1904, when a written contract was entered into between the plaintiff company and the Schlimme Construction Company for the rollers. This contract was in the shape of a written offer by the defendant company, and an acceptance by the plaintiff company. It was called a lease. The defendant company was to receive the rollers, and pay for their use and hire for a period of thirteen months the sum of five thousand four hundred dollars, payable, except two hundred and fifty dollars cash in hand, in thirteen notes, one due each succeeding month. The monthly payments, secured by notes, were as follows: The first, third and fourth months, two hundred dollars; the second month, one hundred and fifty dollars; the fifth to the twelfth month, inclusive, (eight months), five hundred dollars; and the thirteenth month, four hundred dollars. The notes were to draw interest at the rate of six per cent.

⁴¹⁵ The contract provided that the possession and ownership of the rollers should not pass from the plaintiff company, and "at the expiration of this lease they shall be returned to them." It also provided that in case the defendant company failed to protect the machines, "or in case any of the said notes are not paid at maturity, or within ——— thereafter," the plaintiff company "shall have the right to enter upon the premises where said rollers may be located, and take possession of, and remove same without trespass."

The agreement concluded with a provision that if the defendant company paid all the notes, it should have the privilege of purchasing the rollers, "and that for the further consideration of one dollar, you will sell and deliver said rollers to us and make a bill of sale for the same."

The contract was signed by the Schlimme Construction Company, and the notes were signed by John Schlimme. The cash in hand was not paid nor were any of the notes paid. No money whatever was paid by Schlimme or the construction company to the roller company on the contract. The rollers were kept by the construction company until on or about September 27, 1906, when, according to the testimony of the plaintiff's sales agent, the plaintiff entered the premises of the construction company and took possession of the rollers,

“in exercising of the rights reserved in this contract, whatever they may be.” So far as the evidence discloses, the plaintiff still retains possession of the rollers and claims them as its property.

These two suits were brought by the Kelley Springfield Road Roller Company to recover five thousand four hundred dollars and its interest, one of the suits being brought on the notes against John Schlimme; the other, on the contract against the Schlimme Construction Company. On the trial, the court granted a nonsuit in each case which it subsequently refused to take off. The plaintiff has taken these appeals.

The rights of the parties in these actions depend upon the contract between the plaintiff company and the construction company, and the subsequent action of the parties in pursuance thereof. The contract itself shows that the five thousand four hundred dollars required to be paid for the use of the rollers constituted the full value of the rollers. That appears conclusively from the stipulation in ⁴¹⁶ the contract by which the plaintiff company was to sell and deliver the rollers to the construction company on the payment of that sum and an additional nominal consideration. While the contract provides that the sum named shall be “for the use and hire of the said steam road rollers for a period of thirteen months,” yet the clause providing for the sale determines the fact that the sum was the full consideration for the machines. The rental value fixed by the contract was, in the judgment of the parties, the market value of the rollers when the construction company took possession of them.

The contract may be regarded as dual—(1) a hiring or bailment, and (2) a contract of sale. The ultimate purpose of the agreement was a sale of the rollers to the construction company. If the latter complied with the terms of the contract as to payment, the title of the machines passed to the construction company, and it could demand of the plaintiff a bill of sale transferring the title to it. The possession of the machines passed to the construction company upon the execution and delivery of the contract, and it had a right to the possession of the machines so long as it complied with the terms of the agreement—that is, made the payments stipulated in the contract. The title would follow the possession as soon as all the installments of the consideration money were paid, and then an indefeasible title to the machines would become vested in the construction company.

The so-called lease or bailment was to preserve the ownership of the bailor until the full consideration money was paid. The plaintiff company did not intend the title to the machines to pass from it until that event had occurred, and, under our decisions, the contract entered into by the parties was legitimate and legal for such purpose.

By the provisions of the agreement, it will be observed that "at the expiration of this lease they (the rollers) shall be returned to them (the plaintiff)." If for any reason the sale had not been consummated, as contemplated in the contract, it would have been the duty of the construction company to return the rollers to the plaintiff at the expiration of the thirteen months. Of course, it is not to be reasonably inferred that the construction company would pay the five thousand four hundred dollars, the value of the machines, and redeliver them to the plaintiff at the expiration ⁴¹⁷ of the so-called lease. On the other hand, the reasonable presumption is that if the construction company had paid the five thousand four hundred dollars, it would have required the plaintiff to comply with the stipulation in the contract and transfer the title to the machines to the construction company. This it had a legal right to do, and the presumption is that it would have done so.

Under the contract, the plaintiff had two remedies for a default in payment of the installments stipulated to be paid in the agreement: it could, in affirmance of the contract, have brought suit as each installment became due, permitting the machines to continue in possession of the defendant company; or it could "enter upon the premises where said rollers may be located, and take possession of, and remove same without trespass," thereby rescinding the contract. These two remedies are secured to the plaintiff by the agreement of the parties. They are unquestionably not cumulative, but are in the alternative. This necessarily follows from the conceded fact that the "pay for the use and hire" of the rollers was their full market value, and the stipulation that on the payment thereof the title to the property was to pass to the construction company. There is no ground whatever for interpreting this contract so as to impose on the construction company a penalty of the full value of the machines for a failure of the company to comply with the agreement. To subject the company to such penalty, it must be so stipulated in the contract in clear and unmistakable language. On the contrary, we find in the agreement provisions for its enforcement as well as its rescis-

sion. As already suggested, the plaintiff could enforce the payment of the several installments as they severally became due by an action at law. This would be in affirmance of the contract, and would give the construction company the right to retain the possession of the machines. If, however, the plaintiff company desired to rescind the contract and repossess itself of the machines, it was fully authorized to do so by the terms of the agreement on a breach thereof by the construction company failing to make any one or all of the payments stipulated in the contract. The failure to make the payments as they became due was a breach of the contract, and the plaintiff had the right to rescind "and take possession of and remove same without trespass." There was one condition, however, ⁴¹⁸ imposed upon the plaintiff company's action in this respect, and that was that if it took possession of the machines and thereby rescinded the agreement, it could not demand payment of the unpaid installments of money provided in the contract. The plaintiff's assertion of its right to rescind by repossessing itself of the machines was the end of its alternative right to enforce the agreement by compelling payment of the consideration money. This is the proper interpretation of the agreement of the parties as clearly disclosed by its terms.

The construction company retained possession of the machines for several months after the expiration of the thirteen months named in the contract. So far as the evidence discloses, no payments whatever were made by the construction company to the plaintiff, nor did the former return the machines to the latter "at the expiration of this lease." The notes, taken as collateral for the rental, remain unpaid. On or about September 27, 1906, the defendant company, as testified by its sales agent, "removed these rollers, took them from the Schlimme Construction Company under the rights reserved in the contract, . . . in exercise of the rights reserved in this contract, whatever they may be." As suggested by the plaintiff's counsel, until the contrary appears, it will be presumed that what action was taken by the parties relative to the transactions arising out of the contract was taken in pursuance of the contract and to carry out its terms and conditions. By the terms of the contract, the plaintiff was authorized to take possession of the rollers only "in case any of the said notes are not paid at maturity, or within ——— thereafter," or on failure of the defendant company to protect the machines. There is no allegation that the construction company failed to

protect the machines, and hence it must be assumed that the plaintiff company repossessed itself of the machines because the notes, the consideration named in the contract, were not paid. The plaintiff's action, therefore, in taking possession of the machines was in strict compliance with the contract authorizing it do so in default of payment of the consideration money. This was a right reserved in the contract, and according to the testimony of the plaintiff's employé, possession of the machines was resumed "in exercise of the rights reserved in this contract, whatever they may be." The right to repossess itself of the machines was not ⁴¹⁹ confined to any period or any time. The company could take the machines in default of the payment of any installment, or, at its own pleasure, it could wait until all of the consideration money was due or any time thereafter and take possession of the machines. The action of the company in this respect depended solely upon its own pleasure. The right of the construction company to return the machines, as provided in the agreement, is altogether different from the right of the plaintiff company to take possession of them. There is nothing disclosed by the record tending to show that the rollers were removed by the plaintiff by reason of the construction company having failed to return them at the expiration of the lease. On the contrary, as we have seen, the plaintiff's own employé testified that the rollers were removed "in the exercise of the rights reserved in this contract." Those rights permitted a removal "in case any of the said notes are not paid at maturity, or within ——— thereafter." It is therefore clear that the plaintiff removed the rollers in pursuance of the provision of the contract which permitted such action on failure of the construction company to pay the consideration money. This act of the plaintiff was a rescission of the contract, and deprives the plaintiff of any right of action on the contract or on the notes to enforce payment of the money stipulated to be paid in the agreement. The plaintiff cannot retain the machines, and at the same time demand payment of their value. The contract does not so provide, and justice will not permit it. The manifest purpose of both parties to this agreement was, in the language of Chief Justice Gibson in *Myers v. Harvey*, 2 P. & W. 478, 23 Am. Dec. 60, "that the contract of bailment should preserve the ownership of the bailor during the particular relation created by it, and the contract of sale which supersedes it should

transfer the title as soon as it was called into action by the payment of the price." It was not the intention that the construction company should pay the price and that the plaintiff should retain the machines.

This case is ruled by the doctrine announced in *Seanor v. McLaughlin*, 165 Pa. 150, 30 Atl. 717, 33 L. R. A. 467, and *Campbell Printing Press & Mfg. Co. v. Hickok*, 140 Pa. 290, 21 Atl. 362. In the former case, in which the contract provided for a personal judgment for the consideration money or the retaking of the machine, Mr. Justice Dean, delivering the opinion of the court, said (p. 156): "Either remedy ⁴²⁰ was complete in itself, and the plaintiffs, on default, could adopt either; but they were not cumulative; they could not adopt both, unless it was plainly expressed in the contract, or a necessary implication from its terms. The words of this contract negative such a construction. . . . They (the plaintiffs) rescinded the contract by retaking into their possession the subject of it, which they had a right to do, and then immediately entered their bond and issued execution to levy on other property of defendant, which they had no right to do, for the contract or obligation, to which the bond was collateral, no longer existed. It ought to have been surrendered to defendant when he demanded it at the time plaintiffs took away the machine."

The judgment of the court below in each case is affirmed.

A Conditional Sale is a Sale in which the transfer of title to the purchaser, or his retention of it, is made to depend upon the performance of some condition: *Freed Furniture etc. Co. v. Sorensen*, 28 Utah, 419, 107 Am. St. Rep. 731. Such sales are distinguished from chattel mortgages in *Studebaker Bros. Co. v. Mau*, 13 Wyo. 358, 110 Am. St. Rep. 1001; and they are distinguished from leases in *McBryan v. Universal Elevator Co.*, 130 Mich. 111, 97 Am. St. Rep. 453, and in the note to *Fleet v. Hertz*, 94 Am. St. Rep. 248.

**BESECKER v. DELAWARE, LACKAWANNA AND
WESTERN RAILWAY COMPANY.**

[220 Pa. 507, 69 Atl. 1039.]

RAILWAYS, Negligence of in Running Train Between Station and Another Train from Which Passengers are Alighting.—If a passenger train is stopped at a station, it is negligence on the part of the railway company to allow another train to run between the passenger train and the station at which the passengers are being discharged. (pp. 716, 717.)

RAILWAYS, Duty to Passengers, How Long Continues.—The duty of a carrier of passengers is not fully discharged until it has set the passenger down in a place of safety at his destination. It must not only carry him to his destination in safety, but must provide a safe place to discharge him when he arrives. (p. 716.)

RAILWAYS, Passenger's Right to Assume that a Train will not be Run Between Him and His Station.—Where passengers are alighting from a train and proceeding across the tracks at the station, they have a right to assume that their safety will not be endangered by permitting a train to pass on intervening tracks. (p. 717.)

RAILWAYS, Passenger Crossing Tracks of at Station—Duty to Stop, Look and Listen.—It is not always the duty of a passenger before attempting to cross tracks which are necessary to be crossed after alighting from a train to reach their station to observe the rule compelling a person crossing tracks of a railway on a highway to stop, look and listen. The failure to look for a train when thus crossing a track is not necessarily negligent. (p. 717.)

RAILWAYS—Alighting from a Train at a Station While It is Still in Motion.—When a passenger train has reached a station where it is to stop and where the passenger intends to alight, the door of the car having been opened by the brakeman to permit passengers to alight, it is not contributory negligence for a passenger to alight before the train ceases to be in motion, and hence such alighting does not preclude his recovery if injured by another train running between that from which he alighted at a station on a track necessary to be crossed by him to reach such station. (pp. 718-720.)

RAILWAYS, Rules of, Passengers' Right to Assume that They will be Observed.—A passenger about to alight from a train has a right to assume, and is not negligent in assuming, that the company will observe its own rule and that a train shall not be run between the station and the train from which passengers are alighting. (p. 720.)

Trespass to recover for personal injuries. Verdict and judgment for the plaintiff; the defendant appealed.

A. Mitchell Palmer, for the appellant.

Rogers L. Burnett, for the appellee.

509 MESTREZAT, J. On the morning of November 20, 1905, George Besecker, the plaintiff, purchased a round-trip

ticket at Henryville over the defendant company's road to Portland and return. In returning, he took a west-bound train, leaving East Stroudsburg station at 7:15 P. M. He entered the smoking-car, the rear car of the train, and seated himself on the left-hand side and in the third or fourth seat from the front of the car. As the train approached Henryville the rear brakeman, who was seated in the rear end of the smoking-car, announced that station twice, having previously announced as the train left the last station that Henryville was the next stop. The brakeman then opened the front door of the smoking-car, passed through the vestibule of that car and the vestibule of the next coach, which was a coach for ladies, and announced Henryville station twice in that car. He then returned to the front end of the smoking-car, opened the vestibule door of the smoking-car and turned to open the vestibule of the ladies' coach. The plaintiff arose from his seat, passed out the front door of the car and down the steps through the vestibule, and as the smoking-car was about opposite the waiting-room door of the station, he alighted. The plaintiff claims that when he alighted the train had stopped and he stepped off. The defendant claims that the plaintiff alighted while the train was in motion and that he jumped off.

At Henryville the defendant company has two main tracks, east and west bound. The station is on the south side of the east-bound track. As Besecker had arrived on a train on the west-bound track, he was obliged to cross the east-bound track to reach the station. After alighting from the train he started toward the station, and after taking a step or two, was struck and injured by the bumper beam of the engine drawing an east-bound coal train, running at the rate of from twelve to fifteen miles an hour. The plaintiff, it is conceded, left the car at the place where passengers for that station usually and ordinarily alight. It is claimed by the defendant company, and its testimony tended to show, that the engineer of the passenger train saw the coal train approaching on the east-bound track, and realizing that it would cut his passengers off from the Henryville station, he kept his own train moving until the ⁵¹⁰ smoking-car had overlapped the engine of the coal train, when the passenger train stopped.

This is an action by the plaintiff to recover for the injuries he sustained, and the alleged negligence consists in the defendant company running the coal train by the Henryville station

on the east-bound track without notice of its approach to the station or other warning while the plaintiff was attempting to cross that track to get to the station. It is properly conceded by the learned counsel of the defendant company that if the passenger train had stopped at the station, it was negligence on the part of the company to allow the coal train to run between the passenger train and the station while the passengers were being discharged. It is contended, however, by the counsel that the plaintiff alighted from the train while it was in motion, that this was negligence, and that his injuries resulted from this negligent act on his part. It is further claimed by the defendant's counsel that the moving of the passenger train was notice to the passengers that there was danger, and that therefore they had no right to alight from the train while it was in motion. The court, however, instructed the jury that the bare fact of the plaintiff stepping off the train even though it were in motion, would not, of itself, be such contributory negligence as would prevent a recovery in the case. It will, therefore, be observed, as suggested by the learned trial court, that the only question before the court and jury was whether the plaintiff was guilty of contributory negligence. The only question which we need consider is whether it was negligence per se for the plaintiff to alight from the train while it was in motion and attempt to cross the east-bound track to reach the station. If it was, the instructions of the court just alluded to, were erroneous. There was ample evidence to support the defendant's contention that the plaintiff did leave the train while it was in motion, and if his act in doing so was negligence of itself, the jury should have been so instructed.

It is well settled that the duty of a carrier of passengers is not fully discharged until it has set the passenger down in a place of safety at his destination. It must not only carry him to his destination in safety, but it must provide a safe place to discharge him when he arrives there. This is conceded to be the law. If, instead of discharging its passengers at a station on the ⁵¹¹ side of the track, the carrier discharges them between its tracks and obliges them to cross one or more tracks to reach its station, an imperative duty devolves upon the carrier to see that the passenger will not be endangered in crossing the tracks. This duty is imposed by the contract which the carrier enters into with the passenger when he purchases his ticket. While its passengers are alighting from its train and proceeding across the tracks to the station, it is clear negli-

gence for it to permit a train to pass upon one of the intervening tracks, thereby endangering the safety and the lives of the passengers. Under those circumstances, the passenger has a right to assume that his safety will not be endangered by permitting a train to pass upon the intervening tracks while he is in the act of crossing to the passenger station, and he may rely upon the company to keep the tracks clear: *Flanagan v. Philadelphia etc. R. R. Co.*, 181 Pa. 237, 37 Atl. 341; *Harper v. Pittsburg etc. R. R. Co.*, 219 Pa. 368, 68 Atl. 831; *Atlantic City R. R. Co. v. Goodin*, 62 N. J. L. 394, 72 Am. St. Rep. 652, 42 Atl. 333, 45 L. R. A. 671; *Chicago etc. Ry. Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. Rep. 281, 38 L. ed. 131. Before attempting to cross the tracks under such circumstances, the passenger is not always required to observe the rule which compels a person crossing tracks of a railroad on a highway to stop, look and listen before he attempts to cross; his obligation may be totally different from that of a person at a public crossing: *Pennsylvania R. R. Co. v. White*, 88 Pa. 327; *Betts v. Lehigh Valley R. R. Co.*, 191 Pa. 575, 43 Atl. 362, 45 L. R. A. 261. The great current of authority is to the effect that failure to look for trains when crossing a track, in passing from the train to the station, is not necessarily negligent: Per Collins, J., in *Atlantic City R. R. Co. v. Goodin*, 45 L. R. A. 671, citing two of our cases referred to above. The reason of the rule is that the carrier is required to provide a safe place to discharge its passengers, and hence they have a right to assume that in the performance of that duty the carrier will not permit a train to pass on the intervening tracks while they are going from the train to the station. Of course, the passenger in crossing the tracks is not relieved from the exercise of ordinary care under the circumstances, and whether he performed that duty is for the jury.

Conceding, therefore, that it was negligence in the defendant company to permit its coal train to be run on the intervening ⁵¹² track, if the plaintiff alighted from the passenger train after it had stopped, was it negligence in the plaintiff to alight from his train while it was in motion and to attempt to cross the tracks to the station? This is the real and only open question in the case. As we have seen, the defendant's counsel contend that such action on the part of the plaintiff was negligence, that he had no right to alight from the train while it was in motion, and the fact that it had not stopped, although at the usual place for trains to stop at that station, was no-

tice to the passengers that alighting from the train would be dangerous. On the argument of the case the writer was impressed with this position, but upon subsequent reflection we are satisfied that it is not tenable. As this train approached the station the company's brakeman announced the approach and made preparation for the passengers to alight by opening the door of the car and the door leading from the vestibule to the station. His train being a regular passenger train, the plaintiff had a right on its arrival at Henryville to assume that the place for discharging passengers from west-bound trains was safe, and that their safety would not be endangered while crossing the intervening tracks of the carrier company to the station. No notice or warning was given the passengers by the company's servants of any danger at the station or that a train was approaching on the other track. The situation at that time, then, was that the passengers had been notified by the brakeman that their train was approaching the Henryville station, the doors permitting exit from the car had been opened to enable the passengers to alight, the train had lessened its speed so as to be moving quite slowly, no notice of any danger on the intervening tracks had been given, and the passenger train was at the usual and ordinary place for discharging passengers at Henryville. While these facts would not justify the negligent act of a passenger in alighting from a moving train, yet it was the duty of the carrier company to keep the intervening tracks free from danger to any passenger who, having alighted from a west-bound train at that time, desired to go to its station, and especially to enforce its own rule and prevent a train passing in either direction on the east-bound track. The plaintiff had a right to assume that the company would perform this duty, unless ⁵¹³ he had notice that there was danger on the intervening track or that a train was approaching at that time. The mere fact that the train was in motion was not of itself notice to the passengers that the carrier would not perform its duty and keep its other track clear at that time: *Philadelphia etc. R. R. Co. v. Anderson*, 72 Md. 519, 20 Am. St. Rep. 483, 20 Atl. 2, 8 L. R. A. 673. In that case the train was in motion when the passengers alighted, and the Maryland court of appeals, in sustaining a verdict in favor of the passenger who had been injured in crossing the track by a passing train, said (p. 676): "If the discovery of the approaching train caused any change of purpose on the part of the conductor,

it would have been reasonable to communicate this change to the passengers, whose safety might be affected by it." It is true that the defendant company alleges that notice was given to the plaintiff of the approach of the train on the other track, but this was denied by him, and, of course, was a question for the jury. If the plaintiff had been injured in alighting from the moving train by having been thrown or having fallen against something or in any other way, and this action had been brought to recover damages for such injury, of course there could be no recovery; but he was not injured when he was alighting from the train or by anything he did while alighting from the train. He reached the ground in safety. The peril involved in alighting from the train was passed before he attempted to cross the tracks. That was a negligent act, but it was not the proximate cause of his injuries. This action was not brought to recover damages for injuries he sustained while descending from the car. The plaintiff assumed a risk in alighting while the train was in motion, but that assumption of risk cannot be extended so as to protect the company in its subsequent negligent act by which the plaintiff was injured while he was still under its protection as a passenger. Suppose the plaintiff had alighted from the train while it was at rest, and in going to the station was injured by something which had been negligently and improperly left between the rails of the east-bound track or on the station platform, the company clearly would have had no defense to an action brought to recover damages for his injuries. Its liability would have been the same as though the plaintiff, having alighted under those circumstances, had been ⁵¹⁴ struck by a train approaching on the east-bound track. In both cases, the carrier company is liable because the plaintiff is still a passenger and is entitled to its protection while he is crossing its track and passing through its station. In the case in hand, conceding the plaintiff to have alighted while the train was in motion, he is entitled to the same protection from the carrier company while he is crossing its tracks. He was not injured while alighting from the train, but from the negligent act of the company while he was crossing its east-bound track.

The case of Philadelphia etc. R. R. Co. v. Anderson, 72 Md. 519, 20 Am. St. Rep. 483, 20 Atl. 2, 8 L. R. A. 673, decided by the Maryland court of appeals, is in point. The accident occurred upon the defendant company's road at the city of

Chester in this state. The name of the station was announced as the train approached the city, and it stopped at the eastern end of the station platform. Before the plaintiff could alight, the train had started, and while it was moving slowly he stepped from the car and was immediately struck by a train coming from the opposite direction. The court held that his negligence was for the jury. In the opinion it is said (p. 676): "He made his exit from the car in safety, but was immediately confronted by a great danger. If he had looked forward he might have seen and avoided it. But here we must bear in mind the circumstances attending his exit from the cars. He was getting off at a place which, with the knowledge and permission of the defendant, was habitually used for this purpose; and he knew, moreover, that it was the defendant's duty to use all possible care to make this place safe for him. And he knew that by a special rule it had declared that when his train was discharging passengers, any approaching train must be stopped and not be allowed to reach it. Now, assuming that he supposed that he was to be discharged as a passenger at that place, he would necessarily and unavoidably infer that he would be safe, if the railroad company observed this rule. Undoubtedly he had a right to assume that this rule would be enforced, and, relying upon the assurance guaranteed by the rule, he was dispensed from the necessity of using the degree of care ordinarily required of persons who go on or near railroad tracks." In *Chicago etc. Ry. Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. Rep. 281, 38 L. ed. 131, the passenger alighted from ⁵¹⁵ the train when it was in motion, and was subsequently struck by an engine coming from the opposite direction while he was crossing the track to reach the station. The defense was contributory negligence, and the defendant company asked the court to instruct the jury to find for it on that ground. The prayer was refused and there was a verdict for the plaintiff, which was sustained on appeal by the supreme court of the United States.

In the case in hand, the plaintiff knew of the existence of a rule of the carrier company similar to the one in the *Anderson* case, and the remarks of the court in that case apply, therefore, to the plaintiff here. He had a right to assume that the defendant company would observe its own rule: *Lyman v. Boston etc. R. R. Co.*, 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364, and, therefore, although having alighted from the train

while in motion, he had a right to rely upon the defendant company keeping its intervening track clear at the time for receiving and discharging passengers from its west-bound trains at Henryville. As said in *Atlantic City R. R. Co. v. Goodin*, 62 N. J. L. 394, 72 Am. St. Rep. 652, 42 Atl. 333, 45 L. R. A. 671: "Goodin (the passenger) had a right to rely on the assumption that no train would be allowed to come while passengers might properly be crossing the track." Reasonable care according to the circumstances was required of the plaintiff when he attempted to cross the defendant's tracks, and whether he exercised that care or not was a question for the jury. The court could not declare as matter of law that in alighting from the train while it was in motion the plaintiff contributed to the injuries he sustained.

The judgment is affirmed.

The Liability of a Railroad Company to a person who is struck by a train while crossing a track intervening between his train and the railroad station is discussed in Karr v. Milwaukee Light etc. Co., 132 Wis. 662, 122 Am. St. Rep. 1017, and in the note to Duchemin v. Boston etc. Ry. Co., 104 Am. St. Rep. 585.

'ADAMS' ESTATE.

[220 Pa. 531, 69 Atl. 989.]

WILLS, Presumption of Undue Influence, When Arises Where the Provisions of the Will Favor a Stranger.—If a testator, though not without some mental capacity to make a will, is aged and infirm, with his mental faculties impaired, and makes a will in favor of a confidential adviser, there is a presumption of fact that undue influence was brought to bear on the mind of the testator, and the burden is on the beneficiary to rebut this presumption. (p. 723.)

BENEFICIARIES.—The Issue of *Devisavit Vel Non* must be Awarded and submitted to the jury, though there is other evidence sufficient to rebut the presumption of such influence. (pp. 723, 724.)

Appeal from a decree refusing the issue *devisavit vel non*.

Alexander Simpson, Jr., Emanuel Furth and Jacob Singer, for the appellant.

Dimner Beeber and J. Levering Jones, for the appellees.

533 ELKIN, J. The appellant is the only daughter and next of kin of the testatrix, the admission of whose will to Am. St. Rep., Vol. 123—46

probate is being contested. She filed a caveat before the register, objecting to the admission of the will to probate on the grounds of undue influence, and asked for an issue devisavit vel non in order to have the question determined in the court of common pleas. The register after hearing awarded the issue, and the proponents appealed to the orphans' court, where the case was heard upon the evidence submitted before the register of wills. The trial judge decided in favor of the validity of the will and reversed the register. Exceptions were then filed and the case was argued before the court in bank which dismissed the exceptions to the findings of the trial judge and a decree was entered directing the register to admit the will to probate. It is from this decree that the appeal now pending was taken. The real question involved in the case is whether the executor, Croskey, who was also made a trustee under the will, had such a substantial interest as to shift the burden of proof upon the proponents to show that the testatrix had a full understanding of the disposition made of her property by the will and of the nature and extent of the trust relation created in favor of Dr. Croskey and benefits derived by him.

It appears from the testimony that the testatrix two years prior to the making of her will had a stroke of paralysis, which weakened her mentally and physically, and after being thus stricken, she became hysterical, melancholy, nervous, suspicious of her servants, fearful she might end her days in the almshouse, would cry out without reason, was peevish and childish, continually laughing and crying. An attending physician testified that "her mind was enfeebled but not unsound." Under these circumstances the learned trial judge was reasonably justified in reaching the conclusion "that Mrs. Adams was possessed of testamentary capacity," and certainly did not overstate the facts when he said, "Her mind from June, 1902, up to the time of her death was enfeebled as a result of her illness, and in a condition easily susceptible to flattery, persuasion or influence."

The general rule applicable to such cases is that although the evidence is not sufficient to establish testamentary incapacity, ⁵³⁴ as the court below has found in the present case, but does show bodily infirmity and greatly weakened mentality, a presumption of undue influence arises where a stranger to the blood of the testator, standing in a confidential relation, is

benefited by the will which he has been instrumental in having executed. We do not understand that this rule is questioned by the learned counsel for appellee, but it is argued with much force that in order to make the rule operative the confidential adviser must have benefited to a considerable extent or in a substantial manner. In other words, in order to shift the burden of proof the benefit derived from the will must be a large, or considerable, or substantial interest. It is true in some of our cases such expressions have been used, and in Linton's Appeal, 104 Pa. 228, it was held that the appointment as executor with the right to receive the usual commissions did not constitute such an interest. In no case, however, has the court undertaken to exactly define the character of benefit or the extent of interest the confidential adviser must receive in order to shift the burden of proof, and indeed it may be said no hard-and-fast rule can be laid down. Something must depend upon the circumstances of each particular case. What the law requires is that a person acting as confidential adviser to a testator, bodily infirm and mentally weak, must act in the utmost good faith, and if he is benefited in a legal sense by the will procured by him, he must assume the burden of showing deliberation, volition and understanding on the part of the maker of the will. The benefit derived by Dr. Croskey, the confidential adviser in the present case, under the will was, first, an executorship; second, a trusteeship by means of which he has the control, or partial control, of the entire estate, amounting to perhaps seventy-five thousand dollars, for a period of years; and third, a possible residuary interest in the whole estate. Certainly all of these things gave him such a substantial interest as to bring him within the operation of the rule which provides that where a testator, although possessed of testamentary capacity is aged, infirm bodily, with mental faculties impaired, as against a confidential adviser who is a beneficiary under the will, there is a presumption of fact that undue influence was brought to bear on the mind of the testator, and the burden is on the beneficiary to rebut the presumption: ⁵³⁵ Wilson v. Mitchell, 101 Pa. 495; Armor's Estate, 154 Pa. 517, 26 Atl. 619.

It is urged that even conceding the burden of proof was shifted in the present case, it was fully rebutted by the testimony introduced before the register, which it is alleged was not sufficient to support a finding by a jury, even if they should so find, that the testatrix had been unduly influenced

by her confidential adviser, and because the testimony must be deemed insufficient for this purpose an issue devisavit vel non should not be awarded. We do not concur in this view of the situation. In *Boyd v. Boyd*, 66 Pa. 283, Mr. Justice Sharswood, in discussing the rule applicable to this class of cases, said: "Let us see, then, if there was any evidence in this case which raised this presumption and shifted the onus. If there was, it was a question for the jury." As hereinbefore stated, we think under the facts in the present case the presumption of undue influence arose and the testimony, if believed, is sufficient to support a finding of a jury to that effect.

Decree reversed, petition reinstated and issue devisavit vel non awarded.

The Burden of Proof to Show Undue Influence in a will contest is usually upon the contestant: *Compher v. Browning*, 219 Ill. 429, 109 Am. St. Rep. 346; unless, perhaps, where a relation of confidence existed between the testator and the beneficiary under his will: *Dausman v. Rankin*, 189 Mo. 677, 107 Am. St. Rep. 391; *Maddox v. Maddox*, 114 Mo. 35, 35 Am. St. Rep. 734. For a further consideration of the presumption of undue influence, see the monographic note to *Richmond's Appeal*, 21 Am. St. Rep. 94-104; and for a consideration of undue influence generally in the execution of wills, see the monographic note to *In re Hess' Will*, 31 Am. St. Rep. 670-691.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

ROGERS v. AYERS.

[119 Tenn. 340, 104 S. W. 521.]

EXEMPTION—Removal of Property to Another State, When Subjects to Execution Exempt Property Remaining in the State.—If a debtor having a number of animals and entitled to select some of them as exempt from execution removes part from the state of his residence into another state, he thereby makes his election to claim as exempt the property thus removed, and consequently subjects to execution animals remaining in the state of his residence, unless, after they are levied upon, he selects them as exempt and thereupon returns and submits to execution the other property. (p. 728.)

EXEMPTION.—If a Person Having Several Articles of Personal Property or Several Animals, one of which he is entitled to retain as exempt from execution, removes all but one beyond the reach of his creditors, he cannot, while thus retaining the others beyond the reach of creditors, claim that one as exempt. (pp. 728, 729.)

PRACTICE—Special Findings of Facts.—If a judge trying a cause without a jury files written findings of fact, he may thereafter, on the request of a party, make further findings, and the appellate court may, upon such request being made, review the evidence at large, when other material facts are found in the record, not included in the findings made. (p. 729.)

Rogers & Rogers and H. K. Trammell, for Rogers.

Pickle, Turner & Kennedy and John Jennings, Jr., for Ayers.

342 NEIL, J. This was an action of replevin, brought originally before a justice of the peace of Campbell county, for a horse and mule, which had been taken by defendant in error from the plaintiff in error, under an execution in favor

of one L. P. Smith. From the judgment of the justice of the peace an appeal was prayed to the circuit court of the county, and there the case was tried by the court without the intervention of a jury.

At the request of the defendant in error the court below made a written finding of facts substantially as follows:

That the horse and mule replevied were found by the levying officer and levied on in Jellico, Tennessee, and were the only horse stock of any kind that plaintiff in error had within the state; that plaintiff in error was not present when the levy was made, but on his return, when he learned that a levy had been made, he claimed the animals as exempt and demanded their restoration; that plaintiff in error was a resident and citizen of Jellico, Tennessee, and was the head of a family; that in addition to the animals levied on he owned two small mules, known as "bank mules," such as are used in coal mines, but these mules were in Kentucky at the time the levy was made upon the other animals, and had been almost continuously at work in plaintiff in error's coal mine in that state; that these bank mules were kept at work in the Kentucky mine, and, when not actually at ³⁴³ work, were kept in a stable or barn at the mine, and were never kept in Tennessee or used for hauling or other work in Tennessee; that these bank mules were still in Kentucky when the plaintiff in error demanded the return of the animals levied on; that plaintiff in error was accustomed to use the animals levied on in hauling coal and other articles in the city of Jellico.

On these facts the circuit judge rendered a judgment in favor of the plaintiff in error.

On the trial in the circuit court, after the facts above mentioned were found, the defendant in error asked the circuit judge to make the following additional findings:

"1. That plaintiff, J. C. Rogers, fraudulently removed his property to Jellico, Kentucky, from his residence in Jellico, Tennessee, shortly prior to the issuance and levy of the execution in this case, and that said Rogers removed his property as aforesaid for the purpose of evading payment of the judgment on which the execution was issued and levied on the mare and mule in controversy. This request is based upon the testimony of J. C. Rogers, the plaintiff, given on his cross-examination.

"2. That plaintiff, J. C. Rogers, moved his barn, or, rather, rebuilt his barn, across the state line in Jellico, Kentucky,

and stabled all his horse stock in Kentucky, and does now, after the suit was instituted in which the judgment on which the execution levied on the mare and mule in controversy was issued; that ³⁴⁴ Rogers' barn in Tennessee was burned on April 24, 1905; that L. P. Smith instituted suit against Rogers in June, 1905, and after August 1, 1905, Rogers built his barn in Kentucky, where he has ever since, and does now, keep his four head of horse stock, the mare and mule in controversy, and the two small bank mules, 'Frank' and a white mule. This request is based on the testimony of L. P. Smith and J. C. Rogers, the plaintiff.

"3. That prior to the levy of the execution in question, and after the affirmation of the judgment in the supreme court, by defendant, Millard Ayers, on the mare and mule in controversy, plaintiff, J. C. Rogers, frequently rode, in a run, his bank mule, 'Frank' in Jellico, Tennessee; but that since said levy plaintiff, Rogers, has kept said mule 'Frank' in Kentucky. This request is based upon the testimony of J. C. Rogers and L. P. Smith.

"4. That plaintiff Rogers, operates a coal mine in Jellico, Kentucky, which mine is about five hundred or six hundred feet across the state line between Tennessee and Kentucky; that in this mine Rogers works his two small bank mules, and from this mine he works the mare and mule in controversy in hauling coal into Tennessee to his customers, and to be loaded on cars in the city of Jellico, Tennessee, for shipment.

"5. That plaintiff, J. C. Rogers, failed to bring the two small bank mules in his possession at the time of the levy, and tender them, and offer to exchange them ³⁴⁵ for the mare and mule in controversy; that, in claiming the mare and mule levied on as exempt, Rogers never offered the officer, Millard Ayers, the two small mules in exchange for the mare and mule claimed as exempt."

The circuit judge declined to make these additional findings.

The case was appealed to the court of civil appeals and there tried, resulting in a judgment in favor of the defendant in error, and from this judgment the case was brought to this court upon certiorari. Errors were assigned here by the plaintiff in error upon the decision of the court of civil appeals, and the defendant in error renewed here his objections to the findings of the circuit judge.

As to the matters covered by the first request, the testimony shows that the plaintiff in error's piano was moved into Ken-

tucky to avoid its subjection to the judgment of Smith. This request, as bearing upon the bank mules, will be disposed of later, in stating our general conclusion from all the evidence.

The matters stated in the second request are found in the evidence.

As to the matters contained in the third request, it is shown in the evidence of the plaintiff in error that he frequently rode the mule "Frank" in a run into Jellico. This was before the execution was issued, but whether it was after the judgment of the supreme court does not appear clearly. We think, however, it may be inferred ³⁴⁶ that it was after the affirmance of the judgment, and before the issuance of the execution.

The matters contained in the fourth and fifth requests are found in the evidence.

From the additional facts found taken in connection with those found by the circuit judge, we cannot resist the conclusion that the plaintiff in error built his barn in Kentucky, and kept the bank mules over there, for the purpose of evading the payment of the Smith debt. We are of the opinion that the act of the plaintiff in error in so removing the two small bank mules out of Tennessee into Kentucky, and keeping them in the latter state, and his failure to turn them over under the execution, in place of the animals levied on, must be regarded as a selection of these mules as his exempt property. Of course, when the horse and mule were levied on, the plaintiff in error had the right to select these latter animals as his exempt property; but it became his duty to put other property of the same kind in their place, if he had it: *Pyett v. Rhea*, 6 Heisk. 136. It would not do for him to say that he could not place the other two mules under the execution in lieu of the livestock levied on, on the ground that the said other mules were in Kentucky, as stated. Having removed them into the latter state for the purpose of avoiding the payment of the debt, he must be treated as having selected those mules as his exempt property. In *Robinson v. Myers*, 3 Dana, 441, it was said: "The fourth provision in the general execution statute of 1828 (1 St. Law, ³⁴⁷ 641), whether interpreted according to its letter or to its obvious policy, should be understood as intended to secure to every housekeeper with a family against the claims of judgment creditors, the use of only one work beast. If he has more than one, and for the purpose of eluding his creditors, or for any

other purpose, sends all except one beyond the limits of his county, or even this state, he cannot be entitled to the exemption of the only one left at home, because he would then have more than one which he might use, and the statute only intended to secure to him the right to use one; and though an execution debtor, owning more than one work beast subject to the execution, may elect which one he will keep, yet, if one of them only be within reach of the execution, he cannot defeat the creditor's levy on that one, by electing to keep it, whilst he retains the right to control and enjoy the use of another, which he will not substitute under the execution; for if he could do so a beneficent statute, enacted for his protection, might be prostituted as an engine of fraud and evasion, and thus perverted to ends altogether inconsistent with its spirit and policy. As, therefore, the facts in this case conduced to prove that the plaintiff had a work beast which he had carried to Tennessee, and there left, subject to his control at any time, the verdict and judgment in favor of the defendants, in this action of trespass, for selling under execution the only work beast belonging to him in this state, was not without evidence, or contrary to law, and ³⁴⁸ should not therefore be disturbed." Likewise, in the recent case of *Florida Loan etc. Co. v. Crabb*, 45 Fla. 306, 33 South. 523, it was held that concealment or removal beyond the reach of his creditors of part of his personal property by a defendant in an attachment proceeding, as a preliminary to claiming his right of exemption, would, where the property remained concealed, be treated as a selection pro tanto by the debtor of his exemption.

We think both of these decisions are supported by sound reason and common sense.

That the counsel for defendant in error acted correctly in making application for additional findings is apparent from the rules laid down in *Hinton v. Sun Life Ins. Co.*, 110 Tenn. 113, 72 S. W. 118; and that we may, upon such requests made, review the evidence at large, when other material facts are found in the record not included by the circuit judge, is apparent from the same case: See page 129 of 110 Tenn., and page 121 of 72 S. W.

It results that there is no error in the judgment of the court of civil appeals, and it is affirmed.

To Claim Property as Exempt is a personal privilege of the debtor, but he may waive such privilege, and does waive it, when he conveys the property to another, especially when with fraudulent intent: *Wyman v. Gay*, 90 Me. 136, 60 Am. St. Rep. 238. As to the forfeiture of exemption rights by removing from the state, see *Brown v. Beckwith*, 58 W. Va. 140, 112 Am. St. Rep. 955.

To Secure the Benefit of a Statute of Exemptions, the debtor must, by timely interposition, select and reserve such property as he claims to be exempt when the officer seeks to take it in satisfaction of his writ: *Thibault v. Lennon*, 39 Or. 280, 87 Am. St. Rep. 657.

PRICE v. CLAPP.

[119 Tenn. 425, 105 S. W. 864.]

CRIMINAL LAW—Evidence of Other Acts or Crimes.—In an action for a libel contained in an anonymous letter, evidence that the defendant had admitted the writing of other anonymous letters and had stated that she was something of a white cap is incompetent. Such evidence is not admissible as showing the intent with which the libelous letter was written, when intent is apparent on its face. (p. 732.)

APPEAL AND ERROR—Criminal Trials—Reversal for Admission of Incompetent Evidence.—If incompetent evidence has been admitted and the appellate court can see that in no aspect of the case could it have injured the objecting party, there will be no reversal. Where, on the other hand, the court cannot so see, or where it appears clear that the evidence must have prejudiced such party, he is entitled to a reversal. (pp. 732, 733.)

LIBEL, Damages for, When cannot be Regarded as Nominal Merely.—The fact that after the publication of a libel against an employé, he remained for some time in the service of his employer, does not entitle the libeler to have the damages regarded as nominal only, if it appears that a want of confidence on the part of the employer was immediately manifested and the employé was humiliated. (pp. 733, 734.)

LIBEL, Punitive Damages, When may be Awarded.—For any libel involving a charge of moral turpitude, the jury may, in its discretion, award punitive damages. (p. 734.)

HUSBAND AND WIFE, Joinder of in an Action for Her Libel.—A husband's joinder with his wife in an action to recover for a libel published by her is not required on the ground that her misconduct is imputable to him, but for conformity's sake, and because the marriage relation makes it impossible for the injured person to sue the wife alone. (p. 734.)

LIBEL—Damages Which may be Awarded Against Husband for a Libel by His Wife.—In an action against husband and wife to recover for libel published by her, not due to any fault of his, all damages recoverable against him must be compensatory only. (p. 735.)

HUSBAND AND WIFE—Damages Against for Libel Published by Her Only—Punitive and Vindictive.—In an action against husband and wife for libel published by her, there may be an assessment or verdict showing what the jury holds as punitive and what as vindictive damages. For the latter she may be held liable, and both for the amount fixed as punitive damages. (p. 736.)

Shields, Cates & Mountcastle, for Price.

Roberts & Harris, for Clapp.

⁴²⁸ NEIL, J. R. T. Clapp brought this suit in the circuit court of Knox county against G. L. Price and his wife, Annie B. Price, to recover the sum of five thousand dollars damages alleged to have been suffered by the plaintiff Clapp by reason of an anonymous letter averred to have been written by Price and wife to Clapp's employer, one Crouch, in which the writer is alleged to have charged Clapp with being a thief. The declaration charges in substance:

1. That on or about the nineteenth day of March, 1906, the defendants, Price and wife, wrote and mailed to Mr. Will Crouch the following letter, to wit: "I understand R. Clapp is at work in your flower establishment. I want to give you a little warning. You better arrange money affairs so he cannot handle any cash. If you do, you will come up short. I know what I say."

2. That the letter so addressed to Will Crouch was intended for, and was in fact delivered to, one Arthur Crouch, plaintiff's employer, and that by R. Clapp was meant the plaintiff, R. T. Clapp, who was then in the employ of the said Arthur Crouch.

3. That by the letter the defendants intended to charge, and did charge, and assert falsely, that the plaintiff below was dishonest and was a thief.

⁴²⁹ 4. That, by reason of the writing and publication of the libelous letter, plaintiff was discharged and turned out of his position, and brought into public disrepute.

The defendants, Price and wife, pleaded the general issue of not guilty.

The case was tried in the circuit court before a jury and resulted in a verdict against the defendants, G. L. Price and his wife, Annie B. Price, for the sum of one thousand dollars. A motion for a new trial was entered and was overruled by the court, and thereupon the case was appealed to the court of civil appeals, and in that court the judgment of the court

below was affirmed, and the case was brought to this court by the writ of certiorari.

The errors assigned are as follows: First, that there is no evidence to support the verdict; second, that the trial judge erred in permitting the witness Mrs. R. T. Clapp to testify, over the objection of G. L. Price and wife, that Mrs. Price admitted to the witness that she had written anonymous letters other than the one sued on to one of her nephews in law and his mother; third, because the damages are excessive, indicating passion, caprice and prejudice on the part of the jury; fourth, that the circuit judge erred in charging the jury that they might award punitive damages.

The first error assigned is overruled. We are of the opinion that the testimony both of Mr. Clapp and his wife furnishes some evidence that the letter complained of was written by Mrs. Price.

⁴³⁰ The second assignment is based upon the admission of the following evidence to the jury over the objection of the plaintiffs in error:

“Q. Did Mrs. Price ever admit to you about writing other anonymous letters? A. Yes, sir.

“Q. I will ask you if she ever told you who she wrote them to. A. Yes, sir; she did.

“Q. What relation to her, if any, were the people she wrote them to? A. One was a nephew in law.

“Q. Is that the same relation Mr. Clapp is? A. Yes, sir; and the other one was his mother.

“Q. What did she represent herself as being? A. Something like a white cap.”

This evidence was objected to because irrelevant to the issue in this case. The objection was overruled by the circuit judge, and the witness was permitted to answer as above.

We are of the opinion that this testimony was incompetent on the ground stated in the objection. It was certainly wholly immaterial to the determination of the issue before the court whether Mrs. Price had written other letters or not. An effort is made to sustain the competency of the evidence on the theory of those cases wherein evidence of other crimes committed by a person on trial in a criminal case is allowed to go to the jury for the purpose of showing knowledge, intent and purpose in respect of the particular kind of acts under examination in the cases referred to. We think the principle applied in the cases instanced is wholly inapplicable to the

present controversy. Here there can be no doubt ⁴³¹ whatever of the intent or purpose with which the letter was written, nor is there any question of a scheme or plan. The only matter of inquiry under the evidence was whether Price and wife were guilty of writing this letter. Considering this letter, the fact that she had written other letters to other people could be of no sort of importance, and could throw no light whatever upon the question. The court of civil appeals in its opinion said in substance, that the evidence was incompetent, but its admission would not be sufficient ground for reversal, inasmuch as it could not have harmed the plaintiffs in error. We think this was an incorrect view. The rule upon this subject is that where incompetent evidence has been admitted, and this court can clearly see that in no aspect of the case could the parties objecting have been injured by such testimony, then there can be no reversal for the error in admitting it. The cases from this subject will be found collected in *Lowry v. Southern R. R. Co.*, 117 Tenn. 507, 101 S. W. 1157, et seq. Not only can we not be so certain that there was no injury inflicted, but it seems very clear to us that the evidence referred to was very harmful to the plaintiffs in error, since it no doubt inflamed the jury, and added materially to the amount of damages which they allowed. This evidence placed the plaintiffs in error, or, rather, Mrs. Price, before the court and jury in the aspect of a common libeler, who should not only be compelled to respond to the injury done to the defendant in error, ⁴³² but should be punished for her other infractions of good order against other persons.

The second assignment is therefore sustained.

As to the third assignment, we deem it proper to say only this: Since the judgment must be reversed, and the cause remanded to the lower court for a new trial, for the error mentioned in the second assignment, and for that mentioned in the fourth assignment, which we shall presently consider, we do not deem it necessary or proper to pass upon the evidence as to the amount of the verdict further than to say that we do not think the suggestions contained in the brief under the third assignment, to the effect that only nominal damages should be allowed, can be entertained. It is true that Mr. Clapp remained with Mr. Crouch as his employé for some time after the letter was received, still it was testified to by Mr. Clapp that the keys were immediately taken from him,

and he was thus denied the confidence of his employer, and humiliated. We do not think that, under such circumstances, a verdict for mere nominal damages would be sufficient.

Under the fourth assignment, objection is made to the charge of the circuit judge upon the subject of punitive damages. The portion of the charge to which objection is raised is in the following language: "In the event you find for the plaintiff in this case, you can also award punitive or vindictive damages. In other words, any charge that imputes moral turpitude is a case that the jury may in its discretion and under the ⁴³³ facts and circumstances of the case award punitive or vindictive damages, which is measured by no other rules than by considering all the facts of the case, and such damages as the jury thinks ought to be awarded that would deter any others from the commission of a like offense."

It is not denied by counsel for the plaintiffs in error that in general punitive damages may be allowed in this class of cases, and it has been so held in the case of *Saunders v. Baxter*, 6 Heisk. 369. The point, however, of the objection is that the husband was not liable for punitive damages, and that the charge quoted was erroneous as to him.

We had this question before the court at the September term, 1904, at this place, in the case of *Thomas Lee & Wife v. Adelia C. Atchley*, by Next Friend (memorandum case). In that case, in an opinion delivered by Beard, C. J., it was said:

"There is no doubt that in a case where such damages are proper evidence of the pecuniary condition of the wrongdoer may be given: *Dush v. Fitzhugh*, 2 Lea, 307; *Cumberland Tel. etc. Co. v. Poston*, 94 Tenn. 696, 30 S. W. 1040. But this is not that case. This suit is brought against the husband and wife for slanderous words alleged to have been spoken by her. It is neither averred in pleading nor pretended in evidence that the husband counseled or connived at their utterance. The declaration alleges that the wife did the wrong. This ⁴³⁴ is the case which the plaintiff himself made. If the declaration had alleged that it was done by the wife in the husband's presence, or upon his demand, it would have been demurrable by the wife. It is because the wrong complained of is the wife's independent and personal act that she can be sued at all. It is well settled that the husband is not joined as defendant in such cases on the ground that

the wife's misconduct is imputable to him, but for conformity's sake. His being a defendant results not from his participation in the wrong, but from the fact that the existence of the marriage relation makes it impossible for the injured party to sue the wife alone. To reach her, the husband must be joined in the action. If the wife is found guilty, notwithstanding his innocence, the law visits the consequences on his head, as well as hers. But where this is the case, does not the violated law exact all to which it is entitled when it exacts from this innocent party full compensation for the wrong inflicted by the wife? Upon what reasonable ground can it be maintained that he should be compelled to answer in exemplary damages? These are allowed for a wanton and flagrant wrong. Why, then, should they be required of one absolutely blameless, and only held liable on technical grounds? So it is, we think, the weight of authority and of sound reason that the damage recoverable against him is compensatory, and that vindictive damages will not be allowed: Newell, p. 365, and cases cited."

This would, of course, not preclude a judgment ⁴³⁵ against the wife herself for punitive damages, and there could be no objection to having the verdict show how much was assessed on this head.

It has been held in this state, in accordance with the weight of authority everywhere, that a verdict is not proper which distributes the liability between joint tort-feasors according to the jury's impression as to the varying degrees of culpability of the respective parties, but that all who participate are equally liable to the injured party, and he is entitled to a solid verdict against all the guilty ones: Nashville etc. R. R. Co. v. Jones, 100 Tenn. 512, 45 S. W. 681. It has been held, however, that, where one of the defendants is found not guilty, a verdict may be rendered in favor of that one, and at the same time a verdict against the guilty one in favor of the plaintiff in the action: Darwin v. Cox, 5 Yerg. 257; Carpenter v. Lee, 5 Yerg. 265. And it has been held in Nashville St. Ry. Co. v. Gore, 106 Tenn. 390, 61 S. W. 777, that, where several tort-feasors sued jointly, a new trial may be granted as to one, and there may be an appeal as to another, and the judgment enforced against the latter. But, coming more closely to this special question, it has been held that there may be separate findings in the verdict, as to different elements of recovery, against the same defendant even: Wilson

v. Freedley (C. C.), 125 Fed. 962, 129 Fed. 835; 22 Am. & Eng. Ency. of Law, 913, and notes thereto.

It is true that the husband is liable for the wife's libel (Hill v. Duncan, 110 Mass. 238; Austin v. Wilson, 4 ⁴³⁶ Cush. 273, 50 Am. Dec. 766), but she is also liable as a very real party (Smith v. Taylor, 11 Ga. 20; Baker v. Young, 44 Ill. 42, 92 Am. Dec. 149), and in Texas it is held that as between husband and wife, where a judgment has been rendered against them for damages occasioned by the wife's slander, if the husband in no way participates in the wrong, the separate estate of the wife will be applied to the payment of the judgment, and, if her property is not sufficient, then resort will be had to the common estate, after which the separate estate of the husband may be taken: Zeliff v. Jennings, 61 Tex. 458.

Under the rule above announced in Lee v. Atchley, we see no objection to a verdict against the husband and wife for their joint liability, and against the wife for such additional amount as the jury may think proper on the basis of punitive damages, and the framing of the judgment accordingly. In Shannon's Code, it is laid down:

"Sec. 4700. Judgment may be given for or against one or more of several plaintiffs, or for or against one or more of several defendants.

"Sec. 4701. In such case, the verdict shall be as the right may appear, and shall state separately any amount allowed to any of the parties.

"Sec. 4702. Such and so many judgments—joint, separate and cross—may be rendered as may be necessary to the rights of the parties, or one amount may be set off against another and judgment rendered for the residue, ⁴³⁷ or judgment may be rendered for the defendant against the plaintiff for any amount or balance for which it is found that the plaintiff is liable."

For the errors committed in respect of the matters mentioned in the second and fourth assignments, the judgment of the court of civil appeals, and of the circuit court must be reversed, and the cause remanded to the circuit court for a new trial.

As to When Evidence of Other Crimes is admissible in criminal prosecutions, see the note to Sykes v. State, 105 Am. St. Rep. 976.

The Liability of a Husband for the torts of his wife is the subject of a note to *Henley v. Wilson*, 92 Am. St. Rep. 164. An examination of this note will disclose that in some states the absurd rule still obtains that a man is answerable for torts committed by his wife during his absence and without his knowledge or consent.

LUTTRELL v. KNOXVILLE, LA FOLLETTE AND JELICO RAILROAD COMPANY.

[119 Tenn. 492, 105 S. W. 565.]

MECHANICS' AND MATERIALMEN'S LIENS, Subcontractors as Parties to Foreclosure of.—In a suit to enforce a lien for materials and supplies furnished to a subcontractor, he should be made a defendant. (p. 742.)

MECHANICS' AND MATERIALMEN'S LIENS, Waiver of Failure to Make Subcontractor Party.—In a suit against a railroad company to establish and enforce a materialman's lien for supplies furnished a subcontractor, the failure to make him a party defendant is waived by the company's answering to the merits without objecting by demurrer or otherwise. (p. 743.)

MECHANICS' AND MATERIALMEN'S LIENS—Objection to the Nonjoinder of a Subcontractor, What does not Amount to.—In a suit against a railroad company to enforce a materialman's lien for supplies furnished a subcontractor, an answer by the company denying that the complainants have taken the steps to fix a lien in their favor on the property, or that they have acquired any lien on such property for the payment of their claim, does not amount to a plea or objection that a subcontractor has not been made a party defendant. (p. 743.)

MECHANICS' AND MATERIALMEN'S LIEN, Defect in Parties, When cannot be First Made on Appeal.—Where, from the pleadings and record on an appeal in a suit to enforce a materialman's lien, it does not appear that the failure to establish the claim by judgment against the subcontractor or to make him a party defendant was presented in any manner in the trial court, such failure cannot be urged on appeal. (p. 743.)

MECHANICS' AND MATERIALMEN'S LIEN, Suit to Enforce—Jurisdiction Over the Property, When Acquired Without Attachment.—In a suit to enforce a materialman's lien against the property of a railroad company for supplies furnished a subcontractor, it is not necessary to bring the property within the custody of the court by attachment or like process, if the bill is framed in conformity with the statute, describing the property upon which the lien is sought, the contract under which it is claimed, the subletting of a part of the work to the subcontractor, to whom the complainants furnished materials and supplies, and the portion of the road on which the work was done. (p. 746.)

MECHANIC'S LIEN LAW, Construction of.—A mechanic's lien law will be given a liberal construction to carry out its purpose and to secure and protect those entitled to the lien. (p. 745.)

MECHANICS' AND MATERIALMEN'S LIEN—Explosives.—Under a statute purporting to give a lien to every materialman or other person for constructing or aiding in constructing sundry specified appliances of a railroad or delivering material for any of these purposes, one is entitled to a lien for furnishing explosives. (pp. 742, 753.)

MECHANICS' AND MATERIALMEN'S LIEN, Material for Shanties for Workmen.—A materialman is not entitled to a lien against a railroad company for material furnished to erect shanties adjacent to a right of way and used to shelter the workmen of a subcontractor. (p. 749.)

MECHANICS' AND MATERIALMEN'S LIEN for Materials not Used.—A materialman has a lien against a railroad company for materials furnished in good faith to be used in construction, but not in fact so used. (p. 749.)

MECHANICS' AND MATERIALMEN'S LIEN—Tools and Machinery.—A materialman is not entitled to a lien against a railroad company for tools and machinery furnished a subcontractor and used by him in his work, nor for gasoline and coal-oil, nor for torches used for lighting a tunnel while in process of construction. (pp. 749-752.)

MECHANICS' AND MATERIALMEN'S LIEN.—A materialman has not a lien against a railroad company for tablewares and commissary supplies furnished to a subcontractor or to his workmen, nor for materials furnished them in part payment for their labor. (p. 752.)

MECHANICS' AND MATERIALMEN'S LIEN—Blasting Appliances.—A materialman has a lien against a railroad for furnishing to a subcontractor dynamite, fuse, blasting wire, wire fuse, nails, nuts, washers, bolts, and soft steel and iron which go into the construction of the lining and approaches to a railroad tunnel. (p. 753.)

Templeton & Templeton, for the complainants.

Cornick, Wright & Frantz, X. Z. Hicks and Shields, Cates & Mountcastle, for the defendant.

497 HENDERSON, S. J. The original bill was filed in the chancery court of Anderson county February 3, 1905, by complainants, a copartnership engaged in the hardware business at Knoxville, against the Knoxville, La Follette and Jellico Railroad Company, a Tennessee corporation, the Louisville and Nashville Railroad Company, a Kentucky corporation, and Mason and Hoge Company, a corporation or copartnership, defendants.

Complainants furnished materials and supplies, etc., to G. H. Cole & Co. to the amount of ten thousand five hundred and six dollars and forty-five cents, which were used in the building and construction of Dossett's tunnel on the defendant's railroad, said G. H. Cole & Co. being subcontractors under Mason & Hoge Company; and the prayer of the bill is to have

their account declared a lien on the property of the railroads, under chapter 98, page 215, of the acts of 1891.

After certain interlocutory orders and report of special master, the chancellor declared a lien for a portion of the account, and refused to do so for the balance, dismissing the bill as to Mason & Hoge Company. Complainants have appealed from the portion of the decree that disallows the lien; and the two railroad companies appeal from the portion of the decree adverse to them. Both sides have assigned errors.

⁴⁹⁸ We first consider the first assignment of errors by the railroad companies, as that presents a preliminary question. This assignment is as follows:

“The chancellor erred in holding and decreeing that the complainants have acquired a lien on the property of the appellant railroad companies, under this proceeding, for any part of their alleged account against G. H. Cole & Co. There is no privity of contract between the complainants and either of the defendants, and as G. H. Cole & Co. are not sued, and the property of the defendants is not brought into the custody of the court by attachment, the chancery court did not acquire jurisdiction either of the person against whom complainants would be entitled to a judgment or of the property which they seek to have subjected to the payment of their alleged claim against G. H. Cole & Co., and the decree of the chancery court in this cause is absolutely void.”

This is a suit upon an open, unliquidated account for materials, etc., furnished G. H. Cole & Co., the subcontractors, and which were used in the construction of the railroad. It is argued that it is necessarily a proceeding to recover judgment in personam against the subcontractors, and a proceeding in rem against the property in which the subcontractor has no interest, and that, to enable the court to pronounce judgment in rem, complainants must first obtain a personal judgment against the subcontractor and bring the property of the railroad into the custody of the court by attachment, or, at least, that the subcontractor is a necessary ⁴⁹⁹ party to the proceeding to enforce the lien under chapter 98, page 215 of the acts of 1891.

The act of 1891 amends chapter 220, page 296 of the acts of 1883, and the lien is given by section 1, page 215 of the acts of 1891, to the materialman and others on the property of the railroad “in as full and ample a manner as is now pro-

vided by law for persons contracting directly with such railroad company for any such work and labor done or for materials furnished, provided that within ninety days after such materials are furnished such materialman shall notify in writing any such railroad company or the owner of such railroad, should it or they reside in the state, or its or their agents or attorneys, should it or they be beyond the limits of the state, that said lien is claimed, specifying in the face of said notice the character of the materials furnished, and the value thereof; and said lien shall continue for the space of one year from the service of said notice, and continue until the termination of any suit commenced for the enforcement of said liens, brought within said one year; and said liens shall have priority over all other liens on such railroad, its property and franchises."

Section 2 provides "that the liens provided for in this act may be enforced by suits brought against such railroad company in the circuit or chancery court of the county or district where the work or material, or any ⁵⁰⁰ part thereof, was done or furnished, or any part of said services was rendered."

Section 3 provides "that the plaintiff shall set out in his declaration or bill, as the case may be, with reasonable certainty, the work done, services rendered or materials furnished, the amount claimed therefor, the nature and substance of any contract made with such railroad company, or any contractor or construction company, or subcontractor, as the case may be, accompanying such declaration or bill, with a copy of the notice executed, as required in the first section of this act. And such suit shall be docketed and conducted as other suits in said courts."

The bill in this case by its averments fully complies with above directions of the act with regard to notice. G. H. Cole & Co., the subcontractors to whom the materials were furnished, are not made parties. The bill alleges that the Mason & Hoge Company had the contract originally with the railroad company to construct the Dossett tunnel. They sublet the work of construction to G. H. Cole & Co., as subcontractors, to which the railroad company agreed.

This latter company began the work of construction September 15, 1902, but failed to comply with the terms of their contract, and certain modifications of the contract were agreed upon between them and Mason & Hoge Company.

G. H. Cole & Co. finally failed to carry out their contract and became wholly insolvent so that, under the provisions of the contract between the two, ⁵⁰¹ the Mason & Hoge Company, on November 30, 1903, took charge themselves of the work. G. H. Cole & Co. voluntarily retired from the work, and delivered to Mason & Hoge Company all the materials then on hand, which had been furnished by complainants to the former company, and the latter company prosecuted the work to completion, completing it the 1st of April, 1905.

The bill exhibits an itemized statement of the account of materials, supplies, etc., furnished by complainants to G. H. Cole & Co., showing a balance due thereon and unpaid of ten thousand five hundred and six dollars and forty-five cents, and alleges that the whole of these were used in the construction of the tunnel, a part by G. H. Cole & Co., and the remainder by Mason & Hoge Company.

The railroad companies answer to the merits, and interpose no objection by demurrer or otherwise on account of the failure of complainants to make G. H. Cole & Co. parties. The Mason & Hoge Company also answers fully to the merits.

The railroad company holds a contract of indemnity from Mason & Hoge Company, and that company, in their answer, admit that certain portions of the materials furnished by complainants to G. H. Cole & Co., amounting to four hundred and sixty-seven dollars and thirty-eight cents, are liens. They tender this amount to complainants in full settlement of their claim. It being refused, the money is paid into court; and they deny that complainants are entitled to lien for any of the other articles.

⁵⁰² While the act does not expressly provide that the party to whom the materials are furnished, the subcontractors, G. H. Cole & Co., in this case shall be made parties, the authorities are to the effect that this is necessary. In 2 Jones on Liens, section 1303, it is said: "A subcontractor who holds an open, unsettled or disputed account against the principal contractor should obtain an adjudication of this before seeking to establish a lien against the owner, or at the same time that he seeks to do so. He should either obtain a judgment against the contractor before bringing an action to enforce the lien, or he should make the contractor a party to that action. The burden of ascertaining whether there is any defense to the action ought not to be put upon the owner of the property. He is not presumed to have any knowledge upon the subject.

Further than this, if the contractor establishes his lien against the property, and the owner is compelled to pay it, he has recourse on the principal contractor. He ought to be furnished with an adjudicated claim, and not with a mere open account."

In *Vreeland v. Ellsworth*, 71 Iowa, 347, 23 N. W. 374, it is said: "We have the question whether a subcontractor, who holds an open, unliquidated and unsettled account against the principal contractor, may bring his action against the owner of the building or improvement, and establish a mechanic's lien upon the property, without adjudicating the claim or attempting to adjudicate in ⁵⁰³ any way against the contractor who is the person primarily liable upon the account. We think this question must be answered in the negative. If the claim were liquidated, it may be the principal contractor would not be a necessary party. But that question we need not determine. This is an open, unliquidated account—a mere charge against the contractor. The burden of ascertaining whether there is any defense to the action ought not to be put upon the owner of the property. He is not presumed to have any knowledge upon the subject. Further than this, if the subcontractor establishes his lien against the property, and the owner is compelled to pay it, he has recourse on the principal contractor. He ought to be furnished with an adjudicated claim, and not with a mere open account."

To the same effect are the following: *May & Thomas Hardware Co. v. McConnell*, 102 Ala. 577, 14 South. 768; *Cumming v. Wright*, 72 Ga. 767; *Murdock v. Hillyer*, 45 Mo. App. 287; *Ashburn v. Ayers*, 28 Mo. 75; *Estey v. Hallack etc. Lumber Co.*, 4 Colo. App. 165, 34 Pac. 1113; *Thompson v. Gilmore*, 50 Me. 428.

In *Warner v. Yates & Co.*, 118 Tenn. 548, 102 S. W. 92, which was under chapter 67, page 79, of the acts of 1881, as amended by chapter 103, page 207, of the acts of 1889, construing that particular statute, it is said: "The principal contractor is a necessary party, because he is the debtor sued, and the owner of the property, because it is sought to reach his or her property. They are both interested, and must have their day in court; otherwise, ⁵⁰⁴ there would be a failure of due process of law. The principal contractor has the right to controvert the indebtedness claimed, and the owner of the property the existence of the lien sought to be enforced,

and the action cannot be maintained without establishing both the debt and the lien."

While it is true that G. H. Cole & Co. are proper parties, we think that the railroad companies have waived their right to make the question by answering to the merits, without making the objection by demurrer or otherwise.

It is insisted that the amendment to the answer makes the question, where it is denied "that the complainants have taken the necessary steps in this case to fix a lien in their favor upon respondents' railroad and property, and they deny that complainants have acquired or are entitled to any lien upon respondents' property for the payment of their alleged claim."

This is no more than a repetition of the denials of the answer as originally filed, which simply make an issue upon the allegations of the bill as to whether the materials claimed were furnished to G. H. Cole & Co., for the construction of the tunnel, and were used for that purpose, whether the notice has been given as prescribed by the statute, whether the bill has been filed in time thereafter—in short, whether complainants had taken the proper preliminary steps prescribed in the act, so as to enable them to maintain a suit to enforce the lien.

Looking to these pleadings and the decree of the ⁵⁰⁵ chancellor, it does not appear that the question of the failure of complainants to first establish their claim against G. H. Cole & Co. by suit and judgment, or to make them defendants in this case, was made in the lower court, or directly raised or determined there; and it cannot be made in this court.

In addition to this, the evidence by complainants to show that the materials claimed were furnished G. H. Cole & Co. and by them used in the construction of the tunnel was admitted without objection on the part of the defendants.

In the case of Noll & Thompson v. Cumberland P. R. R. Co., 112 Tenn. 140, 79 S. W. 380, it is held that the defects in a subcontractor's notice to a railroad of his lien, or the failure to give such notice, may be waived by defendant, and same is waived by not making the objection in the court below. It is said in that case: "The object of the notice required by the statute is to apprise the railroad company of the amount claimed, and thus put it in a position where it can protect itself against overpayments to the original contractor. While it performs this important function, yet, like any other

benefit, it may be waived by the party in whose interest it is created. And a waiver can very well be assumed unless a timely objection is made to the notice. Such objection, we think, comes too late when made for the first time on appeal."

It is next insisted that the decree of the chancellor is erroneous, because the chancery court has not acquired ⁵⁰⁶ jurisdiction over the property of the railroad companies, and no authority to enforce any lien thereon, because complainants did not bring the property into the custody of the court by attachment or other appropriate process.

There is no provision in the act of 1891, and none in the act of 1883, requiring the issuance and levy of attachment on the property sought to be subjected.

The bill is framed in strict conformity with the provisions of sections 2 and 3 of the act. It describes the lines of railroad upon which the lien is sought as leading from Jellico, through the counties of Campbell, Anderson and Knox, to Knoxville. The contract for the construction of a large part of this line was awarded to Mason & Hoge Company, who sublet a part of the construction to G. H. Cole & Co., including that portion of the road comprising Dossett's tunnel and its approaches thereto; the portion thus sublet lying in Anderson county.

The bill is sworn to, but no attachment is issued. No question is made in the answer with regard to the description of the property; and by the decree of the chancellor the lien is declared upon the property by substantially the description given in the bill.

Referring to creditors' bill to set aside fraudulent conveyances, where the court has proper service on defendant, it is said, in the case of *August v. Seeskind*, 6 Cold. 166: "Having thus obtained jurisdiction, the court may ⁵⁰⁷ rightfully proceed to decree upon the equity of the cause, and give such relief to the complainant as may be suitable to the equity alleged and established. If the subject matter of the controversy be property of any kind, the court may decree such relief as may be proper to the equities of the parties, and execute such relief by process suitable to the purpose. Seizure of the property, pending the litigation, or at the beginning, is not generally essential to give the court jurisdiction over it and to enforce the proper relief in respect of it."

It is further said that if, during the progress of the suit, fear arises that the property may be wasted, upon proper

showing the chancellor will issue process to seize and impound it. This is only auxiliary to the jurisdiction of the court. "But," as said, "it is not essential to the jurisdiction of the court, to enable it to proceed to decree upon the matter in controversy, that the property be seized or impounded."

The right of the court of equity to enforce a lien upon property without seizure by attachment is enforced in *Bryan v. Zarecor*, 112 Tenn. 503, 81 S. W. 1252, when the property is specifically described in the bill.

In *Central Trust Co. v. Condon*, 67 Fed. 84, 14 C. C. A. 314, the case was a bill to enforce a lien of subcontractors and materialmen under the act of 1883. The facts arose before the passage of the amendatory act of 1891. The bill set out the facts constituting the lien, and described the property, and prayed for a sale of the property. There was no attachment prayed for or issued. ⁵⁰⁸ Judge Taft, speaking for the court of appeals of the sixth circuit of the United States, said: "It is clearly a suit to enforce a subcontractor's lien, for otherwise the court could not enforce it."

He further says: "The statute does not provide that an attachment should issue in suits to enforce railroad liens. It is true that under the mechanic's lien law of Tennessee the lien must be enforced by attachment, but this is because the section expressly requires it. There is no such provision in the railroad lien law. The lien of the principal contractor is to be enforced merely by suit, and the form of the declaration is prescribed in the statute. The lien of the subcontractor may be enforced by suit against the principal contractor as principal debtor and against the company as garnishee, but there is not a suggestion in the statute that attachments are necessary to the perfecting of a lien."

The uniform policy has been to give to the mechanic's lien law a liberal construction to carry out its purpose, and to secure and protect those entitled to the lien, and thereby to promote and encourage improvements: *Barnes v. Thompson*, 2 Swan, 313; *Alley & Burk v. Lanier*, 1 Cold. 541; *Kay v. Smith*, 10 Heisk. 41; *Steger v. Arctic Refrigerator Co.*, 89 Tenn. 453, 14 S. W. 1087, 11 L. R. A. 580; *Ragon v. Howard*, 97 Tenn. 334, 37 S. W. 136. In the last-named case it is said: "It is, and has been, the policy of our law to protect and enforce this lien of mechanics and furnishers, and not allow them to be defeated by any technical niceties of construction."

509 Without further discussion of the authorities, we think this first assignment of error by the railroad companies is not well taken, and the same is overruled.

Upon final hearing the chancellor decrees that complainants are entitled to lien upon the property of the railroad for any dynamite, fuse, blasting powder, blasting wire, wire fuses, gasoline and gasoline torches, coal oil, nails, nuts and bolts, soft steel and iron, and building material for shanties for the men, shown on the account, but that complainants are not entitled to lien for any of the other articles set out in the account. As the parties cannot agree upon the value of the articles so declared liens, the cause is referred to R. H. Sansom, Esq., who is appointed special commissioner, or master, to report thereon.

It is further adjudged that complainants have a lien on the property of the railroad for the payment of what may appear to have been declared a lien upon the coming in of the report of the special master, notwithstanding the fact that they caused no injunction to be issued, and no attachment to be issued and levied on the property of the railroad.

The special master makes his report in accordance with this reference, which is confirmed, without exception by either side, by final decree in the cause, and it is decreed that complainant have a lien for the following:

Dynamite, fuse, blasting wire and wire fuse..	\$ 267.84
Gasoline	224.95
Gasoline torches	49.50
510 Coal-oil	53.78
Nails, nuts, washers, bolts, soft steel and iron..	803.72
Building material for shanties	855.43

Making total\$2,255.22

The railroad companies are allowed thirty days in which to pay said amount into court, and upon default their property is decreed to be sold.

The second assignment of error by the railroad companies is with regard to the allowance of lien for the articles above referred to, aggregating two thousand two hundred and fifty-five dollars and twenty-two cents. While defendants contest lien for any amount upon their property, Mason & Hoge Company paid into court an amount to cover the first item above of two hundred and sixty-seven dollars and eighty-four

cents, and also two hundred and one dollars and seventy-two cents; the latter sum being that part of the item for nails, nuts, etc., of eight hundred and three dollars and seventy-two cents, which they admitted are lienable. This thus leaves the remainder of that allowed by the chancellor to which defendants' assignment of error applies.

The assignments of error by complainants are with reference to the balance of their account, less the sum of one thousand eight hundred and forty-eight dollars and seven cents, which was for steel rails used in the construction of a tramway, but were not consumed in use; the claim being for all materials and supplies furnished G. H. Cole & Co. that were consumed in their use for the construction of the tunnel, which consist of all the other articles in their account, the subcontractor's plant and outfit, machinery, tools, etc., and repairs of same, and supplies for same.

It may be said that the assignments of error of both ⁵¹¹ complainants and defendants relate to materials furnished for all these purposes, for some of which the chancellor allowed lien and for some he did not.

The title to chapter 220, page 296, of the acts of 1883, is "An act to protect contractors, subcontractors, mechanics, laborers, and engineers who perform work or furnish materials for the construction or repair of railroads."

Chapter 98, page 215, of the acts of 1891, was to amend that act, as stated in its title, "providing a prior lien for and giving greater security" to the parties named therein. The portion of section 1 of this act necessary to be referred to in this connection is as follows:

"That section 3 of an act passed March 29, 1883, as referred to in the caption of this bill, the same being section 2778 of Milliken & Vertrees' Compilation of the Laws of Tennessee, be and the same is hereby amended so as to provide that hereafter every subcontractor, laborer, materialman or other person who performs any part of the work in grading any railroad company's roadway, or who constructs or aids in the construction or repairs of its culverts and bridges, or furnishes cross ties or masonry or bridge timbers for the same, which is used in the building and construction of such railroad, its bridges and culverts, or who lays or aids in the laying of its track, building of its bridges, the erection of its depots, platforms, wood or water stations, section-houses, machine-shops or other buildings, or for the delivery of material

for any of these purposes, or for any ⁵¹² engineering or superintendence, or who performs any valuable service, manual or professional, by which any such railroad company receives a benefit, all and every such person or persons shall have a lien on such railroad, its franchises and property, for the value of such work and labor done, or material furnished, or services rendered, as hereinbefore set out and specified, in as full and ample a manner as is now provided by law for persons contracting directly with such railroad company for any such work and labor done, or for material furnished."

As already stated, the material, supplies, etc., were furnished by complainants to G. H. Cole & Co., subcontractors under Mason & Hoge Company, and they were used and consumed in the construction, for the Knoxville, La Follette and Jellico Railroad Company, of the Dossett tunnel, a tunnel about one thousand two hundred yards long, which required about three years for completion.

The lien is conferred alone by the act, and its language must, of course, control. The lien is given in favor of the materialman "for the delivery of material" to the subcontractor "who performs any part of the work in grading any railroad company's roadway, or who constructs or aids in the construction or repairs of its culverts and bridges, . . . or who lays or aids in the laying of its tracks."

In *Hercules Powder Co. v. Knoxville R. R. Co.*, 113 Tenn. 382, 106 Am. St. Rep. 836, 83 S. W. 354, 67 L. R. A. 487, it is held ⁵¹³ that explosives furnished to G. H. Cole & Co., used in blasting in this Dossett's tunnel, are materials for which the furnisher is entitled to lien. It is said: "The consumption of explosives is the only use that can be made of them, and their consumption is absolutely necessary to the excavation of tunnels through rock. In other words, they are material which enter into the building and grading of the road, as much so as trestles, bridges, and culverts contain materials which are necessary to the grading of the road at such places as require trestles and bridges and culverts."

We refer first to the building materials furnished for the erection of shanties. These shanties were erected on lands adjacent to the right of way for the railroad, and upon lands leased for that purpose, and they were used for shelter for the workmen.

Upon the question as to whether the materialman has a lien for materials furnished in good faith to be used in the con-

struction, but which in fact were not used, the court, in *Hercules Powder Co. v. Knoxville R. R. Co.*, 113 Tenn. 382, 106 Am. St. Rep. 836, 83 S. W. 354, 67 L. R. A. 487, cites the case of *Stewart Chute Lumber Co. v. Missouri Pacific Ry. Co.*, 28 Neb. 39, 44 N. W. 47, decided by the supreme court of Nebraska, under the statute of that state somewhat similar to ours. The holding of that case is approved to the effect that the lien of the materialman attaches upon the delivery in good faith of the material to the subcontractor,⁵¹⁴ and it is not necessary that the material furnished should have been actually used in the improvement.

This Nebraska case further held that lumber and other material furnished to the subcontractor for the erection of shanty boarding-houses for the workmen and stables for the horses, erected adjacent to the right of way of the railroad, were liens under that statute. The decision in that case on this subject was by a divided court, and upon rehearing it was overruled by the opinion reported in *Gaughran v. Crosby*, 33 Neb. 33, 49 N. W. 769. This decision is based upon the particular language of the Nebraska statute. There the lien is given for material which "shall have been furnished or labor performed in the construction, repair and equipment of any railroad." The court says: "These words do not include lumber, material, or labor which was not performed or furnished in the construction, repair, or equipment of the road. If this were not so, there would be no limit to the liability of a railway company. If, by a strained construction of the statute, the company is held liable for material used for shanties, it would by the same rule be liable also for food and clothing for the employes and feed for the teams; and it would be difficult to tell where its liability would cease. The lien is created by statute, and independently of that no cause of action exists against the company."

The court cites as in accord the case of *Dudley v. Toledo etc. Ry. Co.*, decided by the supreme court of Michigan, and reported in 65 Mich. 655, 32 N. W. 884.

⁵¹⁵ The first decision in the Nebraska case is referred to in *Hercules Powder Co. v. Knoxville R. R. Co.*, 113 Tenn. 382, 106 Am. St. Rep. 836, 83 S. W. 354, 67 L. R. A. 487, as authority that the materialman is entitled to a lien for materials furnished in good faith to the subcontractor, whether they were actually used in the construction or not. The holding of the Nebraska case that there was a lien for the lumber fur-

nished for the shanties and stables is referred to only incidentally.

The materials furnished for these shanties were not put upon the right of way of the railroad, and did not go into the construction thereof, and are not lienable material under the act.

The other articles for which the chancellor allowed lien are gasoline, gasoline torches, and coal-oil. They were used for lighting the tunnel. The gasoline torches were used as small vessels to contain and utilize the gasoline; the work in the tunnel having been prosecuted day and night. The other articles, for which lien was denied, consist of packing, mattocks, cotton-waste, electric light supplies, carts, tools, shovels, spades, blacksmith tools, wagons, scrapers, plows, machines, machinery, derricks, derrick crabs, cables and repairs for all these.

Counsel for complainant in their brief say: "Confessedly the dynamite and the powder are liens; but the dynamite and powder could not be used without the drill to bore the hole in the rocks, and the drill could not be used without the engine and boiler, and the engine and boiler could not be used without the cotton-waste ⁵¹⁶ and the lubricating oil. The cotton-waste and the oil and the steel drills were all alike completely consumed in the use."

The contention is that complainants are entitled to lien for the articles referred to, because, from the character of the work of construction and the length of time required, they were necessarily consumed or destroyed in the use, some within a few hours or days, while some would last for months, and all were indispensable to the work.

The same principle can be as properly applied with regard to horses and mules that may be employed in hauling, which, on account of the hard and heavy draughts and long-continued work, are broken down and rendered worthless and useless. And thus the furnisher would have a lien on the railroad property for the whole outfit of the subcontractor, in addition to all the materials which were furnished for, or went into, the construction.

This would be a construction of the act which extends far beyond the intention of the legislature. The test is not whether the article furnished was consumed in its use, either instantly, as in case of explosives, or by degrees from long and hard use. If lien is allowed for tools and machinery, and horses and mules, for complete destruction, on the same prin-

ciple it should be allowed for deterioration in value pro tanto, when not completely destroyed.

In *Hercules Powder Co. v. Knoxville R. R. Co.*, 113 Tenn. 382, 106 Am. St. Rep. 836, 83 S. W. 354, 67 L. R. A. 487, the following rule is ⁵¹⁷ quoted from Elliott on Railroads: "But a lien cannot be obtained for machinery furnished to a contractor to be used in doing the work upon a bridge, under a statute authorizing a lien for all materials 'used in and about' the construction of a bridge."

In this connection it is said (pages 396, 397): "All of the decisions upon this subject draw a clear distinction between the explosives and explosive supplies used in the construction of a railroad company's roadway, and which are necessarily consumed in the use thereof, and machinery and tools furnished for that purpose, which are held to be a part of the contractor's plant, and which do not go into the building of the roadway, but retain their identity and fitness for future use, saving the limited and gradual wear and tear incident to such use. The explosives which are necessarily consumed in the use are held to be liens, while the tools and equipment which constitute the contractor's plant do not constitute liens under the several lien statutes."

There is cited in support of this the case of *Giant Powder Co. v. Oregon Pacific Ry. Co.* (C. C.), 42 Fed. 470, 8 L. R. A. 700, distinguishing the case of *Basshor v. Baltimore etc. R. R. Co.*, 65 Md. 99, 3 Atl. 285.

Rapalje & Mack's Digest of Railway Law, volume 6, page 284, digests many cases upon this question, and lays down the rule as adjudged therein in the following language:

"In providing that a materialman shall have a lien for all materials furnished for, or used in and about, the ⁵¹⁸ construction of bridges, the law means such materials as ordinarily enter into or are used in the construction of bridges, and are fairly within the express or implied terms of the contract between the owner and the contractor. It does not mean the machinery that may be used for the manufacture of the materials themselves.

"Where a contractor for building a bridge buys machinery for crushing stone to be used in the manufacture of artificial stone for the masonry work, and also appliances to carry the manufactured stone to the place where it is to be used, the seller of such machinery and appliances has no lien therefor under the provision of Maryland mechanic's lien law, which

gives a materialman a lien for all materials furnished for, or used in and about, the construction of bridges."

Section 3200, Revised Statutes of Missouri of 1879 (Ann. Stats. 1906, sec. 4239), provides "that all persons who shall do any work or labor in constructing or improving the road-bed, rolling stock, station-houses, depots, bridges or culverts of any railroad company, . . . and all persons who shall furnish ties, fuel, bridges or material to such railroad company, shall have . . . a lien," etc. In the case of *Central Trust Co. v. Texas etc. Ry. Co.* (C. C.), 23 Fed. 703, the United States circuit court held that "lubricating and illuminating oils are not 'materials,' within the meaning of section 3200 of the Missouri Revised Statutes, and parties furnishing them are not entitled to any statutory lien."

If the tools, carts and machinery furnished as a part ⁵¹⁹ of the subcontractor's outfit are not lienable articles under the act, it follows that the repairs and appliances used or needed in operating same would stand on the same ground.

Lastly, lien is claimed for the tableware and commissary supplies.

It is claimed that these articles were necessary to afford to the workmen cooking-stoves, table furnishings, and supplies in a commissary which was kept by the subcontractor, and the material furnished to the workmen in part payment for their labor.

Again, in *Hercules Powder Co. v. Knoxville etc. R. R. Co.*, 113 Tenn. 382, 106 Am. St. Rep. 836, 83 S. W. 354, 67 L. R. A. 487, the court adopts the language of the authority there cited, that "the food furnished a contractor for his workmen may be said to be 'used' and 'consumed' in the construction of the road on which they work, but this is only so in a remote and consequential way or sense. The food does not enter directly into the structure, and is not so used."

In *Elliott on Railroads*, section 1068, it is said: "So, of course, groceries and food furnished for the workmen, while in a sense used in the construction of the road, are not materials which so enter into its construction that a lien can be based upon them."

The stove upon which to cook the food and the tableware out of which to eat are too remote; and the legislature did not intend to give lien for such. The same principle would apply to clothing furnished the workmen, bedclothing upon which to

sleep, coal and wood for ⁵²⁰ fires by which to warm, and it might be extended indefinitely to any number of luxuries.

The result of the above holding is that none of the materials included in the account of complainants, made exhibit to the bill, are alienable materials, excepting the items for dynamite, fuse, blasting wire, and wire fuse, and the items for nails, nuts, washers, bolts, soft steel and iron, which went into the construction of the lining and approaches to the tunnel.

The cause is remanded to the chancery court, to be further proceeded with in accordance with this opinion. The costs of the appeal will be paid by complainants. The costs of the chancery court will be paid as adjudged by the chancellor.

The Word "Materials" as Used in a Mechanic's Lien Law has been held to include explosives used in blasting rock and earth: Schaghticoke Powder Co. v. Greenwich etc. Ry. Co., 183 N. Y. 306, 111 Am. St. Rep. 751; Slover v. Coal Creek Coal Co., 113 Tenn. 421, 106 Am. St. Rep. 851.

A Lien may be Acquired Against a Railway Corporation for materials furnished and used in the construction of its roadbed: Schaghticoke Powder Co. v. Greenwich etc. Ry. Co., 183 N. Y. 306, 111 Am. St. Rep. 751.

A Person Who Furnishes Board to Workmen employed in making brick under a contract with their employer does not perform labor nor furnish materials for making the brick, entitling him to a mechanic's lien: Perrault v. Shaw, 69 N. H. 180, 76 Am. St. Rep. 160.

If Material is Delivered in Good Faith to a Subcontractor to be used in the construction of a railroad, the materialman is entitled to a lien therefor in the absence of definite proof that the material was not so used: Hercules Powder Co. v. Knoxville etc. R. R. Co., 113 Tenn. 382, 106 Am. St. Rep. 836. As to whether one is entitled to a lien for materials furnished, but which through no fault of his are never used in the construction of the building, see Berger v. Turnblad, 98 Minn. 163, 116 Am. St. Rep. 353.

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SOUTHERN RAILWAY COMPANY v. BICKLEY.

[119 Tenn. 528, 107 S. W. 680.]

CARRIER, Liability of, is Dependent on the Delivery of the Property.—Delivery is essential to create liability of a party sought to be held as a common carrier, but such delivery may be constructive as well as actual. (p. 755.)

CARRIER, Delivery of Check to, When does not Amount to a Delivery of Baggage.—The delivery of a check for baggage to the agent of a railway corporation and the promise of the latter that the baggage would be in the train of a railroad represented by such agent does not amount to a constructive delivery of the baggage to it, nor render it liable for the destruction of the property by fire while still in the possession of the carrier which issued the check. Nor is it material that the two carriers had a common station and were represented by the same agent. (p. 756.)

Lindsay, Young & Smith and Jourolmon, Welcker & Smith, for the railroad.

Shields, Cates & Mountcastle, for Bickley, McClure & Co.

529 **BEARD, C. J.** This is an action to recover from the Southern Railway Company the value of the contents of a trunk which the defendants in error claim was lost by fire while in the possession of that company as a common carrier.

The record shows that one Armstrong was an employé of the defendants in error, traveling in their interest and carrying with him a number of trunks containing samples of merchandise for the purpose of exhibition to the trade. In his testimony Armstrong states that at Pennington Gap, in Virginia, on the line of the Louisville and Nashville Railroad, he checked the trunk in question to Cumberland Gap, a station of the road in this **530** state; that he did not accompany the trunk, but drove through the country to Tazewell, a town on the line of the Southern Railway Company, about twelve or fourteen miles south of Cumberland Gap; that on his arrival at Tazewell he found the agent of the Southern Railway Company at his place of business, and asked him if he could not have this trunk brought over on the morning train of that company, and upon his saying he could, he (Armstrong) delivered the check issued to him at Pennington Gap to this agent; that the next morning he returned to the station, when the agent volunteered the statement that the trunk would be on the train then due, and that, relying on this being done, he (Armstrong) left Tazewell over the line of this

railway for Knoxville, the agent agreeing that the trunk should be shipped to this latter point; that subsequently he was informed that some two weeks thereafter the depot at Cumberland Gap was destroyed by fire, and the trunk, with its contents, being still there, was burned.

He further states that the Louisville and Nashville and the Southern Railway had a common agent at Cumberland Gap, and used at that point for the transaction of their business the same station or depot. Upon these facts the question of law is: Was there a delivery of this trunk to the plaintiff in error, so as to make it liable for this loss as a common carrier?

That delivery is essential to create the liability of a party or corporation sought to be held as common carrier is beyond question. It is well settled, however, that ⁵³¹ this delivery can be as well constructive as actual, and many illustrations of a complete constructive delivery are found in the text-books and in the reports of many states. In the present case there was no actual delivery. Now, was there a constructive delivery, such as to make the Southern Railway liable for this loss? Even if it be true that this trunk was, at the time of the agreement made by the agent at Tazewell to forward it to Knoxville, in the depot at Cumberland Gap (and there is no evidence in the record of that fact), yet we do not see how the mere delivery of that check and its acceptance by the agent of the Southern Railway can be held as a constructive delivery to the latter road. Though it be, as was held by this court in *Louisville etc. R. Co. v. Weaver*, 9 Lea, 38, 42 Am. Rep. 654, that a check for baggage is, in legal effect, and answers the purpose of, a bill of lading, yet this check was issued by the Louisville and Nashville Railroad upon an undertaking to convey the trunk to Cumberland Gap. Wherever the trunk was at the time of the agreement in question, it was in possession and under the control of that company. It may be that, upon the presentation of that check by the Southern Railway to the agent of the Louisville and Nashville Railway Company, it would have surrendered its possession. But it was not surrendered, nor does it appear affirmatively from this record that it would have been. Certainly the mere agreement between Armstrong and the agent of the Southern Railway, without the consent of the Louisville and Nashville ⁵³² Railway Company, could not work a transmutation of possession. This was essential to the maintenance of the present action; for the authorities all agree that, until

the entire and exclusive custody of goods or baggage has been given to the common carrier, no responsibility rests upon him in that character: Hutchinson on Carriers, sec. 94; 4 Elliott on Railroads, sec. 1403 et seq.

We do not deem it of any importance in the settlement of this question that these two railways used the same station at Cumberland Gap and had there an agent in common. The duties of this party to his several employers were as distinct as if devolved upon two separate persons, who discharged them at two different stations or depots in that town.

If it appeared that the Southern Railway had, by an established custom or otherwise, authorized such an agreement as was made in this case, then no doubt the carrier relation would have at once attached; but there is nothing to show that such authority was given to its agent, either expressly or by implication. If bound to make good the loss of this trunk under the conditions disclosed, then this railway would have been equally bound upon such an agreement made by this agent if the check had made it deliverable to Louisville or some other point on the Louisville and Nashville Railway, hundreds of miles distant from Tazewell. Mere distance could not affect in any degree this question of liability. It could hardly be maintained that one who checked his ⁵³² trunk from the city of New York to Washington over one of the lines of the Pennsylvania System, and, without more, being at Bristol, Tennessee, delivered his check to the agent of the Southern Railway at that place, upon the agreement of the latter to see that the trunk was forwarded to Knoxville, Tennessee, where the owner was then bound, could hold that railway liable for its loss, where the failure occurred under the circumstances such as is shown in the present case.

It seems to us that, should the plaintiff in error be held liable in this case, then if, instead of delivering the check to its agent in Tazewell, it had been given by Armstrong to the agent of the transfer company in Knoxville, who accepted it with a promise to see that the trunk was forwarded, and, failing to do so, it was lost or destroyed, that company would be equally liable. Yet no one would insist that, without any authority shown upon the part of the transfer agent to make such agreement, or any proof of the fact that the trunk had ever come into the actual possession of the transfer company, it would be responsible for the loss. We are unable to understand how the mere fact that the line of the Southern Railway

extended from Tazewell to Cumberland Gap can in any wise affect the question.

We think the case falls within the authority of *Stewart v. Gracey*, 93 Tenn. 314, 27 S. W. 664. There, through its agent, the firm of Stewart, Ralph & Co. had purchased from a firm in the city of Clarksville a number ⁵³⁴ of hogsheads of tobacco. The defendants, Gracey & Bro., were common carriers in that city engaged in the transfer business. The agent of Stewart, Ralph & Co. delivered to Gracey & Bro. the warehouse receipts or coupons for this tobacco, and at the same time gave them a written order on the warehouseman for the same. There were unavoidable delays experienced by Gracey & Bro. in the removal of the tobacco, during which time several of the hogsheads were destroyed by fire, and the object of the suit was to hold them liable for the loss thereby sustained, upon two grounds: First, of negligence; and, second, that as common carriers they were insurers against all losses except those occasioned by the act of God or the public enemy. In the course of the opinion, in disposing of the second ground, the court said: "It is insisted the order and coupons had been accepted by the carrier, and that by virtue of holding them they had commenced to move, and had in fact moved, a portion of the fifty-six hogsheads. . . . The argument is that these facts constituted a constructive delivery, and the tobacco thereby passed under the control and custody of the carrier for removal, and that the carrier's liability at once attached. We are unable to concur in this contention. The contract of carriage involves a bailment, and ordinarily there must be an actual delivery of the goods to the carrier. A contract with a common carrier for the transportation of property being one of bailment, it is necessary, in order to ⁵³⁵ charge him for its loss, that it be delivered to and accepted by him for that purpose. But such acceptance may be actual or constructive. For instance, if the property be deposited at a designated station, in accordance with a conventional arrangement between the parties in respect to the mode of delivery, or if it be deposited with a third person who is authorized by the carrier to execute a bill of lading in the name of the carrier, then such mode of delivery is as complete as if the property had been actually deposited with the carrier. . . . But in the case at bar the tobacco was not deposited in the custody of an agent of the shipper and constructively in the possession of the shipper himself. The carrier did not execute a bill of lading

or receipt for the property, nor did he in any way acknowledge that the property was in his custody. The carrier in this place simply had an order from the shipper to enable him to get possession of the tobacco. If the warehouseman had refused to recognize the order, and had converted the property to his own use, the carrier would not be liable simply for the reason that he had never secured possession of the goods."

If it be true that with the warehouse receipts or coupons in their hands, and an order from the owner for a delivery of the tobacco, there was no constructive delivery, so as to impose on Gracey & Bro. the liability of a common carrier, then we think the principle announced applies in this case, where an agent without any real or apparent authority, so far as we can see, from ⁵³⁶ his principal, accepts a check issued by another railroad for a trunk then at a point twelve or fourteen miles distant and in the custody of the railroad, and agrees to forward the trunk to his place of destination. That this agent may be responsible for his failure to do what he thus undertook is possibly true; but this is beside the question in controversy.

The judgment of the court below is reversed; and, this having been delivered without the intervention of a jury, the suit is dismissed.

The Liability of a Carrier for the baggage of passengers is the subject of a note to Wood v. Maine Cent. R. R. Co., 99 Am. St. Rep. 343. The necessity for delivery to the carrier before liability attaches for baggage will be found discussed on page 372 of this note.

TURNER v. STATE.

[119 Tenn. 663, 108 S. W. 1139.]

HOMICIDE, Consent to by the Person Killed.—The fact that the person killed consented to the killing and that it was in the execution of a joint agreement between the slain and the slayer will not remove the case from murder in the first degree. (p. 763.)

HOMICIDE, Malice or Ill-will not Essential to.—Hatred, ill-will or malevolence on the part of the slayer toward the slain is not essential to the express malice necessary to support a conviction for murder in the first degree. (pp. 764, 765.)

HOMICIDE.—Insanity on the Part of a Slayer is not Established on a trial for murder by showing that he entertained no ill-will toward the slain, and the enormity of the crime, as that it was committed under an agreement between the parties that the one should kill the other. (p. 766.)

Frank Sanders and J. Arthur Atchley, for Turner.

Attorney General Cates, for State.

664 McALISTER, J. The prisoner was convicted of the crime of murder in the first degree for the unlawful killing of one Minnie Scott, and was sentenced to hang. The killing occurred in East Knoxville, at the corner of Lithgow street and Church avenue, about 7 o'clock in the evening of March 15, 1907. The deceased was the wife of one W. B. Scott. The plaintiff in error was unmarried. The parties are all negroes. At the time and place stated persons living in that vicinity were attracted by the discharge of a pistol three or four times in rapid succession. An examination revealed the dead body of the woman, Minnie Scott, with three pistol wounds on her person—one in the mouth, one in her breast, and the third wound in her abdomen. Shortly after the discovery of the 665 dead body of the woman, the prisoner, Peter Turner, appeared at his boarding-house somewhere in that vicinity and stated to Charles Cheatham, colored, that he had killed Minnie Scott. He stated that he and Minnie Scott had been lovers, and for several months past had agreed to die together; that he was to kill Minnie, and then kill himself. He said he had met her that night at the corner of Lithgow street and Church avenue, when he shot her. He stated that he first shot her through the mouth, and that she said, "Shoot me again, here" (holding her hand to her abdomen), whereupon he shot her again, when she said, "Shoot me again here" (placing her hand on her breast), when he shot her a third time, and she sank down on the ground. Defendant further stated that he knew people would be attracted by the shooting and find him there, and so he ran away, coming to his room from the place of the shooting.

To another witness, Pat Campbell, witness stated that he had shot Minnie Scott; that they had been sweethearts for a long time, and several months ago agreed that they would die together. He stated that after he killed Minnie he was about to break and reload his pistol for the purpose of shooting himself; that his heart failed him, and he could not shoot himself, and, seeing a white woman coming down the street, he ran away. Defendant also stated to this witness that at the time of the killing he was drinking, and would not have shot the woman had he not been overbalanced with whisky.

666 At a subsequent time the prisoner, in a conversation with Sheriff Reeder, stated that he shot the woman three times and that she fell to the ground, and when he came to shoot himself his heart failed him and he could not do it. On another occasion he stated to Sheriff Reeder that for a long time he and Minnie Scott had had an understanding that they would die together—kill each other—and that on the night in question they had met for the purpose of carrying out that agreement, when he had killed Minnie, shooting her three times, and then undertook to kill himself, but that his pistol snapped, and that is the reason he did not shoot himself.

While in jail the prisoner was searched by the sheriff, who found on his person some match heads broken up and a few dead spiders, all wrapped up together, indicating further preparation to take his life.

It does not appear that there had been any inimical feelings between the prisoner and the deceased, nor is any motive shown for the killing, unless it was in pursuance of a compact entered into between the parties by which they had resolved on mutual self-destruction. It does appear from the testimony of a negress named Hall that about six months before the killing the deceased and the prisoner were at her house and were left alone in the kitchen. While in the kitchen a pistol was fired, and the Scott woman was shot in the face. There was no eye-witness to this shooting, and, while some suspicion attached to the prisoner, he was not charged by the woman with the commission of it, nor was he ever prosecuted 667 or arrested on that charge. The prisoner, in a written confession of the crime, claimed that the woman fired the shot herself with a pistol that she had on her person, and that he at the time tried to dissuade her from the act and prevent it, but that in struggling for the pistol she succeeded in pulling the trigger, and the pistol was discharged, inflicting the wound in her face.

The record reveals that very soon after the shooting the prisoner went to Middlesboro, where he remained about a week and returned to Knoxville, when he was arrested. When approached by the officer he denied his identity and assumed a fictitious name; but the officer reminded him that he had known him for a long time, whereupon the prisoner admitted that he was Peter Turner. It appears from the testimony of the officer that when he arrested the prisoner he found on his person, among other things, what purported to be a history

of the prisoner's relations with the woman, Minnie Scott, together with a complete confession of the killing. This is quite a lengthy document, and is shown to have been written by the prisoner. The substance of this confession is that he had known the deceased for about four years, and that he was accustomed to see her almost daily; that he was very much attached to her, and she to him; that during the four years of their acquaintance there had been no trouble between them. He states that on March 13th, two days prior to the killing, they went together to a certain room for the purpose of carrying into execution their mutual agreement for self-destruction, ⁶⁶⁸ but that his nerve failed him. He claims in this statement that he would not have carried it into execution on the Friday night if he had not been overbalanced with whisky, and in this connection he stated that the woman at the time was also under the influence of whisky. The purport of the letter is that things had come to such a crisis that they could not continue their intimacy without the knowledge of the woman's husband, and that the woman had expressed a preference for death rather than to live without him, and that he had expressed to her the same sentiment. He further states that the woman had repeatedly begged him to kill her, and on one occasion said to him, "Jack, you have lied to me so much, until I hate to make you lie any more," referring to his failure to carry his promise to kill her into execution.

The prisoner then gives this account of the shooting of the woman at the house of the negress Hall about six months before the killing: "When we met there she seemed to still be worried, so I pulled her down on my lap and talked with her a while, and she wanted some beer, so I goes and gets some beer and whisky, and Mrs. Jenkins and her mother hope to drink it, and then they went out on the porch, and Minnie gets up and shuts both kitchen doors, comes back and sat down side me, and we talked on a while, and finally she put one arm around my neck and kissed me three or four times, and said, 'Jack, I have a good mind to blow your brains out and kill myself.' I laughed and said, 'If I was you, I ⁶⁶⁹ wouldn't spile my good mind.' I didn't think of her having any gun, so she begin to cry, and said, 'Now I mean that,' and I said, 'I know you do,' and she then taken a little gun from her bosom, and I grabbed her, and taken it, and we sat down and talked a while, and she taken hold of my hand and placed the barrel of that gun in her left ear

and said to me, 'Now pull the trigger,' and I said, 'Quit your foolishness.' She said, 'I am not fooling.' So she put her finger on mine and tried to press on the trigger; but I managed to hold her hand and move the gun from her ear, but in so doing the gun went off, and thus it was that she got shot."

The prisoner then relates that he was not charged with the assault on the woman, and remained about Knoxville until Christmas, when he went to Etowah, where he remained until February 3d, when, in response to a letter from deceased, he returned to Knoxville and resumed his relations with her, seeing her every day for about a month. He relates that on the night of the killing when she was urging him forward to the commission of the act, he advised her to go home, but she said: "If I ever go in that home again, I'll be carried in. I mean to get out of my worry this night, if I have to walk down to the bridge and jump off in the river." She then requested him to wait until she could go down to her cousin's, Laura Campbell's, for a brief visit. I said, "What for?" She said, "Because I told Will" (her husband) "I was going there, and I want the last words I told him to be true." She remained at Laura Campbell's ⁶⁷⁰ about ten minutes and then returned to the corner of Lithgow and Church streets, where the tragedy was enacted. The following is the prisoner's statement of it: "She came back and put her arm around my neck, and said: 'Now, dear, I am ready to leave this troublesome world with you, and do it before some one comes by that knows me. I don't care after I am dead. So I placed the gun to her head and fired, and she slapped her hand on her stomach and said, 'Right here,' and I put the gun there and fired, her arm still around my neck and mine around her waist; but when I fired that time she halloed and said, 'Once more, and I'll be dead.' So I turned her aloose and put the gun to my own head, and it failed to go off, and I couldn't go on with her. But I am going to her just as willing as she was; for, as she is dead, I don't want to live."

The officer who made the arrest stated that the prisoner had in his possession a written statement of Minnie Scott, the deceased, giving a complete history of her relations with Peter Turner and their plans to die together. This statement was given to a detective, Simon F. Nichols, who it appears was in Chattanooga at the time of the trial and was not examined as a witness, nor was the statement of the deceased woman in evidence.

A survey of this testimony leaves no doubt in the minds of the court that this was a willful, deliberate and premeditated killing, and that plaintiff in error is guilty of murder in the first degree. The fact that the woman consented and the crime was in execution of a joint ⁶⁷¹ agreement would not remove the case from this grade of felonious homicide, since the crime embraced all the elements of malice, deliberation and premeditation necessary to constitute murder in the first degree.

Murder is no less murder because the homicide is committed at the desire of the victim. He who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own head: 1 Hawkins' Pleas of the Crown, c. 27, sec. 6; 1 Russell on Crimes, 670, citing Sawyer's Case (1815), Old Bailey MS., all cited in 8 Am. & Eng. Ency. of Law, p. 294, text, and note 5.

Mr. Wharton, in his work on Homicide (third edition), section 54, states the rule thus: "The law does not require that a homicide shall be committed against the will of the person killed. If a man kills another with his consent, or by his desire, he is as guilty as if he had killed him against his will. . . . And the act of a woman in taking and swallowing poison in the presence and by the direction of a man renders his the act of administering it, constituting it murder in the first degree, where death results."

It may be said, however, there is an absence of express malice, a necessary ingredient of the crime of murder in the first degree, since it is not shown there was hatred, or ill-will, or malevolence on the part of the prisoner toward the deceased.

Mr. Wharton, in his work on Homicide (third edition), section 116, says: "The terms 'express malice,' or 'express ⁶⁷² malice aforethought,' used in statutory provisions as a necessary ingredient of murder in the first degree, not having been defined by statute, have been given the common-law definition: 'When one with a sedate and deliberate mind and formed design doth kill another, which formed design is evidenced by external circumstances discovering the inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm.' And a sedate and deliberate mind implies a mental condition sufficiently composed to admit of reflection on the design, and to comprehend the nature and probable consequences of the

designed act; and to warrant a verdict of murder in the first degree under such provisions the killing must have been the consummation of a previously formed design to take the life of the deceased, and the design to kill must have been formed deliberately and with a sedate mind. An actual and deliberate intention to take the life of another, or to do him some great bodily harm from which death might probably result, constitutes express malice. The statutory term means express malice aforethought as it existed at common law, as distinguished from implied malice. It necessarily renders any murder of the first degree; and it may be inferred from the circumstances attending the act of killing, and is proved by circumstances evidencing a sedate, deliberate purpose and formed design to kill another."

The same author, at section 135, says: "And where a homicide was committed, and there was a deliberate ⁶⁷³ and premeditated intent to do the act, and no circumstances of excuse, justification or extenuation recognized by the law, it is murder in the first degree."

It thus appears that it is not necessary that express malice, in the sense of hatred or malevolence toward the deceased, should be shown in order to support a verdict of murder in the first degree. This may be illustrated by the case of *Warren v. State*, 4 Cold. 130. In that case it appeared that Rainey Warren (a free person of color) was convicted of murder in the second degree for drowning a child under three years old, the son of her former owner. The evidence on the trial tended to show that the crime was actuated by a motive of revenge against the mother of the child. The circuit judge instructed the jury: "The defendant cannot be found guilty of murder in the first degree under the proof. The deceased was a child—a mere infant under three years old—and to make out a crime of murder in the first degree, there must be a premeditated, malicious and deliberate killing, and the malice must exist in the mind of the person against the deceased. Now, malice in this case is absent. The prisoner, if she did the killing, had she malice against this little harmless child? If she had malice, was it not against the mother of the deceased or some other person? This, then, was not murder in the first degree."

This charge was erroneous. Said this court: "Malice, it is true, as stated by the court, is an essential element ⁶⁷⁴ in the crime of murder, either at common law or by the statute; but

it does not necessarily follow that it must always exist toward the person slain. It may be express or implied. Express malice is where one with a sedate and deliberate mind and formed design kills another, which formed design is evidenced by external circumstances discovering the inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm": Wharton's Criminal Law, p. 360.

In the leading case of *Dale v. State*, 10 Yerg. 551, Judge Green, in defining the constituent elements of murder in the first degree, said: "When the act of killing is not done in the commission or attempt to commit some felony, nor by poison or lying in wait, in order that it be murder in the first degree, the killing must be done willfully (that is, of purpose, with intent that the act by which the life of a party is taken should have that effect), deliberately (that is, with cool purpose), maliciously (that is, with malice aforethought), and with premeditation (that is, a design must be formed to kill before the act by which the death is produced is performed). In other words, proof must be adduced to satisfy the mind that the death of the party slain was the ultimate result which the concurring will, deliberation and premeditation of the party accused sought."

In *Swan v. State*, 4 Humph. 136, Reece, J., said: "The characteristic quality of murder in the first degree, and that which distinguishes it from murder in the second ⁶⁷⁵ degree or any other homicide, is the existence of a settled purpose and fixed design on the part of the assailant that the act of assault should result in the death of the party assailed; that death being the end aimed at, the object sought for and wished."

"Proof must be adduced to satisfy the mind that the death of the party slain was the ultimate result which the concurring will, deliberation and premeditation of the party accused sought": *Gratton v. State*, 10 Humph. 103; citing *Commonwealth v. Jones*, 1 Leigh (Va.), 598.

In *Lewis v. State*, 3 Head, 127, it is said: "The distinctive characteristic of murder in the first degree is premeditation. This element is superadded by the statute to the common-law definition of murder. Premeditation involves a previously formed design or actual intention to kill. But such design or intention may be conceived and deliberately formed in an instant."

When these principles of law are applied to the facts of this case, every element to constitute murder in the first degree distinctly appears, and the verdict of the jury is fully justified.

Counsel representing prisoner at the bar argued that the prisoner was insane at the time he committed the act, and incapable of distinguishing between right and wrong. This argument is based largely upon what is supposed to be intrinsic evidence of mental unsoundness furnished by the letters written by the prisoner and read on the trial below.

The enormity of the act and the absence of any motive⁶⁷⁶ for the perpetration of the crime is said to re-enforce the intrinsic evidence of insanity furnished by the letters. There was no evidence adduced on the trial of the previous insanity of the prisoner, nor was the testimony of any medical expert taken on this subject. While the motive for the commission of the crime is unusual, yet the criminal records furnished precedents of crimes committed in pursuance of a compact between two infatuated persons to die together. So far from the letters furnishing evidence of the insanity of the prisoner, they disclose evidence of the prisoner's intelligence and that he was a man of some education. As already stated, there was no evidence of hereditary insanity or previous acts tending to show an unbalanced mind, and no jury would have been warranted in pronouncing the prisoner insane, on account of the atrocity of the act and the sentimental motive that inspired it. Moreover, this question was left to the determination of the jury under a correct charge on the subject by the trial judge, and this court finds no evidence in the record to warrant it in disturbing the findings of the jury. It is not disclosed in the record that the prisoner did not have the benefit of the testimony of absent witnesses, nor was any application made for a continuance of the case.

We find no error in the record, and the judgment is affirmed.

An Attempt to Commit Suicide is not an indictable offense in the absence of an express statute to that effect: *May v. Pennell*, 101 Me. 516, 115 Am. St. Rep. 334. And the survivor of an attempted double suicide is not guilty of murder, unless the evidence shows beyond a reasonable doubt that he aided or encouraged the deceased to kill himself: *Burnett v. People*, 204 Ill. 208, 98 Am. St. Rep. 206. See, also, *People v. Beardsley*, 150 Mich. 206, 121 Am. St. Rep. 617.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

**GRAHN v. INTERNATIONAL AND GREAT NORTHERN
RAILROAD COMPANY.**

[100 Tex. 27, 93 S. W. 104.]

RAILROADS—Passengers on Freight Trains—Collusion with Conductor.—If one obtains permission from a conductor of a freight train to ride thereon for less than the regular fare, he cannot claim the rights of, or expect the treatment due to, a passenger on a regular train. (p. 769.)

RAILROADS—Passengers on Freight Trains—Liability for Reckless Act of Conductor.—One who obtains permission of a conductor of a freight train to ride thereon acts in collusion with such conductor, especially when he rides for less than the regular fare, and cannot recover of the railroad company for the act of the conductor in compelling him to leave the train while in motion, and in ejecting him therefrom in reckless and negligent manner. (pp. 770, 771.)

D. D. McDonald, for the appellant.

J. A. Read, for the appellee.

28 WILLIAMS, A. J. The questions in this case are presented by the following certificate from the court of civil appeals of the first district:

“William Grahn sued the International and Great Northern Railroad Company, to recover damages for personal injuries. Defendant pleaded general demurrer and general denial, and specially such collusion and wrongdoing between plaintiff and the conductor as relieved the defendant from liability, which was specially denied by plaintiff in supplemental petition.

“Upon the trial, upon motion of defendant for peremptory instruction, the court instructed the jury that the evidence showed a collusive arrangement between plaintiff and the con-

ductor, and that the defendant ²⁹ was not liable. From a judgment for defendant, upon this instruction, plaintiff appeals.

“The facts in evidence are as follows: Plaintiff, a boy nineteen years of age, with another boy a little younger, desiring to go from Galveston to Houston, went to the railroad-yards in Galveston between 8 and 9 o'clock at night with the intention of going on a freight train, if they could get the consent of the conductor. At the yards they found a freight train ready to leave for Houston. Finding the conductor they asked him if they could go to Houston, and he asked them if they had any money and the boys told him they had fifty cents apiece. They paid the conductor the money and he took them to a freight-car and put them in and shut the door. This was about 9 o'clock at night. About 1 o'clock A. M., while going into Houston, the conductor came into the car and ordered the boys to leave the train. They objected for the reason that the train was running too fast. The conductor, however, shoved plaintiff off, and in doing so plaintiff fell in such a way that the cars ran over one of his legs, in consequence of which it had to be amputated.

“Plaintiff had been raised in Galveston and was familiar with city ways. He had been to school. He had been working at the plumber's trade, earning three dollars and fifty cents a day, and was going to Houston to look for a job. Plaintiff testified that if he could not have gotten the consent of the conductor to ride on the freight train he would have waited until next morning and gone on a passenger train; that he did not know what the rules of the road were, and that he thought he had a right to ride on the freight train if he paid the conductor what he asked; that he wanted to go as cheaply as he could, and would have preferred to go on a passenger train if he could have gone for the same money. When the conductor told plaintiff to leave the train plaintiff made no objection, except that it was too dark or the train was running too fast. Said nothing to the conductor about having paid his fare.

“Upon these facts the following questions arise which are respectfully certified:

“1. Upon the facts stated, could the trial court properly assume, as matter of law, that appellant knew, or must be presumed to have known, that the conductor had no authority to allow him to ride on the freight train as a passenger?

“2. If it be either assumed as matter of law, or found as matter of fact from the evidence, that plaintiff knew, or must be presumed to have known, that the conductor did not have such authority, would such collusion between the plaintiff and the conductor bar a recovery by plaintiff?”

1. While the plaintiff says that “he did not know what the rules of the road were, and that he thought he had a right to ride on the freight train,” he adds that “he wanted to go as cheaply as he could, and would have preferred to go on a passenger train if he could have gone for the same money,” which shows that he knew he was inducing the conductor to do that which the latter had no right to do; for it is too plain to admit of dispute that he had no right to wrong his employer by carrying ³⁰ passengers on freight trains for less than the regular fare: *Condran v. Chicago etc. Ry.*, 67 Fed. 522, 14 C. C. A. 506, 28 L. R. A. 749; 3 Thompson on Negligence, sec. 3323. The first statement of the witness might admit of much mental reservation and mean any one of several things, but there can be no doubt that the last means that plaintiff intended to get a cheap passage by prevailing upon the conductor to forget his loyalty to his employer. Plaintiff’s whole statement as to the conversation with the conductor, the place where he was put and the manner in which he was carried and treated shows that he was not contracting for, nor expecting, the treatment due from a railroad company to a passenger, but that he dealt with the conductor alone for favors which he had the power but not the right to grant. This being true, it is immaterial whether or not plaintiff knew, specifically, that the rules of the defendant forbade the carriage of passengers on freight trains. He did not suppose himself to be, and does not seek to recover upon the theory that he was, a passenger. His claim is that although he was a trespasser and liable to ejection, a wrong was committed by defendant’s servant in the manner of his expulsion. He would be entitled to recover on that theory if the acts of the conductor in ejecting him could be imputed to defendant; and such acts would undoubtedly be so imputed, but for the effect of the collusion between himself and the conductor; and this raises the second question put by the court of civil appeals.

2. To the second question the reasoning of the supreme court of Minnesota, in the case of *Brevig v. Chicago etc. Ry.*,

64 Minn. 168, 66 N. W. 401, is applicable. In that case the plaintiff paid a brakeman to permit him to travel in a box-car in the train with which the brakeman was connected and was afterward required by some employé to jump off while the train was in motion, and sustained injuries. The evidence conflicted as to whether the employé who expelled the plaintiff was the brakeman who had admitted him to the train. That court holds that brakemen generally have implied authority to eject trespassers from trains on which they are employed, differing with this court on that point; and what is said in the case referred to as to the responsibility of the railroad company for the acts of the brakeman is equally applicable in this state to those of conductors who admittedly have authority ordinarily to expel trespassers from their trains. Says the court: "But we are also of the opinion that the brakeman who conspired with plaintiff to commit a trespass against defendant had no implied authority, subsequently, to represent defendant in ejecting plaintiff, and that if he was the brakeman who did eject plaintiff, it was simply the assault of one joint trespasser upon the other, for which the defendant is not liable. This is true whether the conductor had locked the plaintiff up or not. By plaintiff's own procurement, the brakeman had ceased to be the disinterested servant of the defendant, or, as far as that transaction was concerned, its servant at all. His motive in driving plaintiff off the train while in motion might have been, not to serve his master, but to cover up his offense against his master. If there is any doubt as to that, the doubt must be resolved against the wrongdoer. Plaintiff and the brakeman became joint trespassers at the beginning of the transaction, and it must be presumed that they continued such to the end. The brakeman's ³¹ implied authority to represent the defendant in ejecting his confederate had ceased, and if he was subsequently given express authority to eject him, the burden was on plaintiff to prove it. Then, if the same brakeman whom he bribed to let him into the car drove him out of it, he is not entitled to recover." The same view has been expressed by the supreme court of Mississippi: *Yazoo etc. R. Co. v. Anderson*, 77 Miss. 28, 25 South. 865; *Williams v. Mobile etc. R. R. Co.*, 1 South. 90; *Illinois Central R. Co. v. Latham*, 72 Miss. 32, 16 South. 757; *Alabama & Vicksburg R. Co. v. McAfee*, 71 Miss. 70, 14 South. 260.

This is in accord with the principle of the law of agency which exacts the most perfect fidelity on the part of the agent to his principal, and denies the responsibility of the principal for the conduct of the agent whenever the latter acts in collusion with a third person in order to promote his own interest or that of him with whom he is dealing rather than that of the principal. The general principle which holds the master or principal responsible for the acts of the servant or agent has no just application in such cases. The person who, for his own benefit, induces the servant to engage in a transaction which he knows to be a violation of duty to and a sacrifice of the interests of the master, is in no position to insist that the master is responsible to him for the consequences of the servant's infidelity to him. The conductor, in the present case, could not bind his employer to his engagement with the plaintiff for want of authority. The undertaking was his own and not that of defendant. In executing it by transporting plaintiff, and in determining the time at which and the manner in which plaintiff should depart from the train, he acted for himself alone, and is alone responsible to plaintiff. While the defendant would ordinarily be responsible for the manner in which such an employé exercises his authority in freeing his train from trespassers, that principle cannot apply here, because of the combination by which plaintiff induced the conductor to serve him instead of the defendant.

This subject was considered by the court of civil appeals for the second district, in the case of Texas etc. Ry. Co. v. Black, 23 Tex. Civ. App. 119, 57 S. W. 330, and views were expressed by the majority differing to some extent from that taken by the Minnesota and Mississippi cases to which we have referred. A writ of error was applied for and denied by this court from the judgment of affirmance in the Black case, but, as will appear from the opinion of the court of civil appeals, that action did not necessarily involve a decision of the questions now before us. We are not prepared to say that the principle which we have discussed would apply to the case of such a child as Black was: Denison & Sherman Ry. Co. v. Carter, 98 Tex. 196, 107 Am. St. Rep. 626, 82 S. W. 782. While plaintiff appears to have been a minor, the facts stated suggest no doubt of the sufficiency of his experience and intelligence to justify the application of the doctrine which we have announced.

We therefore reply that the evidence justified the trial court in assuming that there was such collusion between the plaintiff and the conductor as to bar a recovery, which, in substance, answers both of the questions stated in the certificate.

Persons Riding on Freight Trains by the invitation or permission of employes of the railroad company are not passengers: See the note to *Illinois Cent. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 91; *Mendenhall v. Atchison etc. Ry. Co.*, 66 Kan. 438, 97 Am. St. Rep. 380. Thus it is held that a contract made by a person with a freight brakeman to be allowed to ride on the train in consideration of rendering assistance in loading and unloading freight along the way is outside the scope of the brakeman's authority, not binding on the railroad company, and renders such person a trespasser, not a passenger: *O'Donnell v. Kansas City etc. R. R. Co.*, 197 Mo. 110, 114 Am. St. Rep. 753.

Persons on Trains not Operated for Carrying Passengers, by invitation of railway employes, are entitled to at least ordinary care from the railroad company. Some authorities, however, affirm that the railroad company owes them no duty except to abstain from doing them willful or wanton injury: *Baltimore etc. Ry. Co. v. Cox*, 66 Ohio St. 276, 90 Am. St. Rep. 583, and cases cited in the cross-reference note thereto.

GEORGE v. HESSE.

[100 Tex. 44, 93 S. W. 107.]

CONTRACTS—Fraudulent Representations—Measure of Damages.—On an exchange of property, the measure of damages for fraudulent representations inducing the contract is the difference between the value of the property received and that given in exchange. (p. 774.)

G. Bullett, A. C. Bullett and Newton & Ward, for the plaintiff in error.

Bertrand & Arnold, for the defendant in error.

⁴⁵ GAINES, C. J. This is a certified question from the court of civil appeals for the fourth supreme judicial district. The statement and question are as follows:

“In the above styled and numbered cause pending on motion for rehearing, in this the court of civil appeals for the fourth district of ⁴⁶ Texas a question of law arises, which this court deems advisable to submit to your honorable court for adjudication, and this court has accordingly directed to be

certified to your honorable court for decision the following question:

“EXPLANATION.

“A trade or exchange of property was consummated, by which George conveyed to Hesse an undivided two-thirds of certain land in Dimmit county and two-thirds of some personal property thereon, and Hesse conveyed to George a house and lot in San Antonio. The deed to Hesse was in consideration of \$2,000 and the assumption by Hesse of two-thirds of an indebtedness of \$2,000 and interest, and certain other minor assumptions. George assumed an encumbrance on the house and lot of about \$1,300. What the Dimmit county land or the personal property was valued at in the trade does not appear.

“The action was brought by Hesse for damages for deceit in this: That George represented to him and caused him to believe, and act in consummating the trade, upon the fact that the Dimmit county land had a gusher of water upon it, which representation was material and proved to be false. The evidence sustained these allegations. There was evidence that this land without a gusher was worth \$5.33 an acre and with a gusher would have been worth \$20 an acre. The court charged the jury as follows: ‘If you find for the plaintiff, then your verdict should be for the difference in value, if any, that you find from the evidence to be, between the reasonable market value of the Dimmit county land on November 25, 1903, without a gusher of water—that is, a strong, flowing well of water on same, and the reasonable market value of said land on said date, with a gusher of water, that is, a strong flowing well of water on same, of the kind that you find from the evidence was represented by George if you find he made such representation.’ And the jury found a verdict in accordance with such measure of damages.

“QUESTION.

“Did the charge give the correct rule for the measure of damages?

“In view of cases cited in the motion for rehearing on the question we deem it appropriate to refer the court to certain authorities which are against the rule applied by the charge: *Merrill v. Taylor*, 72 Tex. 293, 10 S. W. 532; *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. Rep. 39, 33 L. ed. 279; *Sigafus v. Porter*, 179 U. S. 116, 21 Sup. Ct. Rep. 34, 45 L. ed. 113;

Reynolds v. Franklin, 44 Minn. 30, 20 Am. St. Rep. 540; 46 N. W. 139; High v. Berret, 148 Pa. 261, 23 Atl. 1004; Crater v. Binniger, 33 N. J. L. 513, 97 Am. Dec. 737; Pruitt v. Jones, 14 Tex. Civ. App. 84, 36 S. W. 502.

“In Farmer v. Randall (Tex. Civ. App.), 28 S. W. 384, decided since the case of Merrill v. Taylor, 72 Tex. 293, 10 S. W. 532, the court of civil appeals at Fort Worth held the rule to be in accordance with the charge given by the trial court, with which we are unable to agree.”

We are of the opinion that the question should be answered in the negative. There is a conflict of authority upon the point; but it seems to us that the difference of opinion grows out of a confusion as to the nature of the cause of the action. This is not a case in which the plaintiff sues for the breach of a contract—for the contract has been ⁴⁷ performed by both parties. But it is a case in which plaintiff sues to recover damages for a fraudulent representation by which he has been induced to enter into a contract to his loss. Clearly, we think the extent of his loss is the difference between the value of that which he has parted with and the value of that which he has received under the agreement. The contract in this case was not to convey a tract of land with a “gusher” on it; but was to convey a certain tract of land, which was falsely represented to have a “gusher” on it, which false representation was an inducement which led to the contract. Logically, therefore, what he has lost by the transaction is the measure of his damages. Let us suppose that when the fraud was discovered George had not conveyed any of the property transferred to him, and Hesse had sued for a rescission as he would have had the right to do; the parties would simply have been placed in statu quo, and the plaintiff would have recovered nothing for his failure to get the property as represented. He would have recovered his property and there would have been no loss, except the expense of the litigation. So in this case, if the plaintiff recovers a sufficient sum in money to make that which he has received equal to that which he has conveyed and that which he has assumed to pay, he is compensated for his loss, and, as we think, that is the measure of his damages.

The question came before the court of appeal of England in the case of Peek v. Derry, 37 Ch. D. 541. There the plaintiff claimed to have been induced by a fraudulent representation of the defendants (who were directors in an incor-

porated company) to pay £4,000 for shares in the company, by which he suffered a loss. It was held unanimously, after special argument upon the particular point, that the measure of damages was the difference between £4,000 and the actual value of the shares. The case was taken to the house of lords, where it was reversed upon the ground that no fraud was shown, and the question of the measure of damages was left untouched: 14 App. Cas. 337. In *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. Rep. 39, 33 L. ed. 279, which involved solely the question of the measure of damages in a case of fraudulent representation, the trial judge charged the jury: "As to the law by which the jury were to be governed in the assessment of damages under the issues made in the case," that "the measure of recovery is generally the difference between the contract price and the reasonable market value, if the property had been as represented to be, or in case the property or stock is entirely worthless, then its value is what it would have been worth if it had been as represented by the defendant, and as may be shown in the evidence before you." In reference to this charge the supreme court of the United States, speaking through the chief justice, say: "In this there was error. The measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it; nor if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract. The gist of ⁴⁸ the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations, and so as to the other persons on whose claims the plaintiff sought to recover. If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the

expected fruits of an unrealized speculation. The reasonable market value, if the property had been as represented, afforded, therefore, no proper element of recovery.”

So in *Sigafus v. Porter*, 179 U. S. 116, 21 Sup. Ct. Rep. 34, 45 L. ed. 113, the same doctrine was announced; and Mr. Justice Harlan, who delivered the opinion, expressly follows and quotes with approval from the opinion in both of the cases previously cited: See, also, *Crater v. Binninger*, 33 N. J. L. 513, 97 Am. Dec. 737, and other cases cited in the certificate.

MEASURE OF DAMAGES IN ACTIONS FOR FRAUDULENT REPRESENTATIONS INDUCING A CONTRACT FOR THE SALE OR EXCHANGE OF REAL ESTATE.

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II. Measure of Damages.

a. In General, 777.

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c. When Fraudulent Representations Relate to Title, 786.

d. When the Fraudulent Representations Relate to Encumbrances, 788.

e. When the Fraudulent Misrepresentations Relate to Quantity or Boundaries, 790.

f. When Fraudulent Misrepresentations Relate to Location or Identity, 792.

III. Some Texas Decisions.

I. Introductory.

Perhaps no doctrine is more complicated in the variety of cases found in the books, nor upon which there is less harmony of opinion, than the subject of damages. For this reason it is extremely difficult to satisfactorily determine what is the true measure of damages to be recovered for deceit in the sale or exchange of real estate. Many of the highest courts of the states, and nearly, if not all, of the federal courts hold that the measure of damage in such cases is the difference between the actual value of the property at the date of sale and the amount paid for it. But a majority of the state courts hold that the plaintiff is entitled to the benefit of his bargain, and can recover the difference between the actual value of the property at the time of the purchase and what it would have been worth if the false representations had been true. In spite of these opposite conclusions, the courts in both classes of cases seem to have recognized that the basic principle underlying all rules for the measurement of damages is compensation to the injured party for the actual loss sustained as the direct result of the wrong—that the defendant is only liable for such damages as are the natural and proximate result of his fraud—but they differ widely in its application. Many of the cases which hold that a defrauded vendee is entitled

to the benefit of his bargain, and can therefore recover damages for the difference between the value of the property as it actually was, and as it was falsely represented to be, speak of their holding as being based upon "a well-settled principle," but as this "well-settled principle" has been repudiated by the highest judicial tribunal of the United States, as well as by some of the ablest jurists in the state courts, the practitioner and the litigant may well halt between these two opinions. Some of the courts in either of these two classes of cases, in fixing the measure of damages, make a distinction according to the character of the false representation which induced the bargain; that is, whether it related to the title, or to matters collateral to the land, and if to the latter, whether such false representation related to the value, quality, or condition of the land, or to its quantity, location or identity. But it is clear, from the language generally used by the different courts, in all the cases involving damages for deceit in the sale or exchange of real estate, that there is an irreconcilable difference of opinion as to whether the correct measure is the difference between the actual value and the price paid, or the actual value and that as represented, whatever might be the collateral matter regarding the land to which the false representation had reference, and in some cases this conflict of opinion extends even when the false representation relates to the title. We shall endeavor in this note to review the cases included in both of the classes mentioned, giving such pertinent extracts from the language of the courts themselves as will illustrate their reasons for reaching their several and conflicting opinions.

II. Measure of Damages.

a. In General.—While the decisions are not uniform as to what should be the measure of damages in actions for fraudulent representations inducing the sale or exchange of real property, they practically all agree that the measure is the entire loss occasioned by the fraud, and it is only in applying rules for determining what damage the fraud did occasion, that the great lack of harmony among the cases has arisen. Those cases which insist that the true measure is the difference between the actual value of the land at the time of sale, and the amount paid for it, proceed upon the theory that there should be no distinction made in the damages recoverable in actions for deceit founded in tort, from those allowed where damages are measured in actions for breach of contract, and follow the old English rule laid down in *Hadley v. Baxendale*, 9 Ex. 341, 2 C. L. R. 517, 23 L. J. Ex. 179, 18 Jur. 358, 2 Week. Rep. 302. "Such as may be fairly considered, either arising naturally; that is, according to the usual course of things from such breach itself, or such as may reasonably be supposed to have been, in the contemplation of both parties, at the time they made the contract as the probable result of the breach." The other class of cases which hold that the true measure

of damages is the difference between the actual value of the property at the date of sale and what it would have been worth if the false representations had been true, insist that the consideration paid for property which a vendee is fraudulently induced to purchase often does not amount to full indemnity, and therefore, as the damages in actions for breach of contract are always bounded by the consideration and interest, the rule in such cases is not the proper one to be applied in actions for deceit in the sale or exchange of real estate. Another objection made to the doctrine that the measure of damages should be bounded by the consideration paid is that the vendee might pay more than the property as represented would really be worth, and, as was said in *Estell v. Myers*, 56 Miss. 800: "If he has agreed to pay more than the thing as represented would have been worth, it is his own folly. He cannot insist that the price which that folly induced him to put upon it shall be taken, in opposition to the truth, as the standard by which the measure of values and damages shall be determined." The language used by the courts in both of the classes of cases mentioned is generally very broad, and apparently the respective doctrines are asserted as being applicable to all cases of the kind under discussion without regard to the character of the false representation, but as the courts had before them for decision in most of the cases misrepresentations which related to only one or the other of the various class of misrepresentation, which induce sales or exchanges of real estate, the language can only be considered as dicta, except so far as applicable to the particular fraud, which the court was then called upon to consider. And upon a review of the cases we will find that some distinction has been made as to the measure of damages, according to the character of the false representation, and so we will now consider the correct measure of damages as applicable to the different character of misrepresentations.

b. **Where False Representations Relate to Value, Quality or Condition.**—Misrepresentations made by a vendor as to the value, quality or condition of land are held to require the same measure of damages. And as to such misrepresentations there are many cases holding that the true measure of damage is the difference between the actual value of the land at the time of the purchase and the amount paid for it. Such was the rule laid down by the supreme court of the United States in *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. Rep. 39, 33 L. ed. 279. True, the damages sought to be recovered in this case was for deceit in the sale of certain stocks, and not real estate, but as the rule then announced has been since quoted and adopted by the same court in a later case, when the sale of real estate was involved, it is entitled to be considered. The district court had charged the jury that "the measure of recovery is generally the difference between the contract price and the reasonable market value if the property had been as represented to be, or in

case the property or stock is entirely worthless, then its value is what it would have been worth if it had been as represented by the defendant, and as may be shown in the evidence." Holding this instruction to be erroneous, Chief Justice Fuller, speaking for the court, said: "The measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it; nor if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. . . . The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations. . . . If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out, and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected profits of an unrealized speculation. The reasonable market value, if the property had been as represented, affords, therefore, no proper element of recovery." And in a similar case, *Rockefeller v. Merritt*, 76 Fed. 909, 22 C. C. A. 608, 35 L. R. A. 633, Judge Sanborn said: "The true measure of the damages suffered by one who is fraudulently induced to make a contract of sale, purchase or exchange of property is the difference between the actual value of that which he parts with and the actual value of that which he receives under the contract. It is the loss which he has sustained, and not the profits which he might have made by the transaction." The language quoted in both of the above cases has been indorsed by the supreme court as applicable to actions for deceit in the sale or exchange of real estate in the late case of *Sigafus v. Porter*, 179 U. S. 116, 21 Sup. Ct. Rep. 34, 45 L. ed. 113. This was an action to recover damages for deceit for false representations as to the value of certain mining property which the plaintiff had purchased for the sum of four hundred thousand dollars. If the representations made by the vendor had been true, the property would have been worth one million dollars. The case was certified to the supreme court for instructions as to the correct measure of damages from the circuit court of appeals, to which it had gone from the district court. The district judge had instructed the jury that the measure of damages was the difference between the actual value of the property at the time of sale and what it would have been worth had it been as represented, and refused to charge that it was

the difference between the actual value and what the plaintiff paid for it. Justice Harlan, in delivering the opinion of the court, said: "The question presented by the charge to the jury touching the measure of damages has been heretofore determined by this court in *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. Rep. 39, 33 L. ed. 279," and quoting with approval the language of Chief Justice Fuller and of Judge Sanborn, *supra*: "There are adjudged cases," continued Justice Harlan, "holding to the broad doctrine that in an action for deceit, based upon the fraudulent representations of the defendant as to the property sold by him, the plaintiff is entitled to recover, by way of damages, not simply the difference between its real, actual value at the time of purchase and the amount paid for it by the seller, but the difference, however great, between such actual value and the value (in excess of what was paid) at which the property could have been fairly valued, if the seller's representations concerning it had been true. So, in the present case (taking it to be as set out in the plaintiff's pleadings), although the defendant agreed to take, and the plaintiff agreed to pay, four hundred thousand dollars for the property in question, the latter, according to some cases, interpreting literally the words used in them, could retain the property and recover by way of damages the difference between its real value at the date of purchase and the sum of one million dollars, which the plaintiff alleged it would have been worth at that time if the representations of the defendant concerning it had been true. We held in *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. Rep. 39, 33 L. ed. 279, that such was not the proper measure of damages, that case being like this, in that plaintiff sought damages covering alleged losses of a speculative character. We adhere to the doctrine of *Smith v. Bolles*." And the rule thus clearly announced by the supreme court of the United States has been the rule generally followed by the federal courts in actions to recover damages for deceit in the sale or exchange of land: *Atwater v. Whiteman*, 41 Fed. 427; *Glaspell v. Northern Pacific R. Co.*, 43 Fed. 900. In these cases, which were decided before the *Sigafus* case (179 U. S. 116, 21 Sup. Ct. Rep. 34, 45 L. ed. 113), the rule laid down in *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. Rep. 39, 33 L. ed. 279, was held applicable to actions involving fraud in the sale of real estate, it being said by Judge Thomas in the *Glaspell* case (43 Fed. 900): "Courts have sometimes made a distinction as to the rule of damages in the sale of personal property and real property when effected or induced by fraud and false representations, but the supreme court of the United States in *Smith v. Bolles* seems to have laid down a rule applicable to the measure of damages in the sale of both classes of property coming within the line of facts applicable to that case."

So, too, many of the state courts adhere to this doctrine. In *Crater v. Binninger*, 33 N. J. L. 513, 97 Am. Dec. 737, the subject of what damages are recoverable in actions for deceit seems to have been thoroughly considered. The defendant in this case, contem-

plating the formation of an oil company, represented that the cost of the tract of land wherein it was proposed to bore for oil was twenty-eight thousand dollars, and that it would be necessary to have a working capital of four thousand dollars, making the total amount of the investment thirty-two thousand dollars. He proposed to divide the capital shares into eight shares of four thousand dollars each, and one of them he offered to the plaintiff, who accepted and paid for it. A few months after the initiation of the scheme, the associates, including the plaintiff, finding themselves in debt for accrued expenses, each paid in the additional sum of five hundred dollars. The land purchased was conveyed to the defendant in trust for the members of the association, and some of it was afterward sold for sixteen thousand dollars, with the consent of all of the members. The enterprise proving a failure, plaintiff brought suit to recover damages on the ground that the defendant falsely and fraudulently represented that the original cost of the property was twenty-eight thousand dollars, whereas it did not exceed eighteen thousand dollars. The jury were charged that the proper measure of damages was the entire loss sustained by the plaintiff, and the estimate of damages was based on plaintiff's original investment of four thousand dollars, and his subsequent advance of five hundred dollars less his share of the sixteen thousand dollars, for which a portion of the land was sold. The charge was held to be correct, but the judgment was reversed because in estimating the damages no account was taken by the jury of the value of plaintiff's interest in the land held by the defendant in trust, which remained unsold.

In *Monel v. Colden*, 13 Johns. (N. Y.) 395, 7 Am. Dec. 390, the correct measure of damages was said to be the difference between the actual value of the land conveyed and the amount the purchaser was induced to pay for it by fraudulent representations of the vendor that a certain privilege was annexed thereto, but which was not included in the deed. And the same rule is stated in *Constant v. Lehman*, 52 Kan. 227, 34 Pac. 745, where a vendee was fraudulently induced to enter into a joint purchase of land with defendants, who had concealed from him that they were already owners of the land. In *Oakes v. Miller*, 11 Colo. App. 374, 55 Pac. 193, the plaintiff was induced to purchase a tract of land to be used as a residence and for raising hogs and poultry, by false representations of defendant that a stream bordering the land would not overflow its banks. The stream did overflow, destroying much personal property of plaintiff and rendering the land unfit for the purposes for which it was intended to be used by plaintiff. The measure of damages was said to be the amount plaintiff had paid for the land, upon reconveying the land to the defendant, and the value of the personal property lost by the overflow.

In *Markel v. Moudy*, 13 Neb. 322, 14 N. W. 409, the defendant had induced the plaintiff to buy an eating-house and fixtures, together

with the business of keeping the same. In an action to recover damages for fraudulent representations as to the amount of business done and the profits to be realized from conducting the eating-house, by which plaintiff had been induced to purchase the house, the measure of damages was held to be limited to the difference between the price paid for the property and its actual value at the time of the purchase, though it was said in this case that in estimating the actual value of the house at the date of sale, reference to the business for which it was specially intended should be considered. In *Greenwood v. Pierce*, 58 Tex. 130, the vendee was induced to purchase lots at a depot town by false representations of the agent of the railroad as to the future location of the road with reference thereto. The measure of damages was held to be the difference between the contract price and the actual value of the lots at the date of the purchase, and this general rule is also sustained in the late case of *George v. Hesse*, 100 Tex. 44, ante, p. 772, 93 S. W. 107, 8 L. R. A., N. S., 804. And *Thompson v. Newell*, 118 Mo. App. 405, 94 S. W. 557, affords a good illustration of the doctrine that a defrauded vendee should be limited in his damages to the actual loss sustained. Here a real estate dealer purchased a farm for the sum of sixteen thousand dollars, but induced a third party to buy it for twenty thousand dollars upon representations that he paid that amount for it. In an action by the vendee to recover damages for the fraud, it appeared from the evidence that the farm was well worth twenty thousand dollars at the time plaintiff purchased it, and the plaintiff was adjudged entitled to no damages. "Let us suppose," said the court, "that land costing five thousand dollars be sold under a false representation that it cost ten thousand dollars. Now, it is obvious that the damage which the vendee will sustain under ordinary circumstances will be the difference between what he pays for the land and its actual value. If he pays ten thousand dollars, the price falsely represented as its original cost, and it be worth that sum, and he actually sells it at that rate, he will sustain in point of fact no damage whatever. Can it be pretended, then, that in such state of affairs, sustaining no loss, he will be entitled to recover anything whatever because of the fraud practiced upon him?"

The general doctrine supported in the foregoing cases is also announced in *Matlock v. Reppy*, 47 Ark. 148, 14 S. W. 546; *Woolenslagle v. Runals*, 76 Mich. 545, 43 N. W. 454; *Mountain v. Day*, 91 Minn. 249, 97 N. W. 883; *Parker v. Walker*, 12 Rich. (S. C.) 138. The false representations alleged in these cases, however, related to some other matter than the value, quality or condition of the land, and they will be found noted at greater length hereafter, under the particular subdivision to which the false representation related.

The question as to the misrepresentation of the cost of property has arisen most frequently when it has been purchased by one person who induced others to share in the purchase with him, either as co-

owners or as stockholders of a corporation to which the property has been or is to be conveyed, he representing that the purchase price has been much greater than it really was. In all such cases there is no doubt that he is liable to account to the others who become interested in the purchase for their shares of the difference between the real amount of the purchase price and the amount which it was falsely represented by him to be, however great may be the actual value of the property: *Yale G. S. Co. v. Wilcox*, 64 Conn. 101, 42 Am. St. Rep. 159, 29 Atl. 303, 25 L. R. A. 90; *Seehorn v. Hall*, 130 Mo. 257, 51 Am. St. Rep. 562, 32 S. W. 643; *Pittsburgh M. Co. v. Spooner*, 74 Wis. 307, 17 Am. St. Rep. 149, and note, 42 N. W. 259.

As we have previously observed, a majority of the decisions in the state courts are opposed to the rule adopted by the foregoing cases, and insist that the correct measure of damages when the false representation relates to value, quality or condition, is the difference between the actual value of the land at the date of the purchase and what it would be worth if it had been as represented. In *Estell v. Myers*, 54 Miss. 174, 56 Miss. 800, the vendee was induced to purchase a plantation bordering the Mississippi river, by the false statement of the vendor that the land was safe from overflow, when in fact the farm had been overflowed several times in former years. By reason of an overflow the land was not so valuable, and plaintiff in addition sustained much loss in cattle, destruction of fences and by deposit of driftwood on the plantation. This case seems to have been well considered by the court. The contract price for the land and stock was sixty-two thousand five hundred dollars. The actual value of the land at the date of the purchase was found to be twenty-seven thousand five hundred dollars, and the value of the stock eight thousand five hundred dollars. Had the land been as represented, its value would have been fifty thousand dollars. In a suit by the vendor for a balance due for the purchase price, the defendant was allowed to recoup in damages the difference between the actual value, twenty-seven thousand five hundred dollars, and the amount the plantation would have been worth if plaintiff's representations as to the liability to overflow had been true, viz., fifty thousand dollars, plus the value of the fencing that was destroyed.

Another case which seems to have received very careful consideration is that of *Gustafson v. Rustemeyer*, 70 Conn. 125, 66 Am. St. Rep. 92, 39 Atl. 104, 39 L. R. A. 644. The false representation in this case was a mere naked representation of the defendant as to value and condition, by which an exchange of land was effected. The defendant claimed that the measure of damages was the difference between the values of the properties exchanged, while the plaintiff insisted that it was the difference between the value of the property which the defendant owned and conveyed, and its value if it had been as represented. Said the court: "The general rule in regard to the measure of damages in actions of deception has been stated, and

we think correctly, as follows: 'The defendant is liable, not for everything that follows upon his fraud, but for what may be presumed to have been within his contemplation at the time, as a man of average intelligence': Bigelow on Fraud, 625. Applying the general rule as thus stated to a case like the present, we think the loss of the benefits of the bargain is one of the elements of damages which the defendant must be held to have contemplated as the natural and proximate result of his conduct, and for which he is therefore answerable.' The case of *Barbour v. Flick*, 126 Cal. 628, 59 Pac. 122, was also one where an exchange of property was effected by false representations as to value, condition and location. While the language used in the opinion seems to support the doctrine followed in the Connecticut case just quoted, the holding of the court was that the measure of damages was the difference between the market value of the properties traded. In *Horne v. Walton*, 117 Ill. 130, 7 N. E. 100, defendant had procured a loan from plaintiff of two thousand dollars upon fraudulent representations as to the value of certain landed security, while the land was in fact worthless. The measure of damages was held to be the amount borrowed, with interest thereon while plaintiff was kept out of possession of it, and the court added: "When the sale of lands is made by false representations as to its value, quality, or condition, the measure of damages in any action by the purchaser is the difference between the actual value of the land and its value as represented to be at the time of the sale"; but as seen from the above statement of the facts in this case, the rule thus stated by the court was not necessary to a decision of the case. In *Speed v. Hollingsworth*, 54 Kan. 436, 38 Pac. 496, the false representation related to the amount of bottom land on the farm sold, as well as other false statements as to the condition and value of the farm, and plaintiff was permitted to recover as damages the difference between the real value of the farm at the date of purchase and what it would have been worth if its condition had been as represented. In *Dinwiddie v. Stone*, 21 Ky. Law Rep. 584, 52 S. W. 814, the defendant had induced the plaintiff to purchase a city lot, by falsely representing that the lot and improvements thereon were above the grade established for a street. The measure of damages was said to be the amount necessarily expended in making the lot and buildings conform to the grade of the street.

In *Brownlee v. Hewitt*, 1 Mo. App. 360, plaintiff had been induced to trade to defendant the stock and fixtures of his grocery store of the value of two thousand five hundred dollars, for certain farming lands in Illinois and Missouri which the defendant had falsely represented to be worth that sum, though, as a matter of fact, said lands were not worth over one-third thereof. Plaintiff recovered judgment for two thousand three hundred dollars damages in an action for deceit. The defendant relied in his appeal on the excessiveness of the damages awarded, but the court said: "It [the measure of damages]

is not what plaintiff made or lost by the exchange, but it is the difference between the value of the property sold, at the time of the sale, if the property had been as represented by the defendant, and its value as it was in point of fact." The case was reversed, however, on other grounds. But the rule announced as to the correct measure of damages recoverable in such cases was followed by the same court in *Anslyn v. Frank*, 8 Mo. App. 242, and *Shinnaborger v. Shelton*, 41 Mo. App. 147.

In *Ettlinger v. Weil*, 184 N. Y. 179, 77 N. E. 31, 87 N. Y. Supp. 1049, 94 App. Div. 291, plaintiff sought to recover damages for false representations as to the rentals of a building in New York City which he had been thereby induced to purchase. Defendant had represented that one of the stores in the building was leased to a firm for the period of two years at a rental of thirteen thousand dollars per year, when in fact it was only rented for ten thousand five hundred dollars per year. The measure of damages was held to be the difference between the value of the property with the store leased at ten thousand five hundred dollars, and the value as it would have been had the store been rented for thirteen thousand dollars, as represented.

In *Shanks v. Whitney*, 66 Vt. 405, 29 Atl. 367, plaintiff and defendant had exchanged properties upon representations by the defendant that a mortgage which then rested upon his property could be replaced with a party ready to take it at a lower rate of interest, but after the trade defendant refused to assist plaintiff in his efforts to find a new lender, and the mortgage was foreclosed, defendant being unable to find anyone who would take up the mortgage. The charge of the lower court that the measure of damages "is the difference between the value of the property as it was represented and its value as it was in fact at the time of the sale or exchange" was held to have been correct, and the same rule was applied in *Krause v. Busacker*, 105 Wis. 350, 81 N. W. 406, where defendant had been induced to buy a millsite upon false representations as to the condition of the mill dam, but the plaintiff was not allowed to recover the value of improvements he had since made on the property.

Other cases sustaining the rule that the true measure of damages in actions to recover for false representations inducing the sale or exchange of real estate is the difference between the actual value of the land at the date of the sale or exchange and its value if it had been as represented are: *Williams v. McFadden*, 23 Fla. 143, 11 Am. St. Rep. 345, 1 South. 618; *Winslow v. Newlan*, 45 Ill. 145; *Johnston v. Beeney*, 5 Ill. App. 601; *Drew v. Beal*, 62 Ill. 164; *Cox v. Gerkin*, 38 Ill. App. 340; *Tate v. Watts*, 42 Ill. App. 103; *Van Velsor v. Seeberger*, 59 Ill. App. 322; *Hicks v. Deemer*, 187 Ill. 164, 58 N. E. 252; *Sangster v. Prather*, 34 Ind. 504; *Gates v. Reynolds*, 13 Iowa, 1; *Moberly v. Alexander*, 19 Iowa, 162; *White v. Smith*, 54 Iowa, 233,

6 N. W. 284; *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172; *Page v. Wells*, 37 Mich. 415; *Wright v. Roach*, 57 Me. 600; *Van Epps v. Harrison*, 5 Hill (N. Y.), 63, 40 Am. Dec. 314; *Whitney v. Allaire*, 1 N. Y. 305; *Krumm v. Beach*, 96 N. Y. 398; *King v. Mott*, 56 N. Y. Supp. 213, 37 App. Div. 124; *Fargo Gas & Coke Co. v. Fargo Gas & Electric Co.*, 4 N. D. 219, 59 N. W. 1066, 37 L. R. A. 493; *Beare v. Wright*, 14 N. D. 26, 103 N. W. 632, 69 L. R. A. 409; *Luserode v. Rasmussen*, 63 Ohio St. 545, 59 N. E. 220; *Beasley v. Swinton*, 46 S. C. 426, 24 S. E. 313; *Hecht v. Metzler*, 14 Utah, 408, 60 Am. St. Rep. 906, 48 Pac. 37.

Most of the cases in the state courts mentioned above which support the doctrine that the measure of damages is the difference between the actual value and the represented value at the date of sale were decided before the supreme court of the United States in the *Sigafus* case (179 U. S. 116, 21 Sup. Ct. Rep. 34, 45 L. ed. 113) held that the doctrine announced in *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. Rep. 39, 33 L. ed. 279, with reference to actions to recover damages for deceit in the sale of personal property, was applicable to such actions when real estate transactions were involved. But this cannot be said of all the cases, for in the recent case of *Beare v. Wright*, 14 N. D. 26, 103 N. W. 632, 69 L. R. A. 409, where, like the *Sigafus* case, the false representations related to the value of mining property, reference is made to the ruling of the supreme court of the United States and also to the language of Chief Justice Beasley in *Crater v. Binninger*, 33 N. J. L. 513, 97 Am. Dec. 737, the court saying: "The weight of authority as well as the better reason is against the rule supported by these cases."

c. When Fraudulent Representations Relate to Title.—When the fraudulent representations which induce a sale or exchange of real estate relate to the vendor's title, the rule generally sanctioned by all the courts is that when there is total failure of title, the measure of damages is the amount paid for the property. But when there has been only partial failure of title, the same conflict of opinion exists as when the misrepresentations related to value, quality or condition. Thus, an illustration of the rule that the measure of damages is the difference between the actual value of the property at the date of sale and the amount paid for it, as applied to defect in title, is shown in *Reynolds v. Franklin*, 44 Minn. 30, 20 Am. St. Rep. 540, 46 N. W. 139. Here the plaintiff had been induced by false and fraudulent representations to exchange certain merchandise for three separate parcels of land. The title to one of the parcels failed, and plaintiff sought to recover damages for the false representations as to the title. Collins, J., speaking for the court said: "The principal contention between the parties is as to the measure of damages, and upon this matter the trial court erred in its rulings, as well as when charging the jury. The amount the plaintiff was entitled to recover was not the price fixed or placed by the parties, when making their

trade, upon the tract of land in question, for the action was in tort; and if the jury believed that defendant was guilty of the false and fraudulent representations alleged, and that plaintiff parted with his property relying upon the same, then defendant was bound to make good the loss sustained—he was liable to respond in such damages as naturally and proximately resulted from the fraud. But that would not necessarily be the fixed price placed upon the real estate by the parties. It might be less, and it might prove to be more. The actual loss sustained was the market value of the personal property which, by means of a fraudulent act, defendant had secured from the plaintiff. It was not a question of what the latter might have gained, but of what he lost by reason of defendant's deception. The suit was not brought for breach of contract, but the gravamen of the complaint was the alleged deceit and fraud of the defendant, by means of which the plaintiff was induced to part with his property. The actual loss which he sustained, and for which he can recover, is the value of the property so parted with. This is the true measure of damages in cases of this nature''; and plaintiff was permitted to recover such proportion of the total value of the merchandise as the value of the tract to which the title failed bore to the aggregate value of the three tracts. And this rule is also followed in *Woolenslagle v. Runals*, 76 Mich. 545, 43 N. W. 454, where plaintiff had been induced, by the false and fraudulent representation that he owned certain land in fee, to exchange certain land owned by plaintiff. Title to defendant's land failed and plaintiff was held entitled to recover as damages the actual value of the land he had traded to the defendant.

So, too, in *Parker v. Walker*, 12 Rich. 138, defendant had knowingly conveyed to plaintiff more land than he had title to, and the amount of plaintiff's recovery in an action to recover damages for the deceit was said to be the pro rata value of what he paid for that portion of the land he finally lost, and the expenses he incurred in perfecting title to another part. An instruction to the jury that plaintiff was entitled to recover as damages the pro rata value of the land to which defendant had no title was held to be erroneous.

The other rule that the measure of damages is the difference between the actual value of the property at the time of sale and its value as represented to be is also found applied to defects in title. Thus, in *Brisbane v. Pomeroy*, 13 Daly, 358, a vendor conveyed land, but his wife, who was living at the time, did not join in the deed, the vendor fraudulently representing that another woman who joined him in the deed was his wife. The purchasers expended large sums in improving the land and preparing it for sale, but afterward found that they could not sell because the land was subject to the inchoate right of dower of the vendor's wife. The measure of plaintiff's damage was held to be, not the value of the inchoate right of dower, a release of which the defendants were unable to obtain, but the difference between the value of the land under the disability of the purchaser to

convey to others and what it would have been worth had no inchoate right of dower existed. In *Grosjean v. Galloway*, 72 N. Y. Supp. 331, 64 App. Div. 547, defendant had induced plaintiff to purchase certain lots upon fraudulent representations that he had good title, when in fact he merely held tax titles, and the measure of damages was said to be the difference between a perfect title and the interest which the plaintiff actually acquired under the tax deeds. In *Hicks v. Deemer*, 187 Ill. 164, 58 N. E. 252, a vendor, who had good title, was induced to execute a conveyance to his land upon the false and fraudulent representation of the vendee that he had only a life estate. "The extent of his [plaintiff's] injury," said the court, "was the difference between the value of the actual title which he conveyed and the value of the title which the defendant represented to exist, and which he was led to believe he did convey."

In *Howerton v. Augustine*, 130 Iowa, 389, 106 N. W. 941, by a contract between plaintiff and defendant the former agreed to convey to defendant a tract of land in consideration of defendant assigning to plaintiff a contract for the sale of land to which defendant assured plaintiff he had a good title, but his contract was not shown and its absence explained. The contract in fact contained a reservation of such portions of the land "as are now known, or shall hereafter be ascertained, to contain coal or iron, or other mineral, and also all such surface ground as may be necessary for mining purposes, and access to coal or iron or mineral lands for the purpose of exploring, developing and working the same." Plaintiff's action was for deceit in not disclosing to him the reservations contained in defendant's contract of sale. Speaking of defendant's contention that the market value of the contract was not material, the court said: "Plaintiff was not complaining, however, of the character of the land, but of the nature of the title, and the effect of the reservation could be determined by considering the value of the contract for the purposes of sale much more effectually than by inquiry as to the character of the land itself. It was only necessary to show the difference between what the value of the land would have been had there been no reservation in the contract, subject, of course, to the deduction of what plaintiff was by the contract required to pay, and the market value of the contract for the sale of the land with such reservation."

d. **When the Fraudulent Representations Relate to Encumbrances.** Practically no distinction is made by the cases between the rule to be adopted in determining the measure of damages, whether the misrepresentations relate to encumbrances or to the title. And the general rule, therefore, is that the defrauded vendee is entitled to recover the amount of the encumbrance. The rule adhered to by so many cases, that the measure of damages is the difference between the actual value of the property at the date of sale and its value as represented to be, when the misrepresentations relate to value, quality or condition, has also been applied when the misrepresentations have

reference to the existence of an encumbrance or the amount of the same. But by the conclusions reached in these cases, the result is the same, that is, the measure of damage is the amount of the encumbrance if it is falsely represented that none exists; or if the amount has been falsely represented, then the difference between the amount as represented and the actual amount due. This is well illustrated in the case of *Cross v. Devine*, 46 Hun (N. Y.), 421, where plaintiff had purchased real estate relying on the false representations of the defendant that the same was free from encumbrance, while in fact it was encumbered in the sum of two hundred and fifty dollars. Said the court, in *Krumm v. Beach*, 96 N. Y. 398: "The measure of damages is full indemnity to the injured party, and that is said to be determined by the difference in the value of the thing sold and what it should be according to the representation, going beyond, it might be, the amount of the consideration and interest. Property covered by a mortgage is worth less than it would be if free, by the amount of the mortgage and interest. The only exception to this would be the case where the mortgage exceeded the actual value of the land. But certainly without proof that the land was worth less than the mortgage, the existence of the mortgage lessens the value of the land by the amount of the mortgage, and the damage, therefore, is at once suffered by the purchaser, who pays for the property what it would have been worth if it were as represented. . . . Even though he has not paid the mortgage, his property is worth just so much less than it would have been if free—that is, if it is worth the amount of the mortgage." And in *Hahl v. Brooks*, 213 Ill. 134, 72 N. E. 727, where a vendee was deceived by false representations that no encumbrance existed, he was allowed to recover the amount of the encumbrance if less than the value of the land, although his title had not been swept away. These two cases clearly illustrate the difference in the rule to be adopted in cases of fraud and in actions for breach of covenant against encumbrances, full indemnity being allowed in the latter, while in the former the damages are only nominal unless the encumbrance has been extinguished by the vendee. Another case applying the rule that the measure of damages is the difference between the actual and the represented value of land, to cases of misrepresentation as to encumbrances is that of *Love v. McElroy*, 106 Ill. App. 294. In this case the land was represented to be free from encumbrance except a mortgage of two hundred and twenty-one dollars. It was further represented that there were no unpaid taxes and no unpaid interest on the assumed encumbrance. The land was forfeited and lost to the purchaser by reason of unpaid interest which had accrued both before and after the purchase. Under the proof submitted in this case it was determined that no action for deceit would lie, but in discussing the measure of damages applicable to such cases Justice Brown said: "The measure of damages is the difference between the actual value of the land and what it would have been worth if it

were as represented, together with lawful interest on such difference. Had the proof established a case of deceit and the land been lost to McElroy without his fault he would have been entitled to recover the value of the land, subject to a deduction of the two hundred and twenty-one dollars which he assumed, with legal interest. The value of the land would not necessarily have been the price at which it was estimated by the parties in the transaction. It might be more or less than that amount, depending upon the proof of its market value. Assuming the same facts to have been established, McElroy might have waived the tort and sued for the recovery of the purchase price and interest. And assuming an action for deceit to exist, and McElroy had elected to and paid the back taxes and interest and thereby saved the property from forfeiture, he would, in such case, be limited in the amount of his recovery to the sum so paid, with legal interest from the time of making the payment."

e. **When the Fraudulent Misrepresentation Relates to Quantity or Boundaries.**—The same lack of harmony prevails among the cases as to what the correct measure of damages should be when the false representation which induces a sale or exchange of real estate relates to quantity or boundaries, as when such misrepresentations relate to value, quantity or condition. Those cases which support the doctrine that the true measure of damages is the difference between the actual value of the land at the date of sale and the amount paid for it make no distinction with reference to the character of the misrepresentation, but adhere to that rule whether the fraudulent statement which induces the bargain relates to value, quality, condition, quantity, location or identity. Many of the other class of cases which hold that when the misrepresentation relates to value, quality or condition, the difference between the actual value of the land at the time of sale and what it would be worth if the false representations had been true is the correct measure of damages, also apply this rule when the misrepresentation relates to quantity or boundaries. Thus in *Foster v. Kennedy's Admr.*, 38 Ala. 359, 81 Am. Dec. 56, the defendant had falsely represented the boundaries of the land as to the location of a certain pond and mill, and the measure of damages was said to be the diminution of the value of the property in consequence of the mill and pond not being on the land on which it was represented to be.

In *Smith v. Kirkpatrick*, 79 Ga. 410, 7 S. E. 258, a lot had been sold by number, and one of the boundaries was so misrepresented that the purchaser failed to get all of the land he supposed he was buying, and in a suit by the vendor for the purchase price he sought to recoup damages for the false representation of the plaintiff as to the quantity of land embraced in the boundaries. Said Judge Bleckley: "The deduction is to be measured by the relative value of the tract included within the false boundary, as compared with the tract embraced in the true boundary. It is not the separate value of that part which is beyond the true boundary, but its joint value in con-

nection with the other part that is to be considered. How much does it enhance the value of the premises contracted for? In that proportion ought the agreed price to be diminished?" And the rule was again applied later by the same court in *Estes v. Odum*, 91 Ga. 600, 18 S. E. 355, where the quantity of land sold had been falsely represented to be more than it really was, but the amount actually obtained by the purchaser was worth as much or more than the price paid. The measure of damages was held to be the pro rata part of the purchase money which was paid for the deficiency. "The theory," said the court, "that the vendee must be satisfied if he got in land the worth of his money is altogether wrong. He was entitled to have what he bought and paid for, and if the fraud of the other party deprived him of a part of the same, so considerable that the fraud is manifested prima facie, or fairly suggested as probable, by the grossness of the deficiency, the minimum recovery should be the amount paid for the deficiency, with interest thereon from the time of payment. If the true tract, as it proved to be, was on account of its being so small, worth less than it would have been as part of a larger tract which the vendee supposed he was getting and had a right to expect, this difference would be recoverable, no matter how valuable the true tract was." This case is an excellent illustration of those decisions which hold that a purchaser should be allowed the benefit of his bargain and his damages for deceit, not restricted to his actual loss. In *Cawston v. Sturgis*, 29 Or. 331, 43 Pac. 656, plaintiff had induced defendant to buy certain land in the city of Portland by falsely representing that it contained an area of two and one-half lots fifty by one hundred each, when in fact the area was only equal to two lots fifty by one hundred each. Said the court: "The minimum recovery should be the amount paid for the deficiency, irrespective of the actual value of the true tract." And to the same effect is *Hiner v. Richter*, 51 Ill. 299; *Budlong v. Cunningham*, 11 Ill. App. 28; *King v. Mott*, 56 N. Y. Supp. 213, 37 App. Div. 124. In *Krumm v. Beach*, 96 N. Y. 398, the fraud complained of consisted in a misrepresentation as to the situation and boundaries of the land, and especially in a direct assertion that a specific twenty acres pointed out was included in the tract, when in fact it was not. The measure of damages was held to be the difference between the value of the property as it actually was, and its value if it had been as represented. The same general principle is also recognized in *Hankins v. Majors*, 56 Neb. 299, 76 N. W. 544, though here the court refused to disturb a verdict of one dollar damages for plaintiff, but upon the ground that there had been no positive proof of damage. Plaintiff in this case sought to recover damages for false representations that land contained three hundred and eighty acres when in fact it contained but two hundred and forty-eight acres. At plaintiff's request the jury were instructed that the measure of damages was the difference between the value of the land had it contained the quantity represented and its actual

value. In refusing to disturb the verdict for plaintiff of one dollar damages the court said: "The proof equally warranted the inference that the parties had agreed on an aggregate value on inspection of the land as it lay, without regard to the precise quantity; that the agreed price was not a valuation per acre, and no more represented a valuation on the hypothesis of its containing three hundred and twenty acres than an actual view as to its apparent quantity. . . . The jury must have found that, while the trade was induced by false representations as to quantity, that there was no proof that plaintiffs had not received substantially what they expected and bargained for." In *Sears v. Stinson*, 3 Wash. 615, 29 Pac. 205, defendant had represented to plaintiff that twenty-two lots which the latter had purchased and were represented in a plat exhibited to him by defendant as being twenty-five feet wide and one hundred feet deep, whereas a subsequent survey showed that some of the lots were sixty feet short. Plaintiff was allowed to recover the difference between the contract price of the whole tract and what the land was worth at the time of sale by reason of the deficiency. In *Lynch v. Mercantile Trust Co.*, 5 McCrary, 623, 18 Fed. 486, plaintiff had bought a certain lot in the city of Minneapolis. Defendant had pointed out the boundaries, stating that the lot included all the land lying between certain fences, and that the frontage on a certain street was six hundred feet. The representations were false and the street frontage of the lot was only four hundred and seventy feet. The measure of plaintiff's damage was held to be the value of the property lost by the misrepresentation.

f. When Fraudulent Misrepresentations Relate to Location or Identity.—Bearing in mind that those cases which follow the rule laid down in *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. Rep. 39, 33 L. ed. 279, and subsequently indorsed in the *Sigafus* case (179 U. S. 116, 21 Sup. Ct. Rep. 34, 45 L. ed. 113), as applicable to misrepresentations when sale of land was involved, apply that rule whether the false statements relate to title or to any collateral matters pertaining to the land, it is only necessary to show how the other rule that the measure of damages is the difference between the actual value of the land and its value as represented at the time of sale is applied when the false representations relate to condition or identity.

In *Haldeman v. Schuh*, 109 Ill. App. 259, parties living in Illinois exchanged lands located in Iowa and Tennessee. The owner of the land in Tennessee represented that his land was situated within one-half mile of a county seat, while in fact it was situated eighteen miles from said town. The measure of damage was held not to be the value of the Iowa land exchanged for it, but the difference between the actual value of the land in Tennessee and what it would have been worth if it had been located as represented. And to the same effect is the ruling in *Moberly v. Alexander*, 19 Iowa, 162, where the vendor had represented his land to be located two and a half miles from a

certain town, when its location was in fact six and a half miles from said town.

In *Hitchcock v. Baughan*, 36 Mo. App. 216, plaintiff had represented that a certain dwelling-house, kitchen and barn were located within the boundaries of land he sold to the defendant, when in fact they were not. In suit to recover the purchase price defendant was permitted on his counterclaim to recoup in damages the difference between the value of the land as represented and its value as it actually turned out to be. And a similar ruling was made in *Hecht v. Metzler*, 14 Utah, 408, 60 Am. St. Rep. 906, 48 Pac. 37, where the defendant had falsely represented that the land was accessible to the street and in an improved neighborhood. In this case, however, the representations as to location were also coupled with false statements as to value and condition. In *Phinney v. Hubbard*, 2 Wash. Ter. 369, 8 Pac. 533, defendant had pointed out to plaintiff three lots in the city of Seattle which he sold to him for three hundred and fifty dollars, but conveyed three other lots, two of which did not exist, and the value of the third was only fifty dollars. The value of the three lots which had been pointed out to the plaintiff and which he supposed he was buying was fifteen hundred dollars, and in an action to recover damages for the fraud the supreme court refused to disturb a verdict awarding the plaintiff fourteen hundred and fifty dollars, that being the difference between the value of the lot he received from the defendant and the value of the lots which defendant had fraudulently represented he was conveying.

In addition to these cases the rule that the measure of damages recoverable for fraudulent representations as to location or identity is the difference between the value of the land the purchaser believed he was getting and that which he actually received, is supported in *Woolman v. Wirtsbaugh*, 22 Neb. 490, 35 N. W. 216; *Gunther v. Ullrich*, 82 Wis. 222, 33 Am. St. Rep. 32, 52 N. W. 88.

III. Some Texas Decisions.

A rule somewhat different from either of those adopted in the cases heretofore cited was announced by the supreme court of Texas in *Merrill v. Taylor*, 72 Tex. 293, 10 S. W. 532. Where the defendant in a suit to recover a balance of the purchase price of land sought to avoid such payment upon a plea of partial failure of consideration based upon false representations of the plaintiff as to the quality of the land. Said the court: "It seems that in an effort to establish a partial failure of consideration, that the estimated value of the entire property should form a basis for an estimation of the measure of damages, or the extent of the failure proved; that is, upon such partial failure, the deduction to be made on account of it should be such proportion of the agreed price of the entire property as the deficiency bears to the property as represented." And this rule was applied by the court of civil appeals in *Pruitt v. Jones*, 14 Tex. Civ. App. 84, 36

S. W. 502. Here the plaintiff sought to recover on a note given by defendant as part of the purchase price of land, and the defendant by way of counterclaim sought to recoup damages for false representations made by plaintiff as to the quality and condition of the land. Applying the rule in *Merrill v. Taylor*, 72 Tex. 293, 10 S. W. 532, the court said the defendant should be allowed to recoup as damages "the difference between the purchase price and a sum of money which bears the same proportion to the purchase price as the actual value of the land bears to the value thereof if it had been as represented. To state it as an arithmetical problem, if the land had been as represented, it would have been worth one thousand dollars; but as it actually was when purchased, it was worth only five hundred dollars. The purchaser paid eight hundred dollars for it. To what amount of reduction is he entitled? Solution: Find the amount he should have paid for it in the above proportion, and subtract it from the amount he agreed to pay, and the reduction will be the amount of reduction in the purchase price, which in the problem given would be four hundred dollars."

But this rule seems to be confined to these two cases and was not followed in the late case of *George v. Hesse*, 100 Tex. 44, ante, p. 772, 93 S. W. 107, 8 L. R. A., N. S., 804, in which the supreme court of the same state adhere strongly to the doctrine that the measure of damages is confined to the difference between the actual value of the land at the date of sale and the consideration paid for it.

TEXAS TRAM AND LUMBER COMPANY v. HIGHTOWER.

[100 Tex. 126, 96 S. W. 1071.]

TIME, HOW COMPUTED—Solar or Standard.—If a term of court terminates by law on a certain night, its close is fixed at midnight of that day, according to solar time and not by the standard or railroad time of the place. (p. 795.)

MANDAMUS will lie to Compel the entry of a judgment upon a verdict which settles a title to land when such entry has been erroneously refused on the ground that the verdict was void because returned after the expiration of the term of court. (p. 797.)

Andrews, Ball & Sweetman, Denman, Franklin & McGown, Geers & Nall, G. C. O'Brien and O. J. Todd, for the relator.

T. D. Cobbs, C. L. Batts, L. F. Chester and Baker, Botts, Parker & Garwood, for the respondents.

¹²⁹ GAINES, C. J. This is an original suit in which a writ of mandamus is prayed for to compel the judge of the sixtieth judicial district of the state to enter judgment upon a verdict alleged to have been returned into his court at the April term of the present year.

The facts as alleged in the petition for the writ, stated briefly, but as we think with sufficient fullness for the purposes of this opinion, are as follows: In the year 1901 the Texas and New Orleans Railroad Company, a defendant herein, brought an action of trespass to try title in the district court of Jefferson county against the Texas Tram and Lumber Company, the relator in this proceeding, to recover a parcel of land in the city of Beaumont. The sixtieth judicial district having been subsequently established, the cause came on for trial in the latter court (regularly as must be presumed) during the last days of its April term. Under the statute establishing that district the April term began on the first Monday of that month and could "continue in session until and including the last Saturday in May" of the same year. At 8 o'clock P. M. on Saturday, the twenty-sixth day of May, 1906, it being the last day of the term, the jury having been charged, retired to consider of their verdict. Before the court was adjourned by the presiding judge at three minutes past 12 by railroad time, which was at least fifteen minutes before 12 P. M. by sun time, the jury came into court and returned a verdict in favor of defendant, the relator in this case. Counsel for plaintiff immediately made a motion for a new trial, which was ¹³⁰ overruled, but no judgment was entered upon the verdict. At the next term of the court, to wit, on the sixth day of June, 1906, a motion was made in behalf of the relator, to have judgment entered upon the verdict. This was resisted on the ground that the court was adjourned by operation of law when the verdict was returned, and a counter motion to set the verdict aside and to declare a mistrial prevailed. The trial judge filed his conclusions of fact as above stated and determined, as a matter of law, that the adjournment was controlled by the railroad time and that the verdict came too late.

We are of the opinion that in this conclusion of law the court erred. We see no reason to doubt that when the legislature prescribes the times at which a term of the court shall begin and shall end the true time at the place of holding the court is meant; and we understand that the true time is to

be determined by the instant at which the sun passes the meridian of the place for which it is to be calculated, and not by the time of its passage at some other place. That where at a particular place there are two measures of time, one the true time at that place and the other the time at some other place, the true time at the place of holding a court must govern the hour of its opening, was decided in England many years ago. In the case of *Curtis v. Marsh*, 3 Hurl. & N. 866, the court was holding its session at Dorchester, and by some regulation 10 o'clock in the morning was appointed as the hour for opening the court. The clock in the courtroom was set to Greenwich time, which was ten minutes earlier than the Dorchester time. The trial judge took his seat upon the bench and promptly opened court at 10 o'clock as shown by the clock in court. The case was called and counsel for the defendant not having appeared, the plaintiff's counsel proceeded with the case. The evidence having been introduced, the court instructed a verdict for the plaintiff. After this and a minute and a half before 10 o'clock, according to Dorchester time, counsel for the defendant appeared and asked a trial of his case, which was refused. A rule nisi having been obtained, it was by the court of exchequer made absolute—the court holding that the Dorchester time must govern and that the proceedings were premature. It appears from the report of that case that Greenwich time was the time upon which the railroads were run in England at that period; so that in that case, as in this, the question arose out of the difference between the railroad time and the true time. In the case of *Henderson v. Reynolds*, 84 Ga. 159, 10 S. E. 734, 7 L. R. A. 327, the same principle was announced in an elaborate opinion, and the conclusion was reached, that the true time must control in determining whether the verdict which was returned about 12 o'clock P. M. of Saturday was returned on Saturday or Sunday, and that according to the true time it was Sunday; but since they hold that the verdict was good though returned on Sunday, it would seem that the determination of the point was not necessary to the decision of the case: See, also, *Searles v. Averhoff*, 28 Neb. 668, 44 N. W. 872.

The question was distinctly presented in the case of *Ex parte Parker*, 35 Tex. Cr. App. 12, 12 S. W. 480, 790, and in an elaborate and well-considered opinion by Judge Henderson it was held that when the term ended by operation of law,

was to be determined by the true time and not by the railroad time.

¹³¹ There is nothing in the case from the supreme court of Kentucky of the Rochester Ins. Co. v. Peaslee-Gaulbert Co., 120 Ky. 752, 87 S. W. 1115, 89 S. W. 3, which conflicts with our views. It was there merely held, where it was shown that "standard time," meaning, we presume, railroad time, was in common use at the place where the property insured was situated, and the policy of insurance called to expire at "noon" on a certain day, it was a question of fact to be determined by the jury whether the parties to the instrument meant "noon" as determined by the true time, or by the conventional time.

To show that the proposition that the railroad time at Beaumont because in general use there should govern is not sound, it is only necessary to state it, in substance, in a different way. The railroad time for the section in which Texas is included is not the true time for the particular locality, but the St. Louis time. So that the proposition resolves itself into saying, that because the people at Beaumont have adopted in the conduct of their affairs the St. Louis time, when the legislature declared that the April term of the sixtieth judicial district should continue "until and including the last Saturday in May," the end of the day should be determined by the St. Louis time and not by the true time—namely, "the mean solar time." It seems to us the proposition so stated carries with it its own refutation.

In the case of Hume v. Schintz, 90 Tex. 72, 36 S. W. 429, we declined to award a writ of mandamus to compel the trial judge to enter a judgment upon a verdict, for the reason that the verdict, if it had not been set aside (a question we found it unnecessary to decide), could be as effectually pleaded in bar of another action as the judgment itself. We therefore concluded that the relator had a complete remedy by so pleading it, and therefore refused the writ. But the present case is very different. In the first place, the validity of the verdict itself is here at issue, and that depends upon a question of fact. In the second, the original action in this case involves the title to land, which the verdict settles in the relator's favor. It is entitled to have a judgment entered upon the verdict and to have his judgment recorded and its title made marketable. Pleading the verdict in another action is plainly not a complete remedy.

Upon the undisputed facts of this case, we are of opinion that the relator is entitled to the writ as prayed for, and accordingly the writ is awarded.

The Computation of Time is the subject of a note to *State v. Michel*, 78 Am. St. Rep. 372.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY v. THOMPSON.

[100 Tex. 185, 97 S. W. 459.]

CONFLICT OF LAWS—Foreign Contract.—A contract by a railroad employé made in one state that he will give notice within thirty days from receiving an injury of his claim for damages and that his failure to do so shall bar any suit for their recovery, is not avoided by bringing action in another state, where such contract is invalid. (pp. 799, 800.)

CONFLICT OF LAW—Extraterritorial Operation of Statutes. Statutes of a state have no extraterritorial operation and cannot invalidate contracts made and to be performed in other jurisdictions. (p. 801.)

CONFLICT OF LAWS—Comity—Foreign Contracts.—The rule by which courts of one country test the validity of contracts made and to be performed in other countries in accordance with the laws thereof is one of comity only, and cannot be applied in opposition to the positive law of the former, and while the legislature might set aside the rule of comity by which contracts elsewhere made are enforced in conformity with the law governing their making and performance, it could not render such contracts void, and the purpose to do so should not be imputed. (p. 801.)

CONFLICT OF LAWS—Place of Performance.—The right of a person to recover for an injury received in one state under a contract of employment made and performed there is governed as to his failure to give notice of his claim by the laws of that state, although the contract was to give notice at the general office of the company in another state. (p. 802.)

N. H. Lassiter, R. Harrison and J. H. Barvise, Jr., for the plaintiff in error.

Stewart & Templeton, for the defendant in error.

¹⁸⁷ WILLIAMS, A. J. The defendant in error applied for and received from plaintiffs in error, at Chickasha, Indian Territory, employment in the capacity of brakeman. His application, which constitutes a part of the contract of employment, contained this stipulation:

“In further consideration of my employment, I agree that if, while in the service of the said company, I sustain any per-

sonal injury, for which I shall or may make claim against said company for damages, I will, within thirty days after receiving such injury, give notice in writing of such claim to the general claim agent of said company at Chicago for injuries occurring in Illinois or Iowa, and to the general attorney of said company at Topeka for injuries occurring elsewhere on the system, which notice shall state the time, place, manner and cause of my being injured, and the nature and extent of my injuries, and the claim made therefor, to the end that such claim may be fully, fairly and promptly investigated; and my failure to give notice of such claim in the manner and within the time aforesaid shall be a bar to the institution of any suit on account of such injuries."

He was afterward, in Oklahoma Territory, hurt while performing his duties to plaintiff in error under the contract, and brought this action, and recovered the judgment before us for damages, upon the ground that his injury resulted from the negligence of defendant in failing to exercise proper care in keeping its track in safe condition. At the trial the defendant offered in evidence the contract above stated, together with evidence to show that it was valid under the laws of the ¹⁸⁸ Indian Territory and of Oklahoma, and that the notice had not been given as agreed upon, all of which facts had been pleaded in the answer. This evidence was excluded upon objections urged by the plaintiff.

The court of civil appeals held that this ruling was justified by article 3379 of the Revised Statutes of this state, which provides: "No stipulation in any contract requiring notice to be given of any claim for damages, as a condition precedent to the right to sue thereon, shall ever be valid unless such stipulation is reasonable, and any such stipulation fixing the time within which such notice shall be given at a less period than ninety days shall be void, and, when any such notice is required, the same may be given to the nearest or any other convenient local agent of the company requiring the same. In any suit brought under this and the preceding article it shall be presumed that notice has been given, unless the want of notice is specially pleaded under oath."

The stipulation was regarded by the court of civil appeals as affecting only the remedy, in analogy to the statute of limitations, and as being controlled by the law of the forum. The evident purpose of the stipulation was to secure notice to the employer of the claim of the servant, that it was liable for

an injury suffered by him, in order that opportunity might be given for prompt investigation and ascertainment of the facts affecting the claim: *Phillips v. Western Union Tel. Co.*, 95 Tex. 638, 69 S. W. 63. It fixes no time within which suit must be brought after notice has been given, leaving the plaintiff free to sue within the time allowed by law. But it attaches to the failure to give the notice the effect of "a bar to the institution of any suit on account of such injuries." The bar is not to arise from lapse of time merely, but from the failure to do that which the parties agreed on as essential to the right to have a determination by suit of the question of liability for the injury. Its effect, if enforced according to its terms, was either to prevent the accrual of liability, or to put an end to all further question of liability after the expiration of the prescribed time without notice. Whether it had the effect first mentioned, as contended by plaintiff in error, or the latter, as contended by defendant in error, is wholly immaterial to the present inquiry. In either view it acts upon the substantive rights of the parties, and not upon the mere mode and time of their enforcement in the courts. Had it been only an agreement, valid both in Oklahoma and in the Indian Territory, to fix a period within which suit must be brought, we should have the question, which we need not consider, whether the time so fixed, or that prescribed by our statute of limitations, would govern: *Wharton's Conflict of Laws*, 3d ed., p. 1434, sec. 2.

The cases of *Armstrong v. Galveston etc. Ry.*, 92 Tex. 117, 46 S. W. 33, and *Burgess v. Western Union Tel. Co.*, 92 Tex. 125, 71 Am. St. Rep. 833, 46 S. W. 794, cited by the court of civil appeals, do not decide the question before us. In the *Armstrong* case the contract was made in Texas, and was subject to our laws, unless the fact that it was for an interstate shipment put it beyond their operation, and that was the question discussed. The contract in the *Burgess* case was made in Louisiana, the law of which, presumed to be the same as that of this state, made it illegal. This is the ¹⁸⁹ gist of the decision, the court holding, as in the *Armstrong* case, that it was in the power of the state legislatures to make such regulations applicable to contracts concerning interstate commerce. Neither case holds that the statute of this state applies to contracts made in other jurisdictions. Indeed, the *Burgess* case holds that the contract there in question was governed by the law of Louisiana.

It is too well settled to require citation of authority that the statutes of a state have no extraterritorial operation, and cannot invalidate contracts made and to be performed in other jurisdictions. The courts of this state might be forbidden by the laws of the state, in the absence of constitutional obstacles, to enforce particular contracts, although made in other jurisdictions by the laws of which they would be valid. The rule by which courts of one country test the validity of contracts made and to be performed in other countries, in accordance with the laws of such countries, is one of comity only, and cannot be applied in opposition to the positive law of the forum; and if the statute in question disclosed a purpose to change this rule of comity, and to prevent the courts of this state from applying it to contracts made and to be performed out of the state, questions of a different nature might arise. But we can discover nothing of the sort in it. No reference is made to foreign contracts, nor is any command or inhibition concerning them laid upon the courts. Instead, the statute assumes to act directly upon the contracts and stipulations to which it relates, declaring them to be illegal and invalid. This is a sufficient indication that the provisions relate to things the legality and validity of which were under the control of the legislature, and not to those which were beyond its power, and which it could not nullify. For, while the legislature might set aside the rule of comity by which contracts elsewhere made are enforced by our courts, in conformity with the law governing their making and performance, it could not render those contracts void, and the purpose to do so should not be imputed when it does not appear. Hence, we conclude that the transactions to which this statute applies are such as occur in this state, and that the statute has no application to this case. And, if we could hold that the statute did apply, we do not see how that would enable the courts of this state to render a judgment for plaintiff as upon a cause of action which had accrued to him under the laws of Oklahoma, if, according to those laws, he has none which he can assert.

It is only by virtue of the principles of comity that the plaintiff, a citizen of the Indian Territory, can ask our courts to enforce a transitory cause of action which he claims accrued to him in Oklahoma, and this does not entitle him to have a portion of the law of that territory affecting his claim disregarded because it differs from ours. His right of recovery

must be given by the law of the place where his injury occurred, whether that law be ascertained by proof or by presumption in the absence of proof: 2 Wharton on Conflict of Laws, p. 1108, et seq., and cases cited.

All of the questions raised as to the validity of the stipulation referred to, and its effect upon the case, are therefore to be determined by the laws of Oklahoma, and the defendant ought to have been allowed to introduce ¹⁹⁰ the stipulation in evidence, together with testimony as to the law there in force determining its validity and legal effect.

The force of the contention of defendant in error that, although such stipulations may be held valid by the law of Oklahoma in their application to cases generally, yet they may become, in their operation in particular cases, arbitrary and unreasonable limitations upon the liability of masters for the consequences of their own negligence, and that such is shown to be the case here must also be tested by the law of Oklahoma. That question has not been tried, the exclusion of the evidence offered having deprived the plaintiff in error of any hearing upon it. No view that we might now take of the contention would sustain the action of the court below, and we cannot know what the developments of another trial may be.

There is a further contention of the defendant in error that, because the notice was to be given in Topeka, Kansas, the contract was to be performed there, and that, hence, its validity should be tested by the laws of that state, as to which there were no allegation and proof. But this contention, at least, only goes to the legal effect of the stipulation upon plaintiff's right, and that is to be determined by the law from which the right must be derived—that of Oklahoma. Besides, this stipulation was only an incidental part of the contract of service which was to be performed in the Indian Territory and Oklahoma. The mere fact that the notice was to be received at a place in Kansas does not make the contract performable there in any such sense as to justify the inference that the parties intended to subject their rights to the laws of that state, rather than to those of the place where the contract was made, where they were to remain, and where they were to do most of the things to be done in carrying out their engagements.

For the error in excluding the evidence the judgment is reversed and the cause remanded.

For Recent Authorities upon the question involved in the principal case see Western Union Tel. Co. v. Lacer, 122 Ky. 839, 121 Am. St. Rep. 502; Johnson v. Western Union etc. Co., 144 N. C. 410, 119 Am. St. Rep. 961; Cannaday v. Atlantic etc. R. R. Co., 143 N. C. 439, 118 Am. St. Rep. 821; Banco De Sonora v. Bankers' Mutual etc. Co., 124 Iowa, 576, 104 Am. St. Rep. 367.

LODWICK LUMBER COMPANY v. TAYLOR.

[100 Tex. 270, 98 S. W. 238.]

CONVEYANCE OF TIMBER.—A conveyance of a tract of land in fee simple, to wit, all of the timber thereon, is a conveyance of the timber with an interest in the land, with the right to cut it any time without importing into such grant that it must be cut within a reasonable time. (p. 805.)

CONVEYANCE OF TIMBER—Right to Remove.—If the owner of land conveys the timber thereon in fee simple, and the vendee, long afterward, enters and cuts the timber, he is not liable to one who has in the meantime acquired the title to the soil. (p. 805.)

F. H. Prendergast, for the appellant.

Harrison, Davidson & Scott, for the appellee.

271 WILLIAMS, A. J. Certified questions from the court of civil appeals for the fifth district as follows:

“In the above-entitled cause the following issues of law arise, which this court deems it advisable to present to the supreme court of the state of Texas for adjudication.

“On July 10, 1905, Taylor filed amended petition in the county court of Harrison county against Lodwick Lumber Company, and recovered judgment on July 19, 1905, for one hundred and seventy-five dollars, and defendant appealed. The suit was for the value of timber cut from Taylor's land by the lumber company.

“On March 1, 1893, G. W. Morris was the owner of ninety-six acres of land in Harrison county, Texas, being described in the petition, and on that day deeded the timber on the land to the Hope Lumber Company. The deed was as follows, in consideration of the sum of one hundred dollars to him paid: ‘I have bargained, sold and released unto the Hope Lumber Company, heirs and assigns, forever, in fee simple, the following described tract or parcel of land, to wit: All the timber on the ninety-six acres (being the land described in

plaintiff's petition); and I do hereby bind myself, heirs and legal representatives to warrant and forever defend, all and singular, the title to the above mentioned premises unto the said Hope Lumber Company, heirs and assigns, against every person or persons whomsoever lawfully claiming, or to claim, the same, or any part thereof.' The Hope Lumber Company failed in 1895 or 1896, and J. H. Inman, of New York, became the owner of its interest. Inman died, and his executors sold to D. H. Scott and ²⁷² S. J. Jones, and they sold to the Commercial Lumber Company in 1901, and that company sold to appellant in December, 1903. The appellant company, without Taylor's consent, entered upon the land and cut and removed the timber in March, 1904, more than ten years after the timber was sold by Morris. The title to the land passed from G. W. Morris by mesne conveyance to R. W. Taylor, appellee, who owned the land when the timber was cut and removed.

"At a former day of this term we affirmed the judgment of the trial court. The cause is pending on a motion for rehearing. The appellant has filed a motion requesting us to certify the case to the supreme court. The questions involved are of first impression in this state; this being so, and the appeal being from the county court and the supreme court not having jurisdiction to review the case on writ of error, we deem it proper to certify the questions involved to the honorable supreme court for determination.

"Question 1. Did the title of the timber not removed from the land within a reasonable time revert to the owner of the soil?

"Question 2. Does the Lodwick Lumber Company owe Taylor for the value of the timber cut and removed, without his consent, after the expiration of a reasonable time from the making of the original contract of sale?"

Both questions are answered in the negative. The deed unmistakably expresses the intention to convey the timber as an interest in the land on which it stood, and to convey it in fee simple and forever. It is a well-settled proposition that trees may be so conveyed or reserved in a deed as to leave in one person a title in fee in the soil generally and in another a like title in the timber. Where this is the case there goes with the title to the timber the right to the use of the soil for its sustenance and of entry upon the land for its enjoyment.

Consequently, no such limitation as that the timber must be removed within a reasonable time can be imported by construction into such a grant or reservation. The very terms of the deed, when it says the title is conveyed in fee simple forever, answer any question that might otherwise arise as to the nature and duration of the right granted: *Liford's Case*, 11 Coke, 85; *Stanley v. White*, 14 East, 332; *Clap v. Draper*, 4 Mass. 266, 3 Am. Dec. 215; *Wait v. Baldwin*, 60 Mich. 622, 27 N. W. 697; *Howard v. Lincoln*, 13 Me. 122; 1 Washburne on Real Property, 16; *Knotts v. Hydrick*, 12 Rich. (S. C.) 314; *White v. Foster*, 102 Mass. 375.

Contracts of a different character for the sale of timber as personal property have been passed upon in a great number of reported cases, and have usually been construed as giving only the right to cut and remove the timber within a time fixed by the parties, or when the time is not expressly stipulated, within a reasonable time; and the cases cited by the court of civil appeals in its opinion accompanying the certificate are of that class. There is much diversity of view among them upon questions which do not properly arise here. We have found no case which gives to such a deed as that in question a less effect than that which we have ascribed to it. In one of the cases of the class last referred to, both kinds of contracts are thus considered: "Growing ²⁷³ timber constitutes a part of the realty, is parcel of the inheritance, and, like any other part of the estate, may be separated from the rest by express reservation or grant, so as to form itself a distinct inheritance. It was early so held by this court in *Clap v. Draper*, 4 Mass. 266, 3 Am. Dec. 215, and trespass by the grantee of such an estate against the owner of the soil was maintained, for cutting down the trees: See, also, *Putnam v. Tuttle*, 10 Gray, 48. When so separated and made a distinct estate, it has the incidents of real property so long as it remains uncut, and the rules which govern the title and transfer of such property must apply. It is like property in mines and minerals, which may in like manner be separated from the general ownership of the soil, and become distinct estates in freehold, with all the incidents belonging to such estates: *Adams v. Briggs Iron Co.*, 7 Cush. 361.

"It may be difficult in many cases to determine, from the terms of the contract, whether the parties intend to grant a present estate in the trees while growing, or only a right, either definite or unlimited as to time, to enter and cut, with a title

to the property when it becomes a chattel. If the former be the true construction, then it comes within the statute, and must be in writing; if the latter, then, though wholly oral, it may be enforced": *White v. Foster*, 102 Mass. 375.

No difficulty of the kind thus referred to occurs in the present case, the deed itself showing in express terms the nature and extent of the right conveyed.

A Grant to One, His Heirs and Assigns, of All the Trees and timber standing and growing on certain lands forever, with liberty to cut and carry them away, conveys an estate of inheritance in the trees and timber, and the grantee can maintain trespass quare clausum fregit against the owner of the soil for cutting down the trees: Clap v. Draper, 4 Mass. 266, 3 Am. Dec. 215. But see Hall v. Eastman, Gardiner & Co., 89 Miss. 588, 119 Am. St. Rep. 709.

FORT WORTH AND DENVER CITY RAILWAY COMPANY v. UNDERWOOD.

[100 Tex. 284, 99 S. W. 92.]

PLEADINGS—Amended Petition.—An amended petition which sets up no cause of action takes the place of the original petition, and relates back to the time of the institution of the suit, and the claim which it asserts is to be regarded as if asserted when the suit was brought. (p. 807.)

JURISDICTION—Amount in Controversy—Accrual of Interest.—Although the amount of damages and interest asked in a complaint is increased after suit is instituted by the accrual of interest to a sum beyond the jurisdiction of the court, this does not deprive the court of power to render judgment. (pp. 807, 808.)

.Spoonts & Thompson, Fires & Decker and M. Spoonts, for the appellant.

S. G. Tankersley and E. E. Diggs, for the appellee.

285 WILLIAMS, A. J. Certified questions from the court of civil appeals for the second district, as follows:

"The above-styled and numbered cause is now pending before this court on a motion for rehearing, and we deem it advisable to certify to your honors, for decision, the question whether or not the county court of Childress had jurisdiction over this cause at the time it rendered the judgment herein appealed from. On July 3, 1905, appellee, as plaintiff in the county court of Childress county, filed his third amended

original petition, seeking to recover damages for alleged injuries to a shipment of cattle, wherein he prayed judgment for the sum of nine hundred and forty dollars and forty cents, together with interest and costs of suit, his cause of action having accrued, according to the allegations of his pleading, on August 25, 1903, so that the aggregate damages then claimed amounted to more than one thousand dollars. It was upon this amended pleading that the trial was had, and the record does not contain any of the abandoned pleadings of the plaintiff, nor does it disclose when they were filed, except the second amended original petition, which was filed January 5, 1904."

For most purposes an amended petition, which sets up no new cause of action, takes the place of the original petition, and relates back to the time of the institution of the suit: *Tolbert v. McBride*, 75 Tex. 95, 12 S. W. 752. The claim which it asserts is to be regarded as if asserted when the suit was brought. The question as to the amount put in controversy in this case by the plaintiff's pleadings must, therefore, be determined as if it arose upon the original petition. Thus tested, no more was claimed than the court then had jurisdiction to adjudge. The date of the institution of the suit is not given by the certificate, but it appears that it must ²⁸⁶ have been before January 5, 1904, when the second amended petition was filed. Up to that time six per cent added to the amount of damage alleged to the cattle would not exceed one thousand dollars. Hence, it is evident that the amount claimed when the suit was brought was within the jurisdiction of the county court, and judgment for that amount could have been rendered had the cause been then tried. Taking the amended pleading as speaking from that date, it claimed no more than it is to be presumed was claimed in the original petition. The cause of action asserted was of such a nature that damages might accumulate pending the action, which is true of many actions, as, for instance, those brought for the use of property detained, and the like; but the accrual of further damages in cases of that character does not take away the power of the court to give judgment for an amount claimed which is within its jurisdictional limits. The plaintiff in such cases, with proper pleadings, may recover the entire damages which he has suffered up to the trial, but this right may be restricted by the law limiting the jurisdiction of the court in which he has seen fit to sue. Having brought

his action for an amount within the jurisdiction, he is entitled to such judgment as the court has power to render.

The case of *Gulf etc. R. R. Co. v. Fromme*, 98 Tex. 459, 84 S. W. 1054, decided the question as to the appellate jurisdiction of the court of civil appeals; in other words, as to the right of appeal, as dependent on the amount in controversy, and not as to the jurisdiction of the court from which the appeal was taken. The two questions are not always determinable from the same data, as may readily be deduced from what we have already said. The jurisdiction of a court *a quo*, aside from questions arising from the subsequent assertion of new causes of action, is determined by the matter put in issue when the suit is brought. But as, in cases in which damages accumulate pending the action, the amount recoverable when judgment is rendered may be greater than that recoverable at its institution, the right of appeal is properly held to depend upon the amount in issue and which the court has the power to adjudge at the time of the trial. This is the holding in the *Fromme* case.

What we say has no reference to amendments by which a plaintiff, by amending his pleadings, sets up a new cause of action, or increases the amount originally sued for so as to claim an amount not within the jurisdiction of the court. Questions which might thus arise are not involved, there being nothing to show that the plaintiff ever increased or changed his demand.

The question is answered in the affirmative.

A Court Having Jurisdiction only of actions where the amount in controversy does not exceed three hundred dollars has no jurisdiction of an action on a note for three hundred dollars and interest, alleged to be wholly due: *Wilson v. Sparkman*, 17 Fla. 871, 35 Am. Rep. 110.

Although the Amount Claimed in a Petition may be sufficient to give the court jurisdiction, yet if the facts alleged are such as to show no cause of action as to such part of the sum sued for as to reduce it below the amount for which the court has jurisdiction, the suit should be dismissed: *Carswell v. Habberzett*, 99 Tex. 1, 122 Am. St. Rep. 597.

LANNING v. GREGORY.

[100 Tex. 310, 99 S. W. 542.]

DOMICILE OF CHILD of Divorced Parents.—If parents are divorced in one state without disposing of the right to the custody of their minor child, and the father and mother removed to different states, the domicile of the child follows that of the father and he is not emancipated from the father's control by an agreement to return him to his mother at her request. (p. 811.)

CHILDREN—Domicile.—The judgment of a court of one state upon habeas corpus proceedings awarding the custody of a child, which has been brought temporarily within such state to the mother for a number of years is to take the child from the custody of the father and place it in that of the mother, but this only changed the domestic status of the child for such time. (p. 812.)

CHILDREN—Minor—Domicile of—Temporary Presence.—If a child is in the lawful custody of its father and has its domicile with him, the court of another state cannot acquire jurisdiction of the child by reason of its temporary presence in that state to adjudge a change of relation between the father and child. If there is no unlawful restraint of the child, the question of the relative rights of the child belongs to the jurisdiction of the father's domicile. (pp. 812, 813.)

Looney & Clark and Perkins & Craddock, for the appellant.

Mock & Doss, for the appellees.

313 **BROWN, A. J.** Certified questions from the court of civil appeals of the fifth supreme judicial district, as follows:

“We deem it advisable to present to the supreme court of the state of Texas for adjudication the following issues of law arising in the above-entitled cause:

“On November 10, 1905, appellees caused to be filed in the district court of Hunt county, Texas, and presented to the Hon. R. L. Porter, judge of said court, the following petition for habeas corpus, to wit:

“ ‘The State of Texas,
County of Hopkins.

“ ‘To Hon. R. L. Porter, Judge of the Eighth Judicial District:

“ ‘Your petitioner, Mrs. Alice Gregory, joined by her husband, R. E. Gregory, pro forma, respectfully shows that she is entitled to the custody of her minor son, J. W. Lanning, Jr., who is four years of age, that she has been secretly, clandestinely, and forcibly deprived of the custody of her said minor son by J. W. Lanning, Sr., who now has possession and

custody of her said minor son, and his said custody of said child is illegal; that your petitioner has reason to believe, and does verily believe, that the said J. W. Lanning, Sr., with her said son, J. W. Lanning, Jr., is now in Hunt County, Texas; that your petitioner fears that the said J. W. Lanning, Sr., will remove the said child, J. W. Lanning, Jr., without the State of Texas, and effectually conceal his whereabouts from your petitioner. Wherefore your petitioner prays Your Honor for your most gracious writ of habeas corpus, directed to the sheriff or any constable of Hunt County, Texas, and directed to the said J. W. Lanning, Sr., commanding them to produce the said J. W. Lanning, Jr., before Your Honor, at such time and place as Your Honor shall designate, to the end that the said minor child may be restored to your petitioner.

“ ‘ALICE GREGORY.’

“ ‘Sworn to and subscribed before me this 10th day of November, 1905.

“ ‘[Seal.]

JNO. T. FERGUSON,

“ ‘Notary Public, Hopkins County, Texas.’

“ ‘The judge’s fiat, indorsed on this petition, directed the clerk of the district court of Hunt county, Texas, to issue the writ of habeas corpus as prayed for, returnable before him at the courthouse of said county instanter. The writ was issued on November 10, 1905, and executed by the sheriff of Hunt county on the eleventh day of November, 1905, by taking charge of the person of J. W. Lanning, Jr., and carrying him before the court, as directed. The respondent, J. W. Lanning, Sr., on the same day, viz., November 11, 1905, filed his answer to the writ, denying the right of the relator, Mrs. Gregory, to the custody of the child, and, for the reasons alleged by him, asking that his custody be awarded to him. Both parties urged that a hearing of the matter be had as soon as possible, and in deference to their request the trial was begun that evening, November 11, 1905, and resulted in a judgment of the court awarding the custody of the child to the relator, Mrs. Gregory, until he arrived at the age of twelve years, after which time his ³¹⁴ custody was given to the respondent. From this judgment the respondent, J. W. Lanning, Sr., has appealed.

“ ‘Relator and respondent were both reared in Limestone county, Texas, and married six or seven years ago. The little boy, whose custody the mother seeks to recover in this proceed-

ing, is the fruit of that marriage, born in the state of Texas, and at the time of the trial in the district court was four or five years of age. Respondent and relator moved to Sulphur Springs, in Hopkins county, where they resided for several years. In the month of February, 1904, they separated, the respondent about two months later going to Monroe, Louisiana, where he has since resided. The relator instituted a suit for divorce against respondent in the district court of Hopkins county, in which she also prayed for the custody of their said child. In the month of August, 1904, the divorce suit was tried, and the divorce granted, but, by agreement of the parties, the prayer of the petitioner for the care and custody of the child was waived, and the court made no adjudication thereon. At the time respondent had the child in the state of Louisiana, having placed him with his sister, Mrs. J. H. Baker, the wife of J. H. Baker, who resided at or near Delhi, Louisiana; but, accepting the evidence of relator, we find that respondent agreed with relator that, if she would not have her right to the care and custody of the child adjudicated in the divorce suit, and would let him take the child and place him in the keeping of his sister, Mrs. Baker, she should still have control of the child, and might resume the actual custody of him whenever she desired to do so and called for him, or that respondent, whenever requested by relator, would carry the child to her. Neither Mrs. Baker nor Mr. Baker, with whom the child was left, assumed any responsibility as to its education, support and maintenance.

“Relator was married to her present husband, R. E. Gregory, August 2, 1905, and at the time of the institution of this suit they resided and were domiciled in the city of Louisville, in the state of Kentucky. Respondent resided and was domiciled in Monroe street, state of Louisiana, and the little boy had been with Mrs. Baker, respondent's sister, in the state of Louisiana, from the time it was placed in her keeping, as stated, until a short time before the institution of this suit, when Mrs. Baker brought him to Dallas, Texas, on a visit to some of her relatives. While Mrs. Baker was visiting with the child in Dallas Mrs. Gregory and her husband also visited that city, and, at the request of Mrs. Gregory, the child was left with her to remain through the night, with the understanding that Mrs. Baker should call the next day and get him. During the night, however, Mrs. Gregory and her husband left, carrying the child with them to Sulphur Springs, Texas, where

they were overtaken by respondent, who had been summoned from Louisiana by Mrs. Baker, and the child by him taken from them. Thereupon Mrs. Gregory, joined by her husband, instituted this suit to recover the custody of said child, and the writ issued therein was executed, and the child taken from the custody of respondent while en route with him to Louisiana.

“Question 1. Under the facts stated, did the domicile of the child in question follow that of his father, and was such domicile thereby changed from Texas to Louisiana?

315 “Question 2. Did the judgment of the trial court in awarding the custody of the child to his mother until he became twelve years of age affect or change the status or domestic and social condition of the child?

“Question 3. If the child’s domicile at the time of the institution of this suit was in Louisiana, did the district court of Hunt county, Texas, have power or jurisdiction to hear and determine, as between relator and respondent, to whom the custody of the child should be awarded?”

We answer the first question that the domicile of the infant followed that of the father, and upon the change of the father’s domicile from Texas to Louisiana the infant’s domicile was likewise changed: 14 Cyc. 843; 1 Wharton on Conflict of Laws, sec. 41, and authorities cited; Trammell v. Trammell, 20 Tex. 406; Franks v. Hancock, 1 Posey (U. C.), 554.

The agreement made between the father and the mother of the child did not have the effect to emancipate the child from the control of the father. The infant’s domicile was, in law, still that of the father, notwithstanding the separation and the promises made by Lanning to return the child to the mother at her request.

To the second question we reply, the domestic status of the infant son was that of a member of the family of his father, being in his father’s custody. The effect of the judgment of the district court was, for a period of years, to take the son from the family and custody of the father and place him in the family and custody of the mother. This changed his domestic status for the time.

To the third question we answer, the child being in the lawful custody of the father, his domicile was in the state of Louisiana, and the district court of Hunt county did not acquire jurisdiction of the child by reason of his temporary presence in the state of Texas. That court had no authority to

adjudge a change of relation between the father and the child: *Brown on Jurisdiction*, 290.

It appears in this case that there was no unlawful restraint placed upon the child, the only question at issue being the relative right of the husband and wife to the custody of their minor child. Neither of the parties was a resident of the state of Texas, and the question at issue belonged to the jurisdiction of the domicile of the father: *Brown on Jurisdiction*, secs. 79, 80; *Taylor v. Jeter*, 33 Ga. 195, 81 Am. Dec. 202; *Kline v. Kline*, 57 Iowa, 386, 42 Am. Rep. 47, 10 N. W. 825.

A Decree of Divorce rendered in Wisconsin on service by publication is ineffectual to award the custody of minor children resident in Iowa: *Kline v. Kline*, 57 Iowa, 386, 42 Am. Rep. 47.

In a Suit for Divorce Against a Defendant who had taken his children, and fled with them from the state before it was commenced, a judgment awarding to plaintiff the custody and care of such children is void, if the process was served beyond the state: *De La Montanya v. De La Montanya*, 112 Cal. 101, 53 Am. St. Rep. 165.

WEBSTER v. CLARKE.

[100 Tex. 333, 99 S. W. 1019.]

JUDGMENT Against Executor—Extraterritorial Effect of.—A judgment rendered in another state against an executor upon the indebtedness of the testator is not admissible as a valid claim against such defendant in another state in a suit commenced there by the same plaintiff to enforce a claim against lands in that state bequeathed to the defendant by the testator. (p. 815.)

Cain & Knox, for the plaintiff in error.

Wilson, Box & Watkins, for the defendant in error.

334 WILLIAMS, A. J. This action was brought by plaintiff in error against defendant in error, as executrix of and devisee under the will of Lemuel B. Clarke, to subject certain lands in Cherokee and Polk counties of this state, received by the defendant as such devisee, to the payment of a judgment recovered by plaintiff against the defendant as executrix. It appears from the record that both of the parties are and have been citizens of New York, and that Lemuel B. Clarke, who was also a citizen of that state, died in 1886, leaving a will by which he appointed the defendant as his executrix, and,

after giving certain legacies, bequeathed to her the residue of his estate. The will was duly probated and defendant qualified and received letters testamentary under it and opened and conducted an administration, in New York, which has never been closed. The suit in which the judgment sued on was rendered was pending against Clarke before his death, and was afterward revived against defendant as his executrix, in which capacity the demand asserted was established against her by that judgment. After the present suit was instituted, plaintiff caused a copy of the will and its probate in New York to be filed and recorded in Polk county, but no letters testamentary have ever been issued to defendant in this state, and much more than four years elapsed between Clarke's death and the filing of the will.

The district court gave judgment in plaintiff's favor subjecting the land to the debt as established by the New York decree. The court of civil appeals reversed the judgment of the district court and rendered judgment for the defendant, holding that the judgment relied on, being against a foreign executrix, has no extraterritorial effect, and is not competent evidence of the debt in this action. Plaintiff in error insists that this is wrong, for two principal reasons: 1. Because defendant, as executrix, appears as the defendant in both actions, and the general rule that there is no privity between different legal representatives appointed in different jurisdictions has no application; 2. Because defendant, ³³⁵ being both executrix and devisee, when a party to the New York judgment, is bound by it in both capacities to the extent that it establishes as against her the existence of a debt against the testator. If the assumption that defendant occupies in this state the position of executrix of the will is sound, the first contention would be sustained by the decision in the case of *Carpenter v. Strange*, 141 U. S. 87, 11 S. W. 960, 35 L. ed. 640, cited in support of it. But the probate of the will in this state did not entitle her to act under it as executrix. Indeed, our statutes expressly prohibit the grant of such authority after the lapse of such time as had occurred when the probate of the will in this state took place. She cannot, therefore, be now regarded as in any sense exercising the powers or as being subject to the liabilities, in this state, of an executrix.

The other contention has some plausibility, but it is answered by the fact that the former actions was against her as execu-

trix, solely, and that her power as such extended only to assets within the jurisdiction of the court which granted her letters. The suit against her as executrix in New York had for its object the establishment of the demand against her as a basis for obtaining satisfaction out of assets brought within her control by virtue of her appointment there. As executrix in New York she had no control over lands in Texas, and a judgment rendered there against her could give her no such control. It may be true that we should presume that its effect was to establish the debt against the estate so far as to entitle the plaintiff to satisfaction out of assets in New York, and that to this extent it was binding upon her both as executrix and devisee. This, we may assume, would be the effect of such a judgment against an executrix in this state in subjecting both land and personal property here situate to its satisfaction, and it has not been made to appear by pleading and proof that the law of New York is different. But as such a proceeding against an executor, in his capacity as such has for its sole purpose, and can only have the effect, to subject assets existing within the jurisdiction from which he derives all of his powers, no question is involved in its scope of reaching land in another jurisdiction claimed by him in a different capacity from the testator. It cannot, therefore, be correctly said that the debt which has been asserted and established by such judgment for the former restricted purpose only is thereby established against the person who was the defendant therein only as executrix, when asserted in another jurisdiction for a different purpose and against her in a different capacity.

We conclude that the judgment of the court of civil appeals is correct.

Affirmed.

A Judgment Against an Administrator of a Deceased Person in one state is no evidence of debt in a subsequent action by the same person in another state against an administrator, whether the same or a different person, appointed there, or against any other person having assets of the deceased: Braithwaite v. Harvey, 14 Mont. 208, 43 Am. St. Rep. 625; Brown v. Fletcher's Estate, 146 Mich. 401, 123 Am. St. Rep. 233.

EDELSTEIN v. BROWN.

[100 Tex. 403, 100 S. W. 129.]

EVIDENCE—Testimony Denying Marriage with a Deceased Person.—If the children of a woman who has lived with the defendant and passed as his wife sue him for her interest as his wife in the community property, his evidence that he was never married to her is properly excluded as being testimony of a party as to a transaction with a deceased person. (p. 818.)

M. M. Smith, E. A. King and Morris & Crow, for the plaintiff in error.

S. D. Snodgrass and W. R. Heath, for the defendants in error.

⁴⁰⁴ BROWN, A. J. J. M. and L. B. Brown instituted this action in the district court of Camp county, in which they alleged that they were the children and only heirs of Mrs. Sarah Edelstein, deceased, who was the wife of the defendant, E. Edelstein; that Mrs. Edelstein had departed this life, leaving community property of herself and her said husband which was in the hands and possession of defendant Edelstein. They prayed for the appointment of a receiver for the estate, which was done, and that they should recover their mother's interest in the community property of the said Edelstein and wife. Plaintiffs were the children of Mrs. Edelstein by a former husband.

Edelstein denied the marriage between himself and the plaintiffs' mother, at the same time admitting in his testimony that he and the plaintiffs' mother had maintained illicit intercourse with each other during her marriage to three husbands, from all of whom she had been divorced, and that subsequent to the divorce from the last husband he lived in the house with them, and that they lived together occupying the same room and oftentimes the same bed. There was no evidence of any statutory marriage, and plaintiffs relied upon the presumption of marriage arising from the facts of the cohabitation.

L. B. Brown, one of the plaintiffs, was introduced as a witness on their behalf and testified at length to the facts of the cohabitation between Edelstein and his mother during many years, a part of which time he lived in the house with them, and that they lived together as man and wife up to the time

of his mother's death in the year 1902. The defendant Edelstein objected to this testimony upon the ground that it was proof of a transaction between the deceased mother of the plaintiffs, under whom they were claiming, and the defendant, but the court overruled the objection and admitted the evidence.

E. Edelstein being upon the stand as a witness in his own behalf, his attorneys propounded to him questions in reply to which he would have answered: "I was never married to the mother of the plaintiffs and she and I never agreed in any way or form to become husband and wife, and I never at any time agreed with her to become her husband and I never was married to her. It was not understood between them at any time prior to her death that she was my wife or I her husband." The testimony was objected to by the plaintiffs' counsel and the court sustained the objection, because under article 2302, Revised Statutes, the defendant was not competent to testify as to transactions between himself and the deceased mother of the plaintiffs.

The writ of error in this case was granted upon the ground that the trial court erred in excluding the testimony of Edelstein as shown ⁴⁰⁵ in the foregoing statement. The action of the trial court was based upon the following article of the Revised Statutes:

"Art. 2302. In actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent."

This suit was by the children and heirs of Mrs. Edelstein whom they claimed to have been the wife of the defendant, Edelstein, at the time of her death. The object was to recover her interest in the community property. Edelstein denied the marriage but admitted all of the facts which were testified to by the plaintiffs themselves as showing the relation of husband and wife. The gist of this controversy was the common-law marriage claimed by plaintiffs to have been contracted between Edelstein and their mother, for upon that de-

pendent the rights of the plaintiffs. The character of the testimony to be excluded is expressed in the language: "Neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate or ward." The phrase "as to" is defined thus: "So far as it concerns; as regards; as respects; in regard to; in respect to." That the proof which was offered to be made by the witness Edelstein had respect to, and was in regard to, and, in fact, came within every phase of the definition of, the terms of the statute, cannot be doubted, because it undertook to explain the state of acts which constituted the transaction—the cohabitation of Edelstein and the woman, so as to make it willfully unlawful, whereas the jury might have found from the evidence that the parties had contracted marriage according to the common law. The evidence was properly excluded: *McCampbell v. Henderson*, 50 Tex. 601; *Parks v. Caudle*, 58 Tex. 216; *Bartlingck v. Harriman* (Tex. Civ. App.), 41 S. W. 884; *Johnson v. Lockhart* (Tex. Civ. App.), 40 S. W. 640; *Hazlewood v. Pennybacker* (Tex. Civ. App.), 50 S. W. 199; *Abbott v. Stiff* (Tex. Civ. App.), 81 S. W. 562.

Edelstein testified substantially to the same facts as did L. B. Brown; hence it is unnecessary for us to consider the assignment which challenges the admissibility of Brown's evidence.

The judgments of the district court and of the court of civil appeals are affirmed.

The General Rule that a Party cannot Testify, where the adverse party is an executor or administrator, to facts which occurred with the decedent before his death, is being departed from by the better authorities as calculated to defeat justice rather than to promote it: *Cockley Milling Co. v. Baun*, 75 Ohio St. 270, 116 Am. St. Rep. 741. If one as administrator brings a suit to quiet title to a portion of a mining claim on the ground that a deed made by his intestate and under which defendant claims was so indefinite as to be inoperative, it has been held that the claim of the latter under his deed is a claim against the demand of the plaintiff alone, and is not a claim or demand against an intestate's estate, so as to make him incompetent to testify as to matters occurring prior to the death of his grantor: *Collins v. McKay*, 36 Mont. 123, 122 Am. St. Rep. 334.

STONE v. TILLEY.

[100 Tex. 487, 101 S. W. 201.]

MORTGAGES—Discharge of Tax Lien by Mortgagee.—A mortgagee who, to protect his mortgage, pays off a judgment foreclosing a tax lien against the land, without any request from the owner thereof, is entitled to include the sum thus paid in his foreclosure but has no right to a personal judgment therefor. (pp. 821, 822.)

G. W. Barcus, for the plaintiffs in error.

Sleeper & Kendall, for the defendants in error.

⁴⁸⁸ BROWN, A. J. J. E. Stone and his wife resided in Waco and were possessed of community estate, of which the land described in the plaintiffs' petition situated in the city of Waco was a part. A. A. Stone (the wife) died leaving F. J. Stone, Ethel Swint (nee Stone), Alonzo and Pearl Stone, her only children and heirs at law. After the death of his wife, J. E. Stone, in the management of the community estate, contracted a debt with N. J. S. Lacy of two thousand five hundred dollars, which was a debt against the community property of himself and his deceased wife. J. E. Stone executed to Lacy a deed of trust upon the piece of land in the city of Waco to secure the said two thousand five hundred dollars and afterward in March, 1898, a suit was filed in the district court of McLennan county by the heirs of Mrs. Stone, plaintiffs in error, against J. E. Stone, for partition of the property. By agreement the property was partitioned and the land upon which the deed of trust herein mentioned was given by J. E. Stone was set apart to the heirs subject to the debt of the said Lacy. In the years 1898, 1899, 1900 and 1901 this piece of land was assessed in the city of Waco for taxes in the name of the plaintiffs in error, and, they having refused to pay the taxes, the city filed suit in the district court of that county against the plaintiffs in error and J. E. Stone and N. J. S. Lacy, and recovered judgment against the plaintiffs in error for the debt, three hundred and sixty-five dollars and forty-one cents, and also foreclosing the lien for taxes upon the said land as against the said plaintiffs in error and the said J. E. Stone and N. J. S. Lacy. An order to sell the land in satisfaction of the judgment was issued, and, in April, 1904, Lacy paid off the judgment in order to protect his deed of trust upon the land. Lacy subsequently sold the

land under the power contained in the deed of trust for the sum of two thousand dollars and then sued out an execution upon the judgment in favor of the city of Waco against the said plaintiffs in error for the amount of the judgment, interest and costs. At the suit of the plaintiffs in error the execution was enjoined and Lacy filed a cross-bill against the plaintiffs in error for the recovery of three hundred and sixty-five dollars and forty-one cents, together with interest thereon and costs ⁴⁸⁹ which he had paid in discharging the said judgment in favor of the city, claiming that he had paid the said judgment in order to protect the lien that he had by virtue of his deed of trust upon the land. Upon the trial judgment was given perpetuating the injunction against the execution and judgment was rendered in favor of Lacy against the plaintiffs in error for the amount of the judgment, interest and costs paid by Lacy. The court of civil appeals affirmed the judgment of the district court.

Lacy, who paid the judgment to the city of Waco, was not liable for the taxes due to the city, nor was he included in the judgment rendered in the suit by the city against the plaintiffs in error. Lacy had no right nor interest in the payment of the taxes due to the city except as mortgagee, and aside from his character as mortgagee he occupied the place of a volunteer, who has, without the consent of the debtor, paid and discharged the claim of the city for taxes, and, as a volunteer, he would not acquire any right of action against the plaintiffs in error by making such payment: 27 Am. & Eng. Ency. of Law, 237.

Holding a mortgage upon the land, Lacy had the right to discharge the taxes in order to protect his mortgage. He acquired whatever right would accrue to a mortgagee from making such payment and no more, which by foreclosure of the mortgage was to enforce the collection of the sum paid against the land.

The difference between the right acquired by a mortgagee who pays off a tax against property on which his mortgage is given and the right of one who pays a debt by request or because of joint liability for the debt consists in the enforcement of the claim acquired. While persons of the latter class would have the right to enforce the collection of the debt paid for the debtor by suit, the mortgagee only acquires the right to enforce the taxes so discharged as a part of the mortgage debt, and it must be enforced at the same time that the mortgage is

foreclosed for the debt secured thereby. Lacy acquired no right of action against the plaintiffs in error, and could not maintain a suit against them to reimburse himself for the taxes paid in this case: 2 Jones on Mortgages, sec. 1080; Wiltsie on Mortgage Foreclosure, sec. 452; Swan v. Emerson, 129 Mass. 284; Vincent v. Moore, 51 Mich. 618, 17 N. W. 81; Johnson v. Payne, 11 Neb. 269, 9 N. W. 81; Horrigan v. Wellmuth, 77 Mo. 542.

In the case of Swan v. Emerson, 129 Mass. 289, above cited, after stating, in substance, that the mortgagee was authorized to discharge the taxes upon the land on which his mortgage rested, the court said: "But he had no more right to bring a personal action against either of them for the sum so paid than for the principal sum remaining due on his own mortgage." The taxes paid by Lacy became a part of the mortgage debt, and, not being satisfied by the sale of the land, cannot be recovered by suit, because the plaintiffs in error were not liable for the debt secured by the mortgage.

In Vincent v. Moore, 51 Mich. 618, 17 N. W. 81, before cited, Judge Cooley wrote the opinion. The facts were very much like the present case. In that case the mortgagee had redeemed the land from a tax sale and then proceeded to foreclose his mortgage by a sale under the power in the deed, and thereafter brought a suit against the mortgagor to recover the taxes ⁴⁹⁰ which were not paid by the sale of the land. Judge Cooley said: "What the complainants were compelled to pay for the protection of their mortgage did not constitute a separate and independent lien on the land; it could become a lien only in connection with and because of the mortgage, and could not exist independent of it. When, therefore, complainant took proceedings which resulted in a satisfaction of the mortgage, any lien which may have existed before for taxes paid was necessarily discharged, whether the amount paid was claimed in those proceedings or not."

When Lacy foreclosed his mortgage under the power of sale contained in it, it was necessary for him to include the amount he had paid for taxes on the land, if he expected to collect that sum, for, as stated by Judge Cooley, the only right that he had arose out of his mortgage, and when, by the foreclosure proceedings, he satisfied that instrument, his right and claim against the plaintiffs in error was likewise satisfied. The district court erred in giving judgment for Lacy against the plaintiffs in error for the taxes paid by him and the

court of civil appeals erred in affirming that judgment. It is therefore ordered that the judgments of the district court and court of civil appeals be reversed and judgment here be entered in favor of the plaintiffs in error, that Lacy take nothing by his cross-action against them.

Reversed and rendered for plaintiffs in error.

The Doctrine of the Principal Cases finds support in *Swan v. Emerson*, 129 Mass. 289; *Vincent v. Moore*, 51 Mich. 618, 17 N. W. 81; *Walton v. Bagley*, 47 Mich. 385, 11 N. W. 209; *Spencer v. Levering*, 8 Minn. 461; *Johnson v. Payne*, 11 Neb. 269, 9 N. W. 81; *Kersensbrock v. Muff*, 29 Neb. 530, 45 N. W. 778.

KEMPNER v. DILLARD.

[100 Tex. 505, 101 S. W. 437.]

AGENT—Undisclosed Principal—Purchase in Agent's Name. If an agent buys property in his own name with his principal's money, though the name of the principal is undisclosed, the property becomes that of the principal, and the intent of the agent to defraud the principal does not change the effect of the transaction. (p. 826.)

Hutcheson, Campbell & Hutcheson, for the appellant.

D. R. Peareson, for the appellee.

⁵⁰⁷ GAINES, C. J. This case comes to us upon the following certificate from the court of civil appeals for the first supreme judicial district:

"Mrs. Lillian Dillard brought this suit against the independent executrix of C. W. Riddick, to recover balance due on a note given by him, and against Mrs. E. Kempner, for the value of certain cattle alleged to have been converted by Mrs. Kempner, and upon which Mrs. Dillard is alleged to have had a lien to secure the payment of the balance due on the note sued on. Answering to the merits, Mrs. Kempner pleaded the general denial and claimed the cattle as her own. Mrs. Dillard pleaded that she held her lien on the cattle as an innocent purchaser for value, without notice of Mrs. Kempner's title. A trial by the court, without a jury, resulted in a judgment in favor of plaintiff against Mrs. Kempner for a sum equal to her judgment upon the note, and Mrs. Kempner has appealed.

“The history of the case, as disclosed by the record, is as follows: C. W. Riddick owned a plantation near Richmond, in Fort Bend county, Texas, on which he resided. On March 30, 1903, Riddick, for a valuable consideration, executed and delivered to the First National Bank of Houston, Texas, his promissory note for three thousand dollars, bearing eight per cent interest, and due December 1, 1903. To secure the payment of this note he executed and delivered to the bank a mortgage, in writing, covering certain cattle by the following description: ‘All those certain cattle, being between seven and eight hundred in number, now owned by me, branded C. R., and now running on the range in Harris and Fort Bend counties, in Texas, and being all of the cattle owned by me in said brand, including in this conveyance all other cattle that I may own or become the owner of in said brand, or that may hereafter be put in said brand, and including also all of the increase of cattle herein conveyed.’ This description was followed by a warranty.

“In January, 1904, prior to the death of Riddick, J. R. Farmer, acting as the agent of Mrs. Dillard, agreed to take up and carry the Riddick note of three thousand dollars, and advance to him a further sum sufficient to make the loan five thousand dollars. These sums were to be loaned upon the security of the ⁵⁰⁸ cattle then claimed to be owned by him. Before making the loan or taking up the three thousand dollar note, Farmer proceeded to make inquiry as to the status and value of the security offered. Riddick referred him to his (Riddick’s) agent, one Blakely, who made to Farmer a statement showing the ownership by Riddick of all the cattle in the C. R. brand then on the range, as well as the ownership of other cattle not in that brand. The cattle were in Riddick’s actual possession and control, and Farmer learned, upon examination of the record, that the C. R. brand had been duly registered as Riddick’s brand in January, 1903, and that the mortgage to the bank had been duly recorded. Farmer thereupon concluded that the security offered was ample, so without notice, actual or otherwise, that any other than Riddick owned or claimed the cattle, or any interest therein, he purchased the note for Mrs. Dillard, and would have advanced the remaining sum to Riddick, as agreed, but for Riddick’s death. Mrs. Dillard was equally without knowledge of adverse interests or claims. At the date of the mortgage Riddick owned in his own right a lot of cattle which

he purchased from one Fields, and which are referred to in the record as the Fields, or 'mule-shoe' brand cattle. These and their increase were put in the C. R. brand.

"In 1902, and prior thereto, Mrs. E. Kempner, survivor of the community of H. Kempner and wife, had some business dealings with Riddick, and had advanced him money. Having had to take a good many cattle for debts due the Kempner estate, Mrs. Kempner decided to concentrate her cattle interests at Richmond and place them in charge of Riddick, and this she proceeded to do through her agents and representatives. The arrangement with him was that he should take charge of her cattle and bear the cost of looking after them, and the net profit should be divided between her and Riddick. Pursuant to this arrangement, several bunches of cattle were placed in Riddick's hands and branded in Kempner's brand, which was K. Mrs. Kempner's agent in the management of these affairs was her son, D. W. Kempner, and Mrs. Kempner personally had no knowledge of them.

"In 1902 a man named Forest Clark had charge of some cattle at Alice, Texas, belonging to a Mrs. Collins. The range was dry, and, wishing to sell them, he communicated with one Andrus. Thereupon Kempner authorized Andrus to go to Alice and inspect the cattle, and if they were a good value, to buy them. The evidence is conflicting upon this point, but is sufficient to sustain the following findings in support of the judgment. Andrus advised Clark that a man at Richmond wanted some cattle, and Clark went to Richmond to make the sale. Andrus introduced him to Riddick, and, after some discussion, Riddick and Andrus went to Alice to inspect the cattle. Riddick gave Clark a check on the Kempners for six hundred dollars in advance as earnest-money. He bought the cattle in his own name, and Clark sold them to him, knowing no other party in the transaction. Andrus remained at Alice to receive the cattle, which he did, and consigned them by rail to Riddick at Clodine, near Richmond. They were finally paid for by drafts drawn by Andrus on the bank at Alice, the funds having been placed there for the purpose by Kempner. There is no question but that Andrus was the agent intrusted by Kempner to purchase the cattle and draw the drafts ⁵⁰⁹ for the payment. It is equally clear that Riddick was also sent to Alice to inspect the cattle for Kempner and to act with Andrus in the purchase. They were intended by Kempner to be turned over to Riddick, and kept by him on the

range near Richmond on the same terms as the other Kempner cattle. Clark testifies in the most unequivocal way that Riddick bought in his own name, and that he, Clark, sold and conveyed them to Riddick, and knew no other vendee in the sale. There was no written bill of sale, either to Riddick or Kempner. The transaction was verbal. Clark knew Kempner only as the drawee of the checks. There is much in the record that points to a different conclusion, but Clark's testimony is unequivocal, and is by no means without other facts which tend to support it.

"These Clark cattle were in the '30' brand when bought. They consisted of six hundred cows and about thirty bulls. Riddick placed them on the open range with his and Kempner's cattle, openly claimed and treated them as his, and had the 1902 and 1903 calves of these cows branded in his own brand, C. R. At least one hundred and twenty-five of these calves, the increase of the cows in the '30' brand, were so branded at the date of the mortgage to the bank and the calves of 1903 were branded in the same way.

"Notwithstanding all this it remains undisputed that Kempner trusted Andrus to purchase the cattle and Riddick to handle them for the Kempners as the Kempner cattle on the same terms as set out above, and that Kempner's money paid for them and that the beneficial title to the cattle was in Kempner.

"In May, 1904, Mrs. Kempner made a range sale of all her cattle and the Riddick cattle to one H. S. Dew. For the Fields cattle which were branded C. R. she paid Mrs. Dillard fifteen hundred and fifty dollars, conceding that the Fields cattle and their increase belonged to Riddick and were covered by the lien. This controversy has arisen over the increase of the '30' brand cattle which were branded C. R., and the plaintiff accepted the fifteen hundred and fifty dollars last above mentioned without prejudice to her right to press her claim against the cattle involved in the suit.

"At a former day of this term we affirmed the judgment of the court below on the theory that, because Riddick, the agent of Kempner, had taken the legal title to the cattle in his own name, though in fraud of his principal, Mrs. Dillard who acquired her lien upon the cattle for value without notice of Mrs. Kempner's interest was protected in her purchase as against the claim of Mrs. Kempner.

“As there is much doubt and some difference of opinion among the members of this court as to the correctness of this conclusion, we, under our general right to certify, respectfully propound for your answer the following questions:

“1. Did we err in holding that Riddick, by actually buying the cattle in his own name and in fraud of his principal, Mrs. Kempner, thereby acquire the legal title thereto, notwithstanding his agency and the fact that they were paid for with the funds of his principal?

“2. If the first question is answered in the negative, then were the rights of Mrs. Dillard (acquired as they were innocently and for value) superior to those of Mrs. Kempner?”

510 We are unable to see anything in this case to take it out of the ordinary rule that the contract of an agent, who deals in his own name without disclosing that of his principal, is the contract of the principal. The party contracted with may sue the principal for the enforcement of the contract when he learns that the agent was acting for another; and so the principal may sue the third party to enforce his rights under the contract, subject to any equities of such party as against the agent. Where the agent buys property in his own name, his principal being undisclosed, it immediately becomes the property of the principal, and not that of the agent. The doctrine applies even to written contracts, except to negotiable instruments and such contracts as are under seal. These propositions are elementary, and are founded upon the principle of the identity of the principal and agent. Therefore, when Riddick purchased the cattle, as agent for Mrs. Kempner, paying for them with her own money, she became invested with the legal title thereto, unless his intention to defraud her by suppressing the knowledge that he had a principal can change the rule. The doctrine uniformly announced is that the undisclosed principal may sue upon the contract made by the agent in his behalf. This could not be at common law, unless the principal had the legal title.

Can it make a difference that in not disclosing his principal Riddick intended to defraud her? We are of the opinion that the intention of the agent does not affect the rule. To hold otherwise would be to confer a right upon a fraudulent agent, which one who acted fairly would not have, and to permit a party to take an advantage from his own wrong. In this connection the remarks of the court in *Waldo v. Peck*, 7 Vt. 434, are pertinent: “Where the notes were made payable in specific

articles, or where such articles were received in payment of any notes thus taken, the articles received immediately became the property of the principal, and not of the agent. It is of no consequence what were the intentions of the agent as to purchasing the horse. Unless plaintiff assented, it could not affect him in any wise."

We answer the first question in the affirmative; and hence are not called upon to answer the second.

An Undisclosed Principal may maintain an action on a written contract made by his agent in his name alone, on proof that in making the contract the agent was acting for such principal: *Powell v. Wade*, 109 Ala. 95, 55 Am. St. Rep. 915.

Where One Falsely Represents Himself to be an Agent, and procures a conveyance in his own name by causing his vendors to believe that it is made to cure defects in their former conveyances to the supposed principal, the supposed agent is a mere trustee for the person really intended to be benefited by the grantors: *Virginia Pocahontas Coal Co. v. Lambert*, 107 Va. 368, 122 Am. St. Rep. 860.

HUGHES v. WRIGHT & VAUGHAN.

[100 Tex. 511, 101 S. W. 780.]

DEEDS, ACKNOWLEDGMENT OF.—If, from the language used by the officer in making his certificate of authentication, it appears that the law was substantially complied with, the certificate must be sustained. (p. 829.)

DEEDS—Acknowledgment—Omission of "Each."—If two persons separately execute a deed, and each appears before an officer and from the circumstances and the language of the certificate each acknowledged that he executed the deed for the purposes and consideration therein expressed, the language of the certificate must mean that the acknowledgment was by each of them. (p. 829.)

B. O. Shirliff and C. S. Todd, for the plaintiff in error.

R. T. Wilkinson, for the defendants in error.

512 BROWN, A. J. On the fifth day of June, 1902, Wright & Vaughan filed their petition in the district court of Franklin county in the form of trespass to try title against C. G. Hughes, seeking to recover from him fifty-three acres of land in the said county. Hughes pleaded not guilty, and the statutes of limitation of five and ten years. The trial was had before the judge of the court, who filed his conclusions of fact which we condense as follows:

Wright & Vaughan deraigned their title from the government by regular conveyances, and were entitled to recover the land, unless the defendant Hughes established his title by the limitation of five or ten years. The facts bearing upon the question of limitation as found by the court are as follows: In April, 1892, Hughes was claiming the land under a parol sale made to him by A. M. Temple and S. M. Spear, who claimed to own the land as the heirs of Isaac Spear, who had purchased the land at a tax sale, which the court held to be void. In the month of May, 1892, Hughes, in connection with other persons, fenced the land under a wire fence, enclosing a large body of land. On the eighth day of September, 1892, Temple and Spear made a deed for the land to Hughes, which was recorded on the seventh day of October, 1893. The deed was authenticated for record by the following certificate:

“The State of Texas,
County of Franklin.

“Before me, R. W. Holbrook, clerk of the District Court in and for the county of Franklin, in the State of Texas, on this day personally appeared S. M. Spear ⁵¹³ and A. M. Temple, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

“Given under my hand and seal of office this 8th day of September, A. D. 1892.

R. W. HOLBROOK,

“Clerk Dist. F. C. Texas.”

The fence around the large body of land was taken down, or fell down, and was destroyed to such an extent that persons could ride through it over the ground without perceiving that there was any fence inclosing the land. In April, or May, 1897, Hughes inclosed the land in controversy to itself under a wire fence, and took the exclusive, actual and visible possession of the land and continued to use and enjoy it up to the time of the filing of this suit. Hughes paid all taxes on the land since 1892.

The trial court entered judgment against Hughes holding that the certificate to the deed was not sufficient to authorize the recording of that instrument and therefore that it would not support the statute of limitation of five years. The court of civil appeals affirmed the decision of the trial court.

If from the language used by the officer in making his certificate of authentication it appears that the law was substantially complied with, the certificate must be sustained: *Belcher v. Weaver*, 46 Tex. 293, 26 Am. Rep. 267; *Durst v. Daugherty*, 81 Tex. 650, 17 S. W. 388; *Belbaze v. Ratto*, 69 Tex. 636, 7 S. W. 501; *Musgrove v. Bonser*, 5 Or. 313, 20 Am. Rep. 737.

It is a sound rule for construction of instruments and statutes that where an improper word has been used, or a word has been omitted, if, from the context, the court can ascertain what word should have been used, then it will supply the word omitted, or strike out the word improperly used: *Sutherland on Statutory Construction*, sec. 260; *Belbaze v. Ratto*, 69 Tex. 636, 7 S. W. 501; *Belcher v. Weaver*, 46 Tex. 293, 26 Am. Rep. 267.

In the case of *Belcher v. Weaver*, 46 Tex. 293, 26 Am. Rep. 267, the officer in taking the acknowledgment of a married woman used this language: “. . . and that she does not wish to *contract* the same.” This court in passing upon the sufficiency of the certificate determined from the context that the word intended to be used was “retract” instead of “contract,” and accordingly struck out the word “contract” and supplied the word “retract,” thereby making the certificate express the real meaning and intent of the officer.

In the case of *Belbaze v. Ratto*, 69 Tex. 636, 7 S. W. 501, the officer began his certificate in these words: “I, P. S. Wren, county clerk in and for Galveston County, on this day personally appeared J. L. Belbaze.” It was apparent that the pronoun “I” was improperly used, and that the words, “before me,” were omitted, and the court, in order to sustain the acknowledgment, eliminated the pronoun “I,” and supplied the words, “before me.” Keeping in view this rule of construction, we will analyze the certificate to ascertain wherein the defect lies, and whether or not it can be cured by the observance of proper rules of construction.

⁵¹⁴ Spear and Temple each separately executed the deed and each appeared before the officer, and, from the circumstances and the language of the certificate, each acknowledged that he executed the deed for the purposes and consideration therein expressed. The language of the certificate must mean that the acknowledgment was by each of them because it was an act which could not be done jointly. Both of them did acknowledge the execution of the instrument according to the

terms of the certificate, and that acknowledgment being an act of each individual must necessarily have been made by each one separately. If, therefore, in accordance with the rule of construction above stated, we supply the word, "each," so as to read thus: "On this day personally appeared S. M. Spear and A. M. Temple, known to me to be the persons whose names are subscribed to the foregoing instrument, and each acknowledged to me that he executed the same," etc., the meaning of the certificate will be fully expressed and it will be in entire harmony with all the circumstances and the facts connected with the transaction.

Reliance is placed upon the case of *Huff v. Webb*, 64 Tex. 284. It is not necessary for us to approve or disapprove of that decision, but conceding that it is sound, it is distinguishable from the present case. In that case there was no pronoun used by which to show that any person connected with it acknowledged that he had signed the instrument. In this case the certificate is complete except the omission of the word "each;" which is implied, for the statement that two persons did an act which could not be done by joint action necessarily implies that each did it for himself. Counsel also cite the case of *Threadgill v. Bickerstaff*, 7 Tex. Civ. App. 406, 26 S. W. 739, which is exactly in point with the case that we are now considering. Writ of error was granted to that case by this court, but in the decision of the case this court declined to pass upon the question of the validity of that certificate for the reason that it became immaterial to a decision of the case.

We conclude that the certificate was sufficient to authorize the record of the deed and that the deed was properly recorded. Upon this conclusion it becomes our duty to enter such judgment as the trial court should have entered upon the facts found.

The deed from Spear and Temple to Hughes having been admitted in evidence, and it appearing from the findings of the trial court that it was duly recorded and that Hughes had had actual and exclusive possession of the land, claiming it as his own and paying taxes upon it for more than five years before the institution of this suit, the plaintiffs' right of recovery was barred by the statute of limitation of five years. It is therefore ordered that the judgment of the district court and that of the court of civil appeals be reversed and that the defendants in error take nothing by their suit, and that

Hughes, the plaintiff in error, go hence without day and recover of the defendants in error all costs of all of the courts.

Reversed and rendered.

Defects in Certificates of Acknowledgment are discussed in the note to *Trerise v. Bottego*, 108 Am. St. Rep. 525.

KLOPF v. WESTERN UNION TELEGRAPH COMPANY.

[100 Tex. 540, 101 S. W. 1072.]

TELEGRAPH COMPANIES—Delivery of Telegram.—A telegraph company does not perform its obligation to deliver a telegram by merely attempting to deliver it in the suburb of a city to which it is directed, if its office is in the city and the true address which is within its delivery limits can be ascertained by the exercise of reasonable diligence. (p. 832.)

TELEGRAPH COMPANIES—Duty to Deliver Message.—If a telegraph company fails to deliver a telegram which is misdirected to a particular place, within delivery limits, but which address could be ascertained from the telegraph directory, the telegraph company does not use due diligence in attempting to deliver the telegram. (pp. 833, 834.)

Coke, Miller & Coke, for the plaintiff in error.

Hume, Robinson & Hume, N. G. Kitterel, Jr., A. L. Lindsley, and G. Fearous, for the defendant in error.

540 WILLIAMS, A. J. The district judge instructed the jury to return a verdict for the defendant in this action, brought by plaintiff in error, to recover of defendant, in error damages for delay in delivering several telegrams relating to the sickness and death of Mr. Clampit, the father of plaintiff's wife; and the resulting judgment was affirmed by the court of civil appeals. The telegrams were sent by Roy Clampit, from El Campo, the first being addressed to "Mr. F. Klopff, Houston, Texas," with the notation on it, "lives on Ho. hites," meaning Houston Heights, and the second being addressed to "Mrs. Maggie Klopff, Houston Heights, Houston, Texas." There is no direct evidence showing by whom the reference to Houston Heights was put on the first message, but, as the sender testified that, when he delivered it to the operator at El Campo, the latter inquired as to Klopff's residence, **541** and that the witness replied that he did not know

it, but that it was out toward Houston Heights, it might be inferred that the notation was not then on the paper and was added by the agent. The second, however, was addressed as stated when delivered to the defendant's operator.

Houston Heights is spoken of as a suburb of Houston, but has a corporate government, with corporate limits of its own, separated from those of Houston by intervening territory. Vick's Park, in which Klopff resided, is also a suburb of Houston, not within its limits nor those of Houston Heights, but between the two and adjoining the latter. Street-cars run regularly from the city to Houston Heights, passing Vick's Park within a few blocks of plaintiff's residence. The defendant has an office only in Houston, and from it delivers messages in the territory in question upon payment of an extra charge to cover car fare, and this charge was paid in advance by the sender of the messages involved in this case. Klopff's name and the place of his residence were entered upon the Houston directory, which the defendant used for the purpose of finding persons for whom it received messages at its Houston office. When the dispatches in question were received at Houston the defendant's messenger made several efforts to find the addresses by inquiring at some of the prominent places in Houston Heights, but, so far as the record discloses, did not consult the directory or attempt to find them elsewhere.

The court of civil appeals held that the contract, implied from the messages giving the address at Houston Heights, was, on defendant's part, to make delivery there, and not elsewhere; and that, as the parties did not live, and were not to be found there, there was no right of action. We think this is an incorrect view of the law. Under it the defendant would have been under no obligation to make delivery anywhere but within the corporate limits of Houston Heights, even if it had known the residence of the addressees at some other place within its delivery limits. So restricted a view of its obligation cannot be sound. Its duty was to be performed from its office in Houston, to which the messages were transmitted, and that duty was to use reasonable diligence to effect such delivery as by its course of business it held itself out as undertaking to make from that office. The further address was merely a direction to aid it to find the persons to whom delivery was to be made, and did not necessarily define the extent of its duty: *Western Union Tel. Co. v.*

Mitchell, 91 Tex. 454, 66 Am. St. Rep. 906, 44 S. W. 274, 40 L. R. A. 209; Western Union Tel. Co. v. Smith, 93 Ga. 635, 21 S. E. 166; Western Union Tel. Co. v. Patrick, 92 Ga. 607, 44 Am. St. Rep. 90, 18 S. E. 980.

The contract arising from the acceptance and transmission of telegrams to a particular office is to use the degree of diligence just stated, to deliver them to the addressees within the territory in which the company undertakes, for the charges exacted, to make such delivery; in other words, to treat them as it treats others like them.

The evidence tends to show a general custom of the defendant to make deliveries throughout the territory in which plaintiff and his wife resided, and this defined the extent of its undertaking when, upon payment of its customary charges for like services, it accepted and transmitted the messages. Of course, there may be a special contract for a delivery beyond that which is implied from the course of the business, ⁵⁴² and the company's obligation in such cases depends upon the special arrangement made. But this is not, or, at least, the evidence does not show it to be, such a case.

In the case of Western Union Tel. Co. v. Swearingen, 95 Tex. 420, 67 S. W. 767, the message was transmitted for delivery to the company's office at Comanche, and the allegation was for a contract to deliver at that place; and, as the addressee neither resided nor was to be found within the limits in which the defendant undertook to deliver messages, it was held that no breach of the contract alleged was shown. The further allegation of a special arrangement to deliver at Swearingen's residence in the country was not sustained by the evidence. It was not a case like this, in which the course of the company's business was, for the charges paid, to deliver messages to persons generally within territory where the addressees were to be found.

While it is true that the particular address given did not conclusively determine the extent of the obligation of the company to use diligence to make delivery, it is also true that such address does materially affect the question whether or not the diligence employed was sufficient. The search for the addressees was thereby directed to a particular part of a populous community, and this is a fact which must necessarily be considered in determining what steps should have been taken in the effort to find them. Considering all the circum-

stances, on which we shall make no further comment, we are of the opinion that the question of diligence was one for the jury, and that it was improper to instruct a verdict.

We are not to be understood as holding that there can be a recovery upon the first telegram, which was addressed to Mr. Klopff, and informed him that "your father is very low," for the suffering of Mrs. Klopff resulting from her inability to attend the funeral, without further evidence than appears, of notice to defendant of the purpose to convey the intelligence to her. The second telegram was addressed to her, and informed her that her father was dead, and summoned her to come at once, and the difficulty referred to does not exist with reference to it.

The judgments will be reversed, and the cause remanded for a new trial.

For Authorities bearing upon the question involved in the principal cases, see Western Union Tel. Co. v. Merrill, 144 Ala. 618, 113 Am. St. Rep. 66; Barnes v. Western Union Tel. Co., 27 Nev. 438, 103 Am. St. Rep. 776; Western Union Tel. Co. v. Mitchell, 91 Tex. 454, 66 Am. St. Rep. 906; Western Union Tel. Co. v. Patrick, 92 Ga. 607, 44 Am. St. Rep. 90.

SOUTHERN KANSAS RAILWAY COMPANY v. MORRIS.

[100 Tex. 611, 102 S. W. 396.]

CARRIERS—Right to Recover—Parties.—If a contract of shipment is made directly with the consignor, he has the right to sue in his own name for a breach of the contract, without reference to his ownership of, or property in, the goods. (pp. 835, 836.)

CARRIERS—Contract of Transportation—Joint Owners.—A consignor who contracts with a carrier in his own name for the transportation of property may maintain an action for the breach of the contract, although others were joint owners with him in the property. (p. 836.)

J. W. Terry and Hoover & Taylor, for the plaintiff in error.

W. D. Berry and Coffee & Kelly, for the defendant in error.

612 GAINES, C. J. This suit was brought by the defendant in error against the plaintiff in error to recover damages to certain cattle which were shipped over its line of rail-

way. He recovered a judgment which was affirmed by the court of civil appeals.

There were two herds of cattle, one of which was contracted to be shipped and was shipped in the name of the plaintiff and the other in the name of one J. P. Sutton. The Sutton cattle belonged to the firm of Sutton Brothers, who, before the action was brought, had assigned their claim to the plaintiff. The damage to the cattle was alleged to have been caused by their detention at the initial station in crowded pens for about twenty-four hours without food or water. It developed during the course of the trial that the cattle shipped in the name of plaintiff were owned by himself, his father and his two brothers, each having a one-fourth interest therein. The court ruled that notwithstanding this fact the plaintiff was entitled to recover the entire damage inflicted upon these cattle and judgment was given accordingly.

When we granted the writ of error in this case we were of the opinion that the court of civil appeals was in error in sustaining this ruling; but now we see that under the rule established in this court we were mistaken in that view. The point was decided in the case of the Missouri Pacific Ry. Co. v. Smith, 84 Tex. 348, 19 S. W. 509. In that case we said: "Evidence was also introduced upon the trial tending to show that the horses which were alleged to be injured belonged to plaintiff and Johnson as partners; and the court was requested to instruct the jury on behalf of the defendants, to the effect that if the animals belonged both to plaintiff and Johnson they should return a verdict for the defendant. We are of the opinion that the court did not err in these rulings. We think the plaintiff had a right to sue alone, although the horses may have been the partnership property of himself and another. The exact form and terms of the contract of carriage do not appear from the record. The defendant, however, pleaded that the horses were shipped under a special contract in writing made between the plaintiff and itself. The testimony also shows that the contract was made with the plaintiff alone and ostensibly for his own benefit. He seems to have been both consignor and consignee. The English doctrine seems to be that, as a general rule, the owner of the goods, whether consignor or consignee, must bring action for a breach of the contract to carry and deliver the goods in safe condition; but there are American cases which hold that when the contract is made directly with the consignor, he, as

the party to the contract, has the right to sue in his own name for the breach without reference to his property in the goods: Citing *Blanchard v. Page*, 8 Gray, 281; *Hooper v. Chicago etc. Ry.*, 27 Wis. 81, 9 Am. Rep. 439; *Southern Express Co. v. Craft*, 49 Miss. 480, 19 Am. Rep. 4. . . . The rule commends itself to us as being logically deducible from correct principles and as being both just and convenient in practice: *Hutchinson on Carriers*, sec. 736. No good reason can be urged against its application in a case like the present." In this ⁶¹³ case the bill of lading was made out in the name of the plaintiff and no other person appears as a party to the transaction, The case of the *Missouri Pacific Ry. Co. v. Smith*, 84 Tex. 348, 19 S. W. 509, is not distinguishable from that before us, and is therefore decisive of the question.

The court of civil appeals, as we think, did not err in refusing to sustain the other assignments of error presented to them, and we deem it unnecessary to discuss them.

The judgment is affirmed.

The Right as Between the Consignor and the Consignee of goods to demand their possession from the carrier, and to sue for their loss during transportation, is discussed in *Capehart v. Furman Farm etc. Co.*, 103 Ala. 671, 49 Am. St. Rep. 60; *Sonia Cotton Oil Co. v. Steamer Red River*, 106 La. 42, 87 Am. St. Rep. 293; *Templeton v. Equitable Mfg. Co.*, 79 Ark. 456, 116 Am. St. Rep. 88; *Missouri Pac. Ry. Co. v. Peru-Van Zandt Imp. Co.*, 73 Kan. 293, 117 Am. St. Rep. 468. If a shipper delivers his property to a carrier, marked and addressed to another person as consignee, and gives the carrier no other or further notice than that to be presumed and inferred from the act of consignment, the law will presume the contract for transportation to have been made for and on behalf of the consignee, and that he is the owner of the property and entitled to its possession and to sue therefor: *Pratt v. Northern Pacific etc. Co.*, 13 Idaho, 373, 121 Am. St. Rep. 268. If one not the owner of property delivers it to a carrier for shipment, the true owner, who is not a party to the contract of shipment, may, while the property is in the possession of the carrier, demand and reclaim it, and, upon refusal, enforce his demand by suit: *Georgia R. R. Co. v. Hass*, 127 Ga. 187, 119 Am. St. Rep. 227.

CASES
IN THE
COURT OF CRIMINAL APPEALS
OF
TEXAS.

CALENTINE v. STATE.

[50 Tex. Cr. 154, 94 S. W. 1061.]

LARCENY—Description of Promissory Note in Information.—
An information for theft which describes the stolen property as a promissory note of the value of thirty-one dollars and eighty cents will be quashed as insufficiently describing the property. (pp. 837, 838.)

LARCENY.—A Promissory Note may be the Subject of theft
under the Texas statutes, but it was not at the common law. (p. 838.)

No brief for the appellant.

J. E. Yantis, assistant attorney general, for the state.

155 HENDERSON, J. Appellant made a motion to quash the complaint and information, among other things because the same does not sufficiently describe the property alleged to have been stolen. The property alleged to have been stolen is a promissory note of the value of thirty-one dollars and eighty cents, but it is not alleged by whom the note was executed, nor is the amount of the note stated, or its face value, the date of its execution or the date of its maturity, nor the date when it was made payable; nor do the complaint and information contain any matters of description which would enable defendant to plead either an acquittal or a conviction in bar of a subsequent prosecution for the same alleged offense. The description of the property alleged to have been stolen is as stated in the motion to quash; that is, "one promissory note of the value of thirty-one dollars and eighty cents." We hold that is not a sufficient description of the

property. At common law a promissory note was not the subject of theft, it not being considered property, but merely the evidence or representation of property. However, under our statute, we take it, that the note would be regarded as property and is the subject of theft. But it should be sufficiently described to have put an accused person on notice as to the particular note he was alleged to have committed the theft of, and should contain such description as would constitute a bar to any subsequent prosecution for the same offense. We do not believe that the note here is sufficiently described.

The judgment is reversed and the prosecution ordered dismissed.

Brooks, J., absent.

The Crime of Larceny is the subject of a note to *People v. Miller*, 88 Am. St. Rep. 559. The principal case is followed in the subsequent case of *Patrick v. State*, 50 Tex. Cr. 496, post, p. 861.

BROOKMAN v. STATE.

[50 Tex. Cr. 277, 96 S. W. 928.]

LOCAL OPTION—Sale in Prohibited Territory—Subterfuge.—

There must be a sale in the local option territory before a conviction can follow under the local option liquor law; and an instruction to the jury which complicates the question of sale with what constitutes a subterfuge, without clearly stating what constitutes a sale, is defective. (p. 839.)

LOCAL OPTION—Verdict by Lottery.—Where, on a trial for the sale of liquor in violation of the local option law, the jurors agree each to write down on separate slips of paper the punishment to be assessed, and deposit the slips in a hat, then draw them out and divide the sum of the dollars fine and the sum of the days of imprisonment by the number of jurors, and make the result the verdict, and after this is done, they further agree to make even money and even days by striking off the fractions, the verdict is by lottery. (p. 839.)

A. L. Curtis and J. B. McMahan, for the appellant.

J. E. Yantis, assistant attorney general, for the state.

278 HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of seventy-five dollars and forty-five days' imprisonment in the county jail; hence this appeal.

Appellant criticises the following portion of the court's charge: "If you believe from the evidence beyond a reasonable doubt that the order for the gallon of whisky given by M. D. Light, and taken by defendant, as shown by the evidence, was a scheme and subterfuge and but a plan and device to cover up a sale of whisky by defendant to said Light; or that said Light gave the order as shown by the evidence for one gallon of whisky to defendant, and did not pay for the same at the time or request or authorize defendant to pay for same for him, and the defendant ordered the gallon of whisky from Archinhold of Waco, Texas, and voluntarily and without the knowledge or consent of said Light paid therefor out of his own money without being requested to do so by said Light and afterward delivered to said Light two drinks of whisky out of the whisky so ordered and paid for, and at the time received from said Light the sum of twenty-five cents in payment of said two drinks of whisky, in either case the order would afford no protection to defendant and he would be guilty of a sale, and if you so believe you will find the defendant guilty." It occurs to us that the first portion of said charge might be considered defective, in that it predicates appellant's conviction on the mere fact that, if the jury believe the order for the gallon of whisky for Light was taken by defendant as a scheme and subterfuge and a plan to cover up a sale of whisky by defendant to Light, he would be guilty. We presume that the learned judge intended to tell the jury that, if they believed said statement was a subterfuge, and that appellant made a sale of the whisky to Light, he would be guilty. But he leaves this matter of sale off, and begins with his next proposition by using the conjunction "or." Of course, there must not only be a subterfuge, for both the constitution and statute require, in addition to the subterfuge, there must be a sale in the local option territory, before a conviction can follow. As to the last portion of said charge it appears to be somewhat complicated, in referring to the facts. The jury should have been instructed as to what it takes to constitute a sale in a prohibited territory, and then told, if they believed appellant on the occasion alleged sold said whisky in said territory, then he would be guilty, etc.

279 Appellant also complains that the court refused and failed to give his special requested instruction. In view of

the court's charge No. 6, we do not believe that it was necessary for the court to give the special requested instruction. We believe this adequately guarded whatever defense appellant's testimony raised.

Appellant insists that the evidence does not support the verdict. We are inclined to disagree with him as to this matter; but inasmuch as the case is reversed, we will not discuss the evidence.

The case must be reversed because of the action of the jury in finding a verdict, which is reserved by bill of exceptions. After the jury retired, the following procedure occurred: They agreed on defendant's guilt, but could not agree on the penalty to be assessed. Some were for a low fine and some were for the limit. After they had been out for several hours, an agreement was entered into with each other to write down on a slip of paper the opinion of each as to what punishment should be assessed, and each would put the numbers on separate slips of paper and deposit the slips in a hat, and after drawing these slips out of the hat, they would write down these amounts, add them up, and divide the dollars by six and the days by six, and make the result the verdict. This was done, but a mistake occurred in the first attempt by getting seven slips of paper in the hat, instead of six. It was then tried over, and the result found to be seventy-two dollars and fifty cents and forty-five days. After this result was reached some one suggested to make it even money and even days, which was agreed to and the verdict was then returned, seventy-five dollars and forty-five days in jail. It seems to have been understood that the jury would be bound by the result of the adding and division, and the change was only made to make an even number of days and dollars. We do not understand that this statement of how the verdict was reached was controverted by the state. Under the decisions of this court this was reaching a verdict by lottery. The mere fact that the exact number of days and dollars was not returned is immaterial under the circumstances shown by the testimony. The lottery was the real basis of the verdict and the method adopted to reach the verdict: *Driver v. State*, 37 Tex. Cr. 160, 38 S. W. 1020; *Sanders v. State*, 45 Tex. Cr. 518, 108 Am. St. Rep. 973, 78 S. W. 518. The judgment is reversed and the cause remanded.

If Jurors Agree to Ascertain the Verdict as to the Penalty in a criminal case by each juror setting down on paper the number of years he is in favor of giving the accused in the penitentiary, then adding the total, dividing the result by twelve, the quotient to be the verdict of the jury as to the penalty, a verdict thus reached is arrived at by lot, and is illegal and void: *Sanders v. State*, 45 Tex. Cr. 518, 108 Am. St. Rep. 973, and see cases cited in cross-reference thereto.

TOMBEAUGH v. STATE.

[50 Tex. Cr. 286, 98 S. W. 1054.]

LOCAL OPTION—Loan or Exchange of Liquor.—An exchange of liquor, or an accommodation loan of liquor with an understanding for a return of a like amount, is a sale within the meaning of the local option statute; and it makes no difference whether the accused is a member of a club or not. (p. 843.)

W. H. Browning, for the appellant.

J. E. Yantis, assistant attorney general, for the state.

²⁸⁶ HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of twenty-five dollars and twenty days' confinement in the county jail; hence this appeal.

The proof on the part of the state shows that some time in February prosecutor came to the cold-storage establishment in Lampasas, known as the Farmers' Club, and ordered a pint of whisky, for which ²⁸⁷ he paid fifty cents. After paying to Lawrence Doolittle (one of the parties at that time engaged in running the club) the fifty cents to send for his whisky he told Doolittle that he wanted some whisky then, but was informed that he could not get it until his came; but that he could get anyone who had whisky there to loan him some until his came. Appellant, Tombeaugh, was in the room, and the prosecutor asked him if he could loan him a pint of whisky; that he had ordered some, and when it came would return it to him. He said, "All right," and furnished him a pint of whisky. This witness testified that the transaction was in February. Appellant admitted loaning the whisky to prosecutor, but claimed it was early in March instead of February; and that he had formerly been a member of the Farmers' Club, in copartnership with Otto Ferenkemp, but on the 1st of March he withdrew from said firm but still had

some whisky that he kept there, and that he loaned prosecutor a pint of whisky out of this, and that prosecutor repaid him when his whisky came by express; that is, appellant claims this was an accommodation loan, and not a sale, because at the time of the alleged sale he was not a partner with Ferenkemp in the cold-storage business. In other words, appellant claims that as a member of the Farmers' Club he could not make an accommodation loan, but that when he ceased to be such a member, a loan by him would be legalized. The court seems to have taken this view of the question, as he gave the following charge to the jury: "If you believe from the evidence that the defendant, W. E. Tombeaugh, loaned the said Will Davis intoxicating liquor charged to have been sold; or if you have a reasonable doubt thereof you will acquit the defendant, and say by your verdict not guilty; unless you should further believe that at the time of the said loan defendant was a member of the firm running the Farmers' Club, where said intoxicating liquor was obtained, in that event said pretended loan would be a sale." Appellant asked a charge about to the same effect, which was given. So that it appears that the case was made to depend on whether appellant was a member of the Farmers' Club at the time of the alleged sale. In the view of the court, if he was at the time, he could not make an accommodation loan. If he was not, he could. We desire first to state the law under our decisions on this subject. In *Keaton v. State*, 36 Tex. Cr. 259, 38 S. W. 522, we held that an exchange is a sale, and this was without any limitation. In *Ray v. State*, 46 Tex. Cr. 176, 79 S. W. 535, it was held that a mere accommodation loan by one neighbor to another, to be returned in kind, is not such an exchange as would constitute a sale. In *Buckner v. State*, (Tex. Cr. App.), 89 S. W. 829, 14 Tex. Ct. Rep. 12, it was held that the circumstances there showed a subterfuge and not a loan. In *Stanley v. State*, 43 Tex. Cr. 270, 64 S. W. 1051, it was held that an exchange of peaches for brandy with a distiller is a sale: See, also, *Barnes v. State* (Tex. Cr. App.), 88 S. W. 805, 13 Tex. Ct. Rep. 623; *Parker v. State*, 45 Tex. Cr. 334, 77 S. W. 783, 8 Tex. Ct. Rep. 865. While the doctrine of an accommodation exchange seems to have been recognized by this court in the *Ray* case (46 Tex. Cr. 176, 79 S. W. 535) ²⁸⁸ in our opinion that case should be overruled. There might be a case: to illustrate, where some member of a family should be bitten by a snake, or some venomous insect, that would require

the immediate use of whisky, with no time to send for a physician to obtain a prescription. In such case, it might be allowable to borrow whisky from a neighbor on account of such emergency. We do not believe the doctrine should be extended beyond some pressing necessity. Certainly not to a case of a loan by one club member of whisky to a stranger in social drinking or as a beverage. In our opinion, it makes no difference in this respect whether the party loaning be a club member or not. His exchange of whisky to another person under the circumstances here detailed, would be a sale, and comes under the doctrine announced in Keaton's case (36 Tex. Cr. 259, 38 S. W. 522). We fail to see any difference between such transaction and the payment of money for the whisky at the time. Entertaining this view, we hold it was no defense as to whether appellant was a member of the Farmers' Club or not at the time he loaned prosecutor the whisky. It was a sale in contemplation of law. The judgment is affirmed.

DAVIDSON, P. J., Dissenting. I cannot agree to overruling the Ray case, mentioned in the opinion. I think it enunciates the correct view of the law.

The Principal Case was followed in the subsequent case of *Henderson v. State*, 50 Tex. Cr. 413, In the latter case the evidence showed that the prosecutor while ill approached the accused and asked him for some whisky, which the latter refused; that the prosecutor then asked the accused to order him some whisky and gave him money for that purpose; and that the prosecutor then asked the accused to loan him a pint of whisky until his arrived, which request the accused complied with. It was decided that this amounted to a sale under the local option statute. Judge Davidson, dissented, and in part said:

"The Ray case (Tex. Cr. App., 78 S. W. 535), laid down the rule as I understand it to be, or has been, up to date in this state, and drew the distinction between subterfuges and honest transactions as all the cases have done. Both witnesses in this case testified fully and emphatically that it was not a sale, and not intended as a sale between the parties, and that it was but an accommodation loan to Erwin by Henderson, because of his urgent request and the sickness of Erwin. I have always understood, and the proposition is too well settled to be questioned in this state, that the sale and place of sale is a question of fact to be determined in the main from the intention of the parties and the environments of the transaction. The law cannot make a sale unless the facts constitute a sale. A sale is not a matter of law but a matter of fact, and sometimes may be a mixed question of law and fact. Wherever the issue is made of sale vel non, the court cannot take away from the jury the right to pass upon the question of fact. I understand even in an

apparently bona fide transaction, an evasion of the law may be found or intended, and sales may be covered in various ways, and evasions of the law brought about. Wherever these questions arise, it is one for the jury and not for the court. It will not do for the court to say that all loans of whisky constitute sales, even under the most strenuous possible view to be taken of the local option law. And this is recognized in the principal case, for Judge Henderson, rendering the opinion for the majority, says that there might be instances arising that would put the transaction out from a violation of the law, and illustrates snake-bites. If that is correct, then it is equally true that sickness would be as much a necessity as a snake-bite. But I am not placing this question on the ground of necessity, however righteous that may be. I place my dissent in this case mainly upon the proposition that it was not a sale; was not intended as a sale, but simply as an accommodation by one friend to another. I will say, however, that this law was never intended, as I understand it, under the harshest possible construction, to punish citizens of the state living in the local option territory, for the loaning of whisky in cases of sickness or matters of that sort, suggested by the ordinary principles of humanity. If the transaction is a loan and not intended to operate as a sale, or as an evasion of the law, then it would not be a sale. These remarks are made with the clear understanding that loans or exchanges or barter or anything of that sort that may cover up sales, where a sale is intended, would be a violation of the local option law. But where, as in this case, there was no intent to sell, but simply to make a loan, under the circumstances detailed, it would not be a sale, and a conviction ought not to be had. I do not believe that the judgment in this case ought to have been affirmed, that the exceptions were well taken, and the judgment should be reversed. Therefore I dissent."

TAYLOR v. STATE.

[50 Tex. Cr. 362, 97 S. W. 477.]

RAPE—Indictment—Allegation of Sex.—An indictment for an assault to commit rape need not allege that the defendant is a male person. (p. 845.)

RAPE—Indictment—Allegation of Force and Sex.—An indictment charging that "Lee Taylor" unlawfully made an assault upon "Pearl Wright, a female, then and there under the age of fifteen years; and she, the said Pearl Wright, not then and there being the wife of the said Lee Taylor, and the said Lee Taylor did then and there ravish and have carnal knowledge of the said Pearl Wright, against the peace and dignity of the state," is not objectionable on the ground that it does not allege force or the sex of the parties. (p. 845.)

RAPE—Female Under Age of Consent.—The offense of assault with intent to rape on a female under the age of fifteen years may be complete with or without her consent. (p. 846.)

RAPE—Instruction on Aggravated Assault.—Where the evidence, in a prosecution for assault to commit rape, raises the issue of aggravated assault and battery, the court errs in failing to charge on the same. (p. 846.)

G. R. Smith and M. H. Garnett, for the appellant.

J. E. Yantis, assistant attorney general, for the state.

³⁶³ BROOKS, J. Appellant was convicted of assault with intent to rape, and his punishment fixed at seven years' confinement in the penitentiary. The charging part of the indictment is as follows: That Lee Taylor, "with force and arms, in the county of Collin and state of Texas, did then and there unlawfully make an assault in and upon the person of Pearl Wright, a female, then and there being under the age of fifteen years; and she, the said Pearl Wright, not then and there being the wife of the said Lee Taylor, and the said Lee Taylor did then and there ravish and have carnal knowledge of the said Pearl Wright, against the peace and dignity of the state." Appellant filed a motion to quash and in arrest of judgment upon the following grounds: 1. The indictment does not charge whether the alleged rape was committed with the consent of Pearl Wright, or without her consent; 2. There is no charge in the indictment that the defendant is a male person, nor is it charged that the alleged injured party is a female person; 3. It does not allege force. None of these objections are tenable. It is not necessary to allege that the defendant is a male person: *Davis v. State*, 42 Tex. 226. The indictment in an exact copy of the form laid down by Judge White in section 1101 of his Annotated Penal Code, which has been approved by this court. The motion was therefore properly overruled: *Buchanan v. State*, 41 Tex. Cr. 127, 52 S. W. 769.

Exception was reserved to the following portion of the court's charge: "The use of any unlawful violence upon the person of another with intent to injure him or her, whatever be the means or degree of violence used is an assault and battery. Any attempt to commit a battery or any threatening gesture showing in itself or by words accompanying it an immediate intention, coupled with an ability to commit a battery, ³⁶⁴ is an assault. The injury intended may be either bodily pain, constraint or sense of shame, or other disagreeable emotion of the mind." The complaint is as to the latter clause, to wit: "The injury intended may be either bodily pain, constraint or sense of shame, or other disagreeable emotion of the mind," because erroneous and misleading, and is not a correct principle of law; that the evidence shows

prosecutrix consented to the assault, and in order to consummate an offense, there must be something more than bodily pain, constraint or sense of shame or other disagreeable emotion of the mind. This charge was correct. The evidence on behalf of the state shows that prosecutrix was eleven years of age and appellant was twenty-one. She testified that defendant got on top of her and committed a rape upon her. The evidence indicates that this was probably done with her consent, although she denies it. There are some circumstances, however, showing a lack of penetration. Consequently it was proper for the court to charge an assault with intent to commit rape, and of this appellant cannot justly make complaint.

Appellant also complains of the portion of the court's charge instructing the jury that the offense would be complete, whether it was committed with or without the consent of the prosecutrix. This is the law.

We think the evidence raises the issue of aggravated assault and battery, and the court erred in failing to charge on the same. For the failure of the court to charge on aggravated assault, the judgment is reversed and the cause remanded.

The Crime of Rape is the subject of a note to *Smith v. State*, 80 Am. Dec. 361. If the prosecutrix is under the age of consent, it is no defense that the intercourse was not against her will, or that the defendant was ignorant of her age: *Smith v. State*, 44 Tex. Cr. 137, 100 Am. St. Rep. 849, and see the cases cited in the cross-reference note thereto.

An Indictment for Rape need not specify the sex of the defendant, nor of the injured person: *State v. Williamson*, 22 Utah, 248, 83 Am. St. Rep. 780; note to *Smith v. State*, 80 Am. Dec. 374.

An Indictment for a Criminal Assault, following the statute, and charging that the accused "did carnally know, or abuse in the attempt to know, a girl [naming her] under the age of ten years," is sufficient: *McGuff v. State*, 88 Ala. 147, 16 Am. St. Rep. 25.

POTTS v. STATE.

[50 Tex. Cr. 368, 97 S. W. 477.]

LOCAL OPTION—Proof of Intoxicating Character of Liquor.— The testimony of a witness that he bought from the accused a beverage called “lager beer” is not sufficient to sustain a conviction under the local option law; it must be shown that the beverage was of such alcoholic body as to produce intoxication if drunk in reasonable quantities. It is not the name by which the liquid is called, but its quality and strength as an intoxicant, which determine whether or not its sale is a violation of the law. (p. 850.)

W. M. Ballew and John W. Hooper, for the appellant.

J. E. Yantis, assistant attorney general, for the state.

³⁶⁸ DAVIDSON, P. J. Appellant was convicted of violating the local option law. It is contended, first, that the court erred in charging the jury that lager beer was an intoxicant; and second, that the evidence is not sufficient to support the conviction. Under the decisions of this court error assigned in regard to the charge cannot be considered, as no exception was taken during the trial or on motion for new trial.

Witness Cadenhead testified that he went to Pittsburg with Puckett. On reaching town, on the invitation of Puckett, he went to defendant's cold storage and he and Puckett drank “two bottles of beer.” These were set out by appellant. Puckett presented defendant with a ticket which defendant punched. About an hour afterward, on invitation of Puckett appellant drank more beer. He inquired of Puckett how he managed to get the beer, and being informed that he would have to order it, he went to appellant and gave him an order “for a dozen bottles of beer,” for which he paid one dollar and fifty cents. He paid the money, and called for three bottles, which he, Puckett and King drank. Later this was repeated. When witness left he still had six unpunched numbers on his ticket, each of which called for a bottle of beer. This witness testified at this point as follows: “The beer was lager beer. I do not know the meaning of the word ‘lager’; but they called it ‘lager’ beer.” This is the testimony and all of the testimony upon ³⁶⁹ which the conviction is predicated, as this was the only witness. If there is any testimony indicating that this was lager beer, or that the beer witness obtained was intoxicating, it is found in the statement above.

We are of opinion that this is not sufficient to show intoxicating properties. The witness did not know that it was lager beer. His testimony states that when he bought it, they called it "lager beer." We do not believe that the evidence is sufficient to show beyond a reasonable doubt that the mere statement that they called the beer he bought "lager beer" would in fact make it lager beer. Nor under our decisions are we prepared to hold that lager beer is judicially known to be an intoxicant, even if the testimony was clear and unequivocal that the bottles contained lager beer. The authorities are divided as to whether or not the court will take judicial cognizance that lager beer is an intoxicant, even when the evidence is clear and conclusive that the beer was lager beer. Speaking of lager beer, Mr. Black, says, as to whether or not evidence of its intoxicating properties is required: "The weight of authority appears to be with the cases holding that courts will take judicial notice that beer of this variety is intoxicating, and that it need not be shown to be so by evidence. But there are also decisions to the effect that lager beer must be shown to be capable of producing entire or partial intoxication, and that this is a fact to be ascertained by the jury upon the evidence in the case. In some of the earlier statutes and decisions similar questions arose in relation to the character of the status of what was then denominated 'strong beer.' This term, though now practically obsolete, was once in familiar use as the name of a species of beer made of malt and hops, and so called in order to distinguish it from 'small beer,' which was compounded of molasses and yeast with the addition of either ginger or spruce, and which contained a very small percentage of alcohol. The 'strong beer' seems to have been rich in the intoxicating principle, chemical analysis (in one of the reported cases) showing the presence of alcohol in the proportion of eight per cent. And the courts had no difficulty in determining that this particular beverage was an intoxicating liquor within the meaning of the statutes on that subject. But as it differed from the lager beer of modern commerce both in the process of its manufacture and in the proportion of alcohol contained (the latter being a very much lighter fluid), the courts appear to be unwilling to be bound, in their judicial dealing with beer of to-day, by the precedents relating to the beer of a past generation. At least, there are some decisions, particularly in New York, not explainable on any other hypothesis." In

Massachusetts it was held that the fact that a given quantity of beer contains a certain percentage of alcohol, or that a gallon of beer contains as much alcohol as does a pint of whisky, is not conclusive upon the question whether or not the beer is intoxicating. These quotations are from Black on Intoxicating Liquors, section 17, pages 21, 22, and see footnotes for authorities cited.

³⁷⁰ The question has been before this court in quite a number of cases, under our local option law, when the general term "beer" was used, and it has been invariably held that the court did not judicially know that the general term "beer" meant an intoxicating liquor. Nor do the decisions rest at that point. They go further and hold that where a conviction is sought under the local option law, that the commodity sold must be shown to be intoxicating: *Ex parte Gray* (Tex. Cr. App.), 83 S. W. 828; *Scales v. State*, 47 Tex. Cr. 294, 83 S. W. 380; *Harris v. State* (Tex. Cr. App.), 86 S. W. 763; *Cassens v. State*, 48 Tex. Cr. 186, 88 S. W. 229; *Sullivan v. State*, 48 Tex. Cr. 201, 87 S. W. 150; *Rutherford v. State*, 48 Tex. Cr. 431, 88 S. W. 810; *Potts v. State* (Tex. Cr. App.), 89 S. W. 856; *Uloth v. State* (Tex. Cr. App.), 87 S. W. 822. And to the same effect see *Rau v. People*, 63 N. Y. 277; *Blatz v. Rohrback*, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669; *Sarlls v. United States*, 152 U. S. 570, 14 Sup. Ct. Rep. 720, 38 L. ed. 556; *Nevin v. Ladue*, 3 Denio, 437; *State v. Beswick*, 13 R. I. 211, 43 Am. Rep. 36; *Weis v. State*, 33 Ind. 204; *Kurz v. State*, 79 Ind. 488; *Klare v. State*, 43 Ind. 483; *State v. Sioux Falls Brewing Co.*, 5 S. D. 39, 58 N. W. 1, 26 L. R. A. 138; *Hansberg v. People*, 120 Ill. 21, 60 Am. Rep. 549, 8 N. E. 857; *Netso v. State*, 24 Fla. 363, 5 South. 8, 1 L. R. A. 825.

The rule has been laid down differently where the general term "beer" is used. Some of these were under statutes peculiar to the states, or in the jurisdictions where the decisions were rendered, and it would be practically of little value to take these under consideration and show the difference where they exist. If the intoxicant charged to have been sold was whisky or rum, or any beverage or fluid known and recognized generally as being intoxicating, and known to be by reason of the alcoholic body, the court would take judicial cognizance of the fact that it was intoxicating. An investigation of the different kinds and character of beer and

the alcoholic strength of these various liquids might be entertaining and interesting, but where the formula runs from about one and sixty one-hundredths per cent alcoholic strength to four and four and one-half per cent, and the intoxicating properties depend upon the percentage, it would hardly require reasoning to show that the liquids sold, in order to come under the violation of the local option law, must be of sufficient alcoholic body to produce intoxication if drunk in reasonable quantities. It has been the rule, where these lighter drinks have been relied upon to sustain a conviction in a local option case, that it must be made to appear that the liquid was intoxicating within the rule thus announced. If not, then the law has not been violated. The mere fact that the party drank a bottle of beer, and he called it lager beer, is not in our judgment sufficient to authorize the court to instruct the jury that the liquid was intoxicating. There must be evidence of the fact that it was an intoxicant. The presumption of innocence should be overcome by sufficient cogency to exclude the reasonable doubt of that innocence. In the particular case in hand, the only evidence, sifted to its final analysis, is the witness' statement that they called it "lager beer," but that he did not know what the word "lager" meant. He was not even asked, nor ³⁷¹ did he testify as to any effect it had upon him. He states that he drank two bottles of beer with Puckett, and that he and King and Puckett drank six bottles that he purchased from appellant. Yet he was not asked nor does he testify that it had any effect upon him in the direction of intoxication. The decisions of this state have rather rigidly held to the proposition that we would sustain convictions for the sale of intoxicants in violation of the local option law, whenever the ingredients were shown to be an intoxicant, without reference to its name or supposed quality. If the fact was made to appear that the liquid was an intoxicant, and that such was or would be its effect if drunk in reasonable quantities, we have sustained convictions, so far as the weight of the testimony is concerned. We believe this to be a wise and salutary rule in the enforcement of this law. It is not the name they call the liquid, but its quality and its strength when viewed as an intoxicant. For the court to hold that Frosty Uno, Ino, Hiawatha, and the various other brands of fermented liquors shipped into local option territory are not per se intoxicating would lay down a rather dangerous precedent for the enforcement of

this law. It would be a very easy matter for those who desire to evade its provisions to put one of these labels upon the bottles. The law would be rapidly brought into disrepute and with facility evaded. On the other hand, it might be dangerous to the liberty of the citizenship of the country to hold that because they called it "lager beer," or that it was labeled "lager beer," or that in fact it was "lager beer," that it was therefore an intoxicant. It might not be, and the citizen would be unjustly punished. It is a matter of proof whether it is or is not intoxicating. Therefore, we are of opinion that the evidence in the record is not sufficient to justify an affirmation of this case. If the contents of these bottles were intoxicating, it was a matter easily susceptible of proof. Certainly a man who testified before the court to drinking as many as six bottles of what they called "lager beer" would be able to know whether or not it had an intoxicating effect upon him. Yet this record is wanting in any testimony intimating such a result.

The judgment is reversed and the cause remanded.

When It Appears that a Certain Liquor comes within the scope of a forbidden statutory enumeration as intoxicating, that moment its character becomes fixed by law, and its nonintoxicating character, as a matter of fact, becomes entirely immaterial with respect to the application of the statute: State v. Frederickson, 101 Me. 37, 115 Am. St. Rep. 295. The sale of a mixture of horseradish and alcohol to be used as a medicine, and incapable of being practically used as a beverage, though if drunk in sufficient quantity would produce intoxication, is not a sale of intoxicating liquor in violation of a local option law: Kincaid v. State, 49 Tex. Cr. 303, 122 Am. St. Rep. 809.

CARROLL v. STATE.

[50 Tex. Cr. 485, 98 S. W. 859.]

CRIMINAL LAW—Failure of Accused to Testify.—Where the jury, after retirement in a larceny case, discuss the failure of the defendant to testify, their verdict must be set aside. (p. 852.)

LARCENY—Subsequent Abandonment of Property.—Where one who has escaped from a convict farm appropriates a horse simply to steal a ride, but with no intent fraudulently to appropriate the animal, his subsequent abandonment of the horse is immaterial on the issue of whether he is guilty of theft. (p. 853.)

FORMER JEOPARDY.—Where an Indictment is Quashed at the Instance of the Accused after the jury is impaneled, he is estopped, when subsequently indicted, to assert that the former indictment was valid and placed him in jeopardy. (pp. 853, 854.)

W. H. Browning, for the appellant.

J. E. Yantis, assistant attorney general, for the state.

⁴⁸⁵ DAVIDSON, P. J. This conviction was for horse theft. Appellant did not testify in his own behalf. After the jury had retired they had a ballot resulting in nine for conviction and three for acquittal. The question was asked whether appellant did not testify; and some of the jurors swear that one of the jurors stated that he knew better. On another occasion one of the jurors mentioned the fact that appellant did not testify, and asked the reason. ⁴⁸⁶ To this the reply was made that there was no necessity for it, as the sheriff had testified to what defendant would testify. It seems that one juror asked why appellant did not testify, and to this reply was made that the jury could not consider that. This is about the substance of this ground of the motion for new trial. We are of opinion that under our decisions this is such an infringement of the statute prohibiting comment and criticism or allusion to the failure of the defendant to testify as requires a reversal.

The statements, admission or confessions, whichever they may be termed, made by appellant to the sheriff were introduced in evidence by the state, to the effect that appellant had escaped from the county convict farm in Navarro county, and that the officers were pursuing him with hounds, and to escape arrest he took the horse in question, and rode him to Fort Worth, turned him loose, and there bought a horse and went on to the Indian Territory. Later on, the horse in question was recovered at the point designated by appellant, near Fort Worth, where he had been running from the time appellant turned him loose until recovered by the owner. The court charged the jury that there must be a fraudulent taking of the property before they could convict, and further, if they should believe at the time appellant took the horse he was pursued by officers of Navarro county and to evade them he took the horse, with no intention of permanently appropriating the same to his own use and benefit, but intended simply to use the horse temporarily, or if they had a reasonable doubt in regard to this matter they should acquit. This was a correct charge. Subsequently, however, the court instructed the jury, if appellant took the horse fraudulently with the intent to permanently deprive the owner of it, and did not simply

intend to use it temporarily, and that he abandoned the horse north of Fort Worth, because the horse was ridden down and unable to travel farther, they should find him guilty, although they might believe appellant realized no pecuniary benefit from said horse. If appellant took the horse with intent to defraud, it would make no difference whether he rode him to Fort Worth to escape the officers or not. The offense was complete the moment he fraudulently took him into possession. If he did not take him fraudulently with the intent to appropriate him, but simply to steal a ride, the fact that he abandoned the horse later on would make no difference. Whenever the taking is not fraudulent no subsequent appropriation could be theft. While the court's charge announced a correct proposition, it has the appearance of having singled out the fact of abandonment to the jury as evidence in the court's mind that the original taking was fraudulent, which was evident by the subsequent abandonment. If the court should see proper upon another trial to give this question in charge to the jury, the converse of it, it occurs to us, in fairness should be given, that is, if the horse was not fraudulently taken, the fact that the horse was ridden down and abandoned would not be evidence of an original fraudulent taking.

⁴⁸⁷ There is a bill of exceptions in the record to the action of the court overruling the plea of jeopardy. The facts as raised by the bill show that appellant had been previously placed upon trial for the same transaction under a different indictment; that the other indictment charged that appellant "fraudulently took the horse from E. D. Parker, same being the personal property of said E. D. Parker, without the consent of the said E. D. Parker," etc. Upon the last trial, after the announcement of ready, impanelment of the jury, reading the indictment, and plea of not guilty, Parker was placed upon the stand as a witness. Defendant then brought to the attention of the court that there was what he terms a variance in the indictment. To copy from the bill: "In other words, in the first place in the indictment where it is alleged the horse was taken from the possession of E. D. Parker, the same being the corporeal personal property of said E. D. Parker, without the consent of the said E. D. Parker, and with the intent to deprive the said E. D. Parker of the value of the same," constituted a variance in the allegations on the face of the indictment. The objection in the name being that, in the first instance, the "r" was left out of Parker's

name, and that on account of said variance the court quashed the former indictment and dismissed the same at the instance of the defendant. The present indictment is identical with the former except the "r" is inserted in Parker's name throughout the indictment. Without going into the sufficiency of the original indictment—that is, whether it was valid or not, as to the name—we are of opinion that appellant is not in condition to urge it on the question of jeopardy, whether the indictment was sufficient or not. The indictment was quashed at his instance. While it is true that jeopardy had attached upon the entry of the plea of not guilty, if the indictment had been good, this plea of jeopardy could not avail appellant, for the reason that he secured the quashal of the indictment and the dismissal of the case. As a general proposition, where an indictment is quashed as being insufficient or a demurrer has been sustained and the accused is therefore discharged, there is no such jeopardy as will bar a prosecution on another indictment for the same offense. By the great weight of authority, where the accused is arraigned upon a sufficient indictment and pleads, and the jury is impaneled and the plea of not guilty is entered, the dismissal of the indictment, without the consent of the accused, amounts to an acquittal, and bars further prosecution for the same crime. This proposition would hardly need authorities to support it. But it is equally true that where the accused has secured a decision that the indictment is void, or procured its being quashed, the accused is estopped, when he is subsequently indicted, to assert that the former indictment was valid: *United States v. Jones*, 31 Fed. 725; *Joy v. State*, 14 Ind. 139; *State v. Meekins*, 4 La. 543, 6 South. 822. And it has been held that if the accused on a prior trial maintains a variance, was material, and the court directed an acquittal on that ground, he cannot subsequently, on his plea of former acquittal, allege or prove that it was not material: *People v. Meakim*, 61 Ill. 327, 15 N. Y. Supp. 917; *State v. Goff*, 66 Mo. App. 491. Nor can a defendant plead jeopardy where the jury before which he was first on trial was discharged on his motion or with his consent: *Arcia v. State*, 28 Tex. Cr. App. 198, 12 S. W. 599; *State v. Coleman*, 54 S. C. 282, 32 S. E. 406; *Peiffer v. Commonwealth*, 15 Pa. 468, 53 Am. Dec. 605; *State v. Davis*, 80 N. C. 384; *People v. White*, 68 Mich. 648, 37 N. W. 34; *People v. Gardner*, 62 Mich. 307, 29 N. W. 19; *Commonwealth v. Sholes*, 13 Allen (Mass.), 554; *State v.*

Wamire, 16 Ind. 357; McCorkle v. Commonwealth, 14 Ind. 39; Hughes v. State, 35 Ala. 351; Cobia v. State, 16 Ala. 781; Rex v. Stokes, 6 Car. & P. 151; Foster's Crown Law, 27; 2 Hawkins' Pleas of the Crown, 47, sec. 1.

Under these authorities this quashal of the indictment and dismissal of the case, after the jury was impaneled, being at the instance of defendant and with his full and free consent, cannot be set up by him as a plea in bar of further prosecution. As before stated, we deem it unnecessary to discuss the sufficiency of the indictment, that is, whether the omission of the letter "r" from the name "Parker" in the first indictment, under the allegation above set out, was sufficient to render it invalid. Appellant is in no condition to assert the proposition that it was invalid.

For the reasons indicated the judgment is reversed and the cause remanded.

Brooks, J., absent.

An Acquittal or Conviction obtained upon a void proceeding or indictment is not a bar to a subsequent indictment and prosecution for the same crime: Ogle v. State, 43 Tex. Cr. 219, 96 Am. St. Rep. 485. One who procures a reversal of a judgment of conviction waives his right of objection to a second trial, on the ground that he has been once in jeopardy: McGinn v. State, 46 Neb. 427, 50 Am. St. Rep. 617; Commonwealth v. Murphy, 174 Mass. 369, 75 Am. St. Rep. 353.

McCOMBS v. STATE

[50 Tex. Cr. 490, 99 S. W. 2d 7.]

CRIMINAL LAW.—*Prima Facie Evidence* is merely that upon which the jury may find a verdict unless rebutted by other evidence. It is not conclusive, but such as may be overcome by evidence to the contrary. It is to be weighed together with the other evidence, and in connection with the reasonable doubt and presumption of innocence which obtain in all criminal trials. (p. 858.)

BIGAMY.—*Presumption as to Validity of Marriage.*—In a prosecution for bigamy the law does not presume that the former marriage was valid, but it devolves upon the state to prove the validity of such marriage beyond a reasonable doubt. (p. 860.)

BIGAMY.—*If a Marriage is a Nullity*, a subsequent marriage does not constitute the crime of bigamy. (p. 860.)

BIGAMY.—*Validity of Marriage.*—It is essential in the crime of bigamy that the first marriage be legal and the second illegal; it is not enough to support a conviction to show that the first marriage is illegal and the second legal. (p. 861.)

W. P. Hancock and Tom Connally, for the appellant.

J. E. Yantis, assistant attorney general, and Mark Smith, county attorney, for the state.

⁴⁹⁰ DAVIDSON, P. J. This prosecution was for bigamy. Appellant was married in McLennan county on March 6, 1879, to ⁴⁹¹ Emma Price, by virtue of a marriage license. While this marriage was undissolved by death or divorce, appellant entered into a bigamous marriage with Donne Wooten, on December 27, 1890, by virtue of a marriage license issued by the county clerk of Robertson county. In September, 1891, the first wife, Emma, entered suit in Bexar county for divorce against appellant. Service was accepted by appellant and on October 19, 1891, a decree of divorce was rendered in her favor dissolving the marital relation between herself and appellant. Appellant continued to live with Donne Wooten under his bigamous marriage until about 1902 or 1903, when a final separation occurred between them on July 27, 1905. Some two or three years after his separation from Donne Wooten appellant married Annie Langston by virtue of a marriage license issued by the county clerk of Ellis county. By reason of this marriage the bigamy is alleged in this case. These facts are undisputed. It may be further stated that appellant and Donne Wooten were known as husband and wife wherever they resided from the time they were married in 1890 until their separation; that two children were born to them, by reason of their living together. It is also an undisputed fact, proved by both sides, that the only marital contract or agreement entered into between Donne Wooten and appellant was by virtue of the license issued from Robertson county. Donne Wooten testified that she had never heard of appellant's marriage to Emma Price until the institution of this prosecution, and that she never heard or had any intimation of the divorce proceeding between appellant and his first wife; and that the only marital contract ever entered into between herself and appellant was by reason of the license issued from Robertson county. This is a sufficient statement of the case to bring in review the questions discussed.

Exception was reserved to the court's charge, which in effect instructed the jury that the law would presume that the marriage entered into between Donne Wooten and appellant was legal; that is, the law would presume that Donne McComb was the legal wife of defendant at the time he separated from

her. Appellant sought to cure this by special instruction to the effect that before appellant could be convicted, the evidence must show beyond a reasonable doubt that the marriage to Donne Wooten or Donne McComb was a valid legal marriage, and if there was a reasonable doubt on this point, then appellant was entitled to an acquittal. We believe that the charge given by the court was wrong, and that requested by appellant correctly stated the law. Marriage is a contract and must be shown by the evidence, whenever it becomes an issue. The law does not presume against the innocence of a party even on a disputed question of fact. The charge was especially harmful in this case, because the uncontroverted evidence, both for the state and appellant, demonstrates the fact that the marriage between Donne Wooten and appellant, by virtue of the license, was void, and at the time entered into was bigamous. ⁴⁹² If the facts in this case show a marriage at all, it was by reason of the fact of living together and holding each other out to the world as husband and wife. The result of this testimony is but a presumption that a marriage had occurred between them, which the facts demonstrate did not occur, otherwise than the bigamous one, by virtue of the Robertson county license.

There are some other questions that might require a reversal by reason of the bills of exception reserved, which we deem unnecessary to discuss, in view of the main question to be discussed.

We believe that this case can be disposed of upon what we deem the main question, to wit: whether or not the evidence supports the conviction, and whether or not the marriage entered into with Annie Langston is bigamous. We are of opinion that it is not, and that the marriage with her was legal; and that there was no such marital relations existing between Donne Wooten and appellant as to constitute the marriage with Annie Langston bigamous. As before stated, the undisputed evidence shows that the only marital contract entered into between Donne Wooten and appellant was by reason of the marriage license issued in Robertson county and executed in December, 1890. She was used as a witness, and emphatically testified that there was no other contract between them, and that she was in absolute ignorance during her entire cohabitation with appellant that he had ever been married to and divorced from his first wife, Emma Price. This was shown to be void by reason of the marital relation

existing between appellant and his first wife, Emma Price. Now, if the marital relation existed between appellant and Donne Wooten, it was by reason of the fact that he lived with her for several years, and they held each other out as husband and wife. Reputation and cohabitation, with the consent of parties living together, may furnish prima facie evidence or presumption of a prior marriage. Concede that rule to obtain in prosecutions for bigamy (which is not here discussed), then the effect of this testimony makes but a prima facie case. A case made prima facie by the evidence is always subject to rebutting testimony. This court in *Floeck v. State*, 34 Tex. Cr. 314, 30 S. W. 794, held that prima facie evidence is merely proof of the case upon which the jury may find a verdict, unless rebutted by other evidence. In other words, prima facie evidence is not conclusive, but such as may be overcome by evidence to the contrary. Such evidence is to be weighed together with the other evidence, and in connection with the reasonable doubt and the presumption of innocence which obtains in all criminal trials. The rule may be tersely and correctly thus stated: "A prima facie case is that which is received or continues until the contrary is shown. Prima facie evidence means evidence which is sufficient to establish the fact, unless rebutted. Evidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced": 22 Am. & Eng. Ency. of Law, 2d ed., 1294, and notes for cited authorities.

493 If it be conceded that cohabitation, reputation and holding out of the parties by themselves to the world as married people makes a prima facie case, this would be the limit, and would be sufficient, in the absence of further testimony, to authorize the conclusion of a marriage. In this case, the facts are not only uncontroverted, but proved by both sides, that no marital contract had ever been entered into between the parties, except the bigamous marriage in Robertson county, which was totally void. Donne Wooten testified positively that she had never entered into any contract with appellant, and swears that she would not have lived with him had she known of his prior marriage or of the divorce proceedings; that the matter was never under discussion between them, and that she had never heard of appellant's prior marriage. This absolutely meets and overcomes any presumption arising from cohabitation.

In marrying Donne Wooten appellant perpetrated a fraud upon her and upon the law, and for which, had he been indicted, he would have been consigned to the penitentiary. A criminal act of this sort, and one which would have rendered him guilty of an infamous offense, cannot be the basis of a legal contract; it being not only a violation of the law, but was a fraud perpetrated upon his innocent victim, Donne Wooten. Under the holding of a majority of this court, this would have constituted rape by fraud: *Lee v. State*, 44 Tex. Cr. 354, 72 S. W. 1005, 61 L. R. A. 904. Possibly had Donne Wooten ascertained the facts in regard to the previous marriage and divorce, and then consented to live with appellant, as his wife, a different question might arise in regard to their marital relations; but her testimony as well as defendant's excludes this idea, and all idea of the ratification on her part of the previous illegal marriage. It is true that appellant was in the wrong and perpetrated this fraud upon the law and upon Donne Wooten; but this does not make a marital contract: *Lee v. State*, 44 Tex. Cr. 354, 72 S. W. 1005, 61 L. R. A. 904. If the original marriage between Donne Wooten and appellant was void, then there are no facts in this case, which show a subsequent marriage. On the contrary, every fact disproved any subsequent contract of marriage between the parties, and Donne Wooten expressly disavows that she ever entered into any contract except by virtue of the marriage license.

As we understand the record, there was no attempt made to show a common-law marriage, and Donne Wooten and appellant by their testimony both destroy any such presumption or conclusion otherwise than as the facts are above stated. Without going further into a discussion of the evidence, we are of opinion that it does not support the conviction, and that there was no marital contract within the purview of our statute in regard to bigamy between Donne Wooten and appellant that would form the basis of a legal contract, and that the marriage between appellant and Annie Langston was not in violation of the law: *Halbrook v. State*, 34 Ark. 511, 36 Am. Rep. 17; *Lady Madison's Case*, reported in 1 Hale's Pleas of the Crown, p. 693; *State v. Goodrich*, 494 14 W. Va. 834; *Keneval v. State*, 107 Tenn. 581, 64 S. W. 897; *Bashaw v. State*, 1 Yerg. 177; *Kopke v. People*, 43 Mich. 41, 4 N. W. 551; 3 Ency. of Pl. & Pr. 325, 326; 3 Greenleaf's Evidence, sec. 208. These cases are authority for the proposition that, if the prior marriage is a nullity, a subsequent

marriage cannot constitute the offense of bigamy. In Halbrook's case (34 Ark. 511, 36 Am. Rep. 17), it was said: "Upon the hypothecated facts the case would have been similar on principle, to Lady Madison's Case, reported in 1 Hale's Pleas of the Crown, page 693, thus: 'A takes B to husband in Holland, and then in Holland takes C to husband, living B and then B dies, and living C marries D, this is not marrying a second husband, the former being alive, for the marriage to C, living B, was simply void, and so he was not her husband; but if B had been living, this had been felony to marry D in England; ruled at Newgate sessions, about 1648, in the Lady Madison Case.' Mr. Greenleaf, after stating the points that the state is required to prove, as above, adds: 'The defense may be made by disproving either of the points above stated. Thus, where a woman married a second husband abroad, in the lifetime of the first, and afterward the first died, and then she married a third in England, in the lifetime of the second, and for this third marriage she was indicted; upon proof that the first husband was living when the second marriage was had, it was held a good defense to the indictment: the second marriage being a nullity, and the third therefore valid': 3 Greenleaf's Evidence, sec. 208, citing Lady Madison's Case; State v. Goodrich, 14 W. Va. 834." In addition to the authorities already cited, we might cite Hull v. State, 7 Tex. App. 593; Cuneo v. De Cuneo, 24 Tex. Civ. App. 436, 59 S. W. 284; Hiler v. People, 156 Ill. 511, 47 Am. St. Rep. 221, 41 N. E. 181; Dumas v. State, 14 Tex. App. 464, 46 Am. Rep. 241; Cartwright v. McGown, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; Jenkins v. Jenkins, 83, Ga. 283, 20 Am. St. Rep. 316, 9 S. E. 541; Collins v. Voorhees, 47 N. J. Eq. 315, 24 Am. St. Rep. 412, 20 Atl. 676, 14 L. R. A. 364; Voorhees v. Voorhees, 46 N. J. Eq. 411, 19 Am. St. Rep. 404, 19 Atl. 172; Williams v. Williams, 63 Wis. 58, 53 Am. Rep. 253, 23 N. W. 110; Gathings v. Williams, 27 N. C. 487, 44 Am. Dec. 49; Lowery v. People, 172 Ill. 466, 64 Am. St. Rep. 50, 50 N. E. 165; Rose v. Rose, 67 Mich. 619, 35 N. W. 802; Cram v. Burnham, 5 Greenl. 213, 17 Am. Dec. 218; State v. Worthingham, 23 Minn. 528; Weatherford v. Weatherford, 20 Ala. 548, 56 Am. Dec. 206.

The marriage between appellant and Donne Wooten being void, appellant was not guilty of the crime of bigamy in marrying Annie Langston. Whatever may be the rule in civil cases in regard to the legitimacy of children or the rights of

property under doubtful marital relations, in criminal cases there must be a prior marriage valid in law to constitute a second marriage bigamous. The presumption of innocence and reasonable doubt does not arise in a civil case as in a criminal prosecution, and an attempted marriage which is void and one that cannot exist in law cannot form the basis of a prosecution for bigamy on a subsequent marriage that is legal. It is essential in this crime that the first marriage must be legal and the second illegal. It is not sufficient to support a conviction for this offense to ⁴⁹⁵ show that the first is illegal and the second legal. Therefore, under the facts as presented, this conviction is not sustained.

The judgment is reversed and the cause remanded.

Brooks, J., dissents.

Proof of Former Marriage in prosecutions for bigamy is discussed in the note to *Hiler v. People*, 47 Am. St. Rep. 228. If two successive marriages are charged in a prosecution for bigamy, the presumption in favor of the legality of each is equal, and an actual marriage in each case must be proved. Both marriages must be proved, though it is not necessary to prove either by record evidence, such as the register or certificate. In each instance the marriage may be proved by such evidence as is admissible to prove a marriage in other cases: *Lowery v. People*, 172 Ill. 466, 64 Am. St. Rep. 50; *Bynon v. State*, 117 Ala. 80, 67 Am. St. Rep. 163.

PATRICK v. STATE.

[50 Tex. Cr. 496, 98 S. W. 840.] ,

LARCENY.—A Railroad Ticket is a subject of theft. (p. 862.)

LARCENY—Description of Property in Indictment.—In charging larceny such general allegations are advisable as will embrace or comprehend the particular property alleged to be stolen, but always a sufficient description must be given such as will advise the defendant of the charge against him and furnish a bar against future prosecution. (p. 863.)

LARCENY—Description of Railroad Tickets in Indictment.—An indictment for the theft of railroad tickets should allege the name of the railroad issuing them, that it is incorporated, and that the tickets were issued by it, if such is the case; if the tickets have not been issued, this should be stated, and if they entitle the holder to transportation when stolen, that also should be stated. An indictment which alleges the taking of six railroad tickets, stating the value of each and also their aggregate value, stating the cities between which they read, is not sufficient. (p. 865.)

Hart. Mahaffey & Thomas, for the appellant.

J. E. Yantis, assistant attorney general, for the state.

497 HENDERSON, J. Appellant was indicted for the theft of six railroad tickets, was convicted, and his punishment assessed at three years' confinement in the penitentiary; hence this appeal.

Motion was made to quash the indictment, the charging part of which is as follows: ". . . did then and there unlawfully and fraudulently take from the possession of S. M. Gibson, six railroad tickets reading from Texarkana, Texas, to Kansas City, said tickets of the value of fourteen and 65-100 dollars each, and of the aggregate value of eighty-seven and 90-100 dollars, the same being the corporeal personal property of and belonging to the said S. M. Gibson," etc. The motion to quash is based on an alleged insufficiency in the description of the stolen property. It is insisted that it should have been alleged on what road said tickets authorized transportation, and should have further given the date, that said tickets were properly signed and stamped, and in a condition to be used; that is, the claim is made that enough should have been stated to have shown that the tickets had been issued by the railroad company and were property. It is further claimed that it should have also been alleged that the railroad company which issued said tickets was incorporated, etc. Besides the motion to quash, when the tickets were offered in evidence, they were objected to because, as it was claimed, said tickets were not valid when taken—that is, not in condition to be used for transportation. Railroad tickets are held by our civil courts to be property: *International etc. Ry. v. Ing*, 29 Tex. Civ. App. 398, 68 S. W. 722. This court held in *Jannin v. State*, 42 Tex. Cr. 631, 96 Am. St. Rep. 821, 51 S. W. 1126, 62 S. W. 419, that railroad tickets issued by a railroad company were, more properly speaking, tokens authorizing the owner to be transported between certain points on such railroad or its connecting lines, and quasi property. We hold that such tickets are that character of property which under our statute is the subject of theft. We note in this particular case that said tickets when stolen were not stamped and were not dated. They were taken out of the office of the company before they were issued by the company. Three of said tickets were subsequently recovered from appellant, which were stamped, evidently with the stamp of the company to which appellant had access, but the stamp was barely legible. When the agent was pressed to state whether or not such of the tickets in the condition when taken would entitle

the holder to transportation, he answered: "It was our instruction to stamp the tickets when we sold them. I cannot say a ticket not stamped would not be good to ride on. The conductor might honor a ticket for passage on the railroad not properly dated and stamped. At the time all six tickets were stolen they had ⁴⁹⁸ not been stamped with the stamp of the company, and whatever stamp is on the ticket now was put on there after they were stolen, and without my authority or consent." We are inclined to believe that this proof, if it does not show, at least strongly suggests, that a ticket not stamped and regularly issued by the company would be of no more value than the paper on which it was written. Evidently it was a rule of the company to require railroad tickets for the transportation of passengers to be stamped when they were sold or issued, and the conductors of the company in response to such rule must have been authorized to recognize only such tickets as were properly issued by the agent of the company. Such a ticket in the hands of the company not stamped, signed and issued might be the subject of forgery, but not being in the shape of a token authorizing transportation thereon, it could hardly be regarded as of equivalent value to a ticket issued by the company.

While what has been said may be somewhat foreign to the motion to quash the indictment, still we regard it as pertinent and relevant, as tending to show the necessity of a further description of the tickets alleged to have been stolen than was used in the indictment—that is, while these bits of paper might in general terms be regarded as railroad tickets, they were not such tickets as authorized transportation thereon, and were of no more value than so many bits of paper. When taken they unquestionably did not have the value alleged by the state. Ordinarily, under the rules of pleading such general allegations are advisable as will embrace or comprehend the particular property alleged to be stolen; but always a sufficient description must be given of stolen property as will advise a defendant of the charge against him, and as will furnish a bar against a future prosecution. We do not believe the indictment here complies with this test. It was necessary here to give the thing stolen a particular description in order to indicate the particular character of property alleged to have been taken. Appellant was not apprised by the indictment that he was charged with stealing a ticket issued by any particular railroad company, and which au-

thorized transportation between certain points by said company on its own or connecting lines. What value was given to the tickets was evidently after being taken, by the unauthorized use of the stamp of the company on the part of the appellant; and the tickets produced in evidence, while themselves possibly of value in their then condition, were not the same tickets when stolen, and at that time were not of the same value. In our view the pleader should have alleged the name of the railroad issuing said tickets, and that it was incorporated, and should have shown by allegations, if such was the case, that said tickets had been issued by the company. If they had not been so issued, the fact should have been stated. If same when stolen entitled the bearer or holder to transportation, that also should have been stated. While we are not laying down any particular form ⁴⁹⁹ for an indictment, we are stating principles which should govern the pleader.

We are not aware that this question has been before the courts of this state directly. In *Calentine v. State*, 50 Tex. Cr. 154, ante, p. 837, 94 S. W. 1061, we held that the allegation which described the alleged stolen property as a promissory note of the value of thirty-one dollars and eighty-one cents was not sufficient. Some of the states hold that a general description of a railroad ticket is sufficient: *Millner v. State*, 15 Lea, 179. In Minnesota, an indictment in the following form was held good, "Divers and sundry genuine railroad passenger tickets prepared for sale to passengers, and after the sale thereof, the personal property of and issued by the 'St. Paul, Minneapolis, and Manitoba Railroad Company,' coupled with the further allegation that a more particular description was unknown." This was under a statute which makes it an offense against whoever steals, takes and carries away any railroad passenger ticket or tickets prepared for sale to passengers, previous to or after the sale thereof, being the personal property of any railroad company, or any other corporation, or person, is guilty, etc. In the state of Washington, it is held that an indictment charging larceny of a railroad ticket does not allege an offense, for it fails to state that the ticket was stamped, dated and signed, as otherwise the ticket would be worthless and not the subject of larceny: *McCarty v. State*, 1 Wash. 377, 22 Am. St. Rep. 152, 25 Pac. 299; *State v. Holmes*, 9 Wash. 528, 37 Pac. 283. Under our system we hold that some further description of

the tickets alleged to have been stolen was necessary to be set out in the indictment. It may be that the indictment was good for theft of any unissued railroad tickets, but it was certainly not good for railroad tickets that had been issued by the company and entitling the holder thereof to transportation.

It is not necessary to discuss other assignments. Because the indictment was defective, the judgment is reversed and the prosecution ordered dismissed.

BROOKS, J. There is no defect in the indictment; therefore I cannot agree to the opinion.

The Crime of Larceny is the subject of a note to *People v. Miller*, 82 Am. St. Rep. 559. An indictment or information charging grand larceny, in taking "ninety-three railroad tickets," of an aggregate value, without alleging the value of each ticket taken, or that they were stamped, dated, signed and genuine, is insufficient, as not stating facts sufficient to constitute the crime: *McCarty v. State*, 1 Wash. 377, 22 Am. St. Rep. 152.

EX PARTE CASH.

[50 Tex. Cr. 623, 90 S. W. 1118.]

CONTEMPT—Sufficiency of the Judgment for Contempt.—If the adjudication in the body of the order of court for contempt in violating an injunction is not sufficient, the moving papers, as indicating the particular character of the violation, may be looked to to cure the defect. (p. 867.)

CONTEMPT by Ticket-scalpers—Invited Violation of Injunction.—A railroad company does not invite a violation of an injunction which it has procured against ticket-scalping when it sends out an agent to purchase an inhibited ticket for the purpose of ascertaining whether the injunction is being violated. Hence a ticket-scalper who sells a ticket to such agent may be adjudged guilty of contempt. (pp. 867, 868.)

CONTEMPT—Violation of Injunction.—The fact that an injunction may have been improvidently granted does not relieve one from responsibility for contempt in violating it. (p. 868.)

INJUNCTION—Power to Restrain Traffic in Railroad Tickets. The sale of nontransferable railroad tickets may be enjoined, and persons violating the injunction may be punished for contempt. (p. 868.)

William Aubrey and Lipscomb & Napier, for the relator.

F. J. McCord, assistant attorney general, for the state.

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623 HENDERSON, J. This is a proceeding under an original writ of habeas corpus granted by this court. It appears from the recitals that the relator, Cash, was held by the sheriff of Bexar county, John W. Tobin, under a proceeding in contempt, issued out of the thirty-seventh judicial district, Bexar county. Suit had been filed and **624** the injunction issued against said Cash and others, alleged ticket scalpers, prohibiting them from dealing in or selling certain nontransferable tickets, issued by the Galveston, Harrisburg and San Antonio Railroad Company. The suit was numbered 17,124, and was styled the Galveston, Harrisburg and San Antonio Railroad Company et al. v. W. J. Lytle et al. On an alleged violation of the writ of injunction said relator was brought before said district court on May 5, 1905, when the following order was made: "On this the 5th day of May, 1905, came on to be heard the affidavit and complaint against the defendant, H. H. Cash, for violation of the writ of injunction heretofore issued in this case, restraining and enjoining the said defendant and others from buying and selling, or dealing in certain railroad tickets issued over the lines of said plaintiffs, the return portion of which contained the word 'nontransferable,' or equivalent words; and the court having heard the evidence and the arguments of counsel, is of the opinion that the said H. H. Cash is guilty of the contempt of this court, and is therefore adjudged to pay a fine of \$50. It is therefore ordered, adjudged and decreed by the court that the said H. H. Cash be and he is hereby adjudged in contempt of this court in violating said writ of injunction, and a fine of \$50 is assessed against him, together with all costs of the proceeding against him, for which execution may issue, and the clerk of this court will issue a writ commanding the sheriff of Bexar County to take the said H. H. Cash into his custody and retain him in his custody until the payment of said fine of \$50."

Relator alleges that said proceeding holding him in contempt is void, because the same does not adjudge the particular matter about which relator was in contempt of said injunction. And, furthermore, that it was not competent on the proof for the court to have adjudged relator guilty of contempt, inasmuch as he sold the ticket in question to one E. T. Lancaster, who was the agent of the complainant, and that he did so at the suggestion of said Lancaster. That said application and invitation by the complainant's agent was such as vitiated

the injunction; that is, it was tantamount to an agreement on the part of the complainant that relator might sell the ticket.

In *Ex parte Kearby*, 35 Tex. Cr. 634, 34 S. W. 962, it was held by this court that the factum of contempt should be set out in the judgment. However, that was a case of contempt in the presence of the court. Here the matter is different. It is a contempt proceeding originating in a civil suit, and in accordance with the authorities we understand the moving papers can be looked to, to help out some defect amounting to an irregularity in the judgment: *Ex parte Smith*, 40 Tex. Cr. 179, 49 S. W. 396.

So, if it be conceded that the mere adjudication in the body of the order of the court for contempt for violating the injunction is not sufficient, the moving papers, as indicating the particular character of violation, may be looked to, which in this case was the sale of a railroad ticket in violation of the order of the court.

⁶²⁵ The next proposition is, Did the plaintiff in the suit, the railroad company, invite such violation of the injunction as to render it nugatory? The proof shows that the railroad company suspected the relator of violating the injunction and sent out an agent to ascertain the fact. Said agent bought one of the inhibited tickets from the relator. We do not believe this was such an invitation on the part of the company to relator to ignore the injunction as would render it incapable of enforcement. It seems that it was not treated as a matter over which the railroad company had any control. There was no judgment in favor of it, but merely the visitation of the judgment for contempt on the part of the court in violating its order on the subject. Relator cites a number of authorities, which he insists maintain his position. But it does not occur to us that any of them are in point. A number of cases hold, where the contempt charged is the result of the advice, direct or implied of complainant, this is a sufficient justification: 9 Ency. of Law & Pr. 25. We do not regard the action of the agent here shown as in any degree persuading or inviting a violation of the injunction. The agent merely acted as the agent or detective to ascertain whether the injunction was being violated, and like others applied to the relator for the purchase of a ticket. His action was in the nature of a detective, our laws regarding theft do not render such a person an accomplice, unless such detective originates

or brings about the crime. The rule laid down in 2 High on Injunctions, section 1450, is, as follows: "But to deprive a party obtaining the writ of the right to move for the committal for its breach, on the ground of acquiescence therein, a strict showing of acquiescence must be made out. Thus where a defendant seeks to evade his liability for the breach of an injunction, restraining him from the use of plaintiff's trademark, upon the ground of acquiescence, he must show such a degree of acquiescence as would suffice to create a new right in himself." Beyond this, however, in our opinion, this is a matter that does not concern us, but pertains to the jurisdiction of the district court granting the injunction, where such a motion might be entertained. The next question: Was this a matter which the district judge was authorized, under any circumstances, to treat as a contempt? The court had jurisdiction of the subject matter and the parties, and as a court of equity had the right to grant injunctions. As was said in *Ex parte Warfield*, 40 Tex. Cr. 413, 76 Am. St. Rep. 724, 50 S. W. 933, the injunction may have been improvidently granted. That was a matter pertaining to the jurisdiction of the court which issued it, and not for inquiry here. The writ while in existence required the obedience of the relator. Instead of moving to dissolve it or taking steps against it, he violated the writ, and was subjected by the court to a fine for contempt for such violation. See this matter discussed in *Ex parte Warfield*, 40 Tex. Cr. 413, 76 Am. St. Rep. 724, 50 S. W. 933; *Ex parte Tinsley*, 37 Tex. Cr. 517, 66 S. W. 818, 40 S. W. 306; *Ex parte Breeding* (Tex. Cr. App.), 90 S. W. 634, 14 Tex. Ct. Rep. 572.

In *Jannin v. State*, 42 Tex. Cr. 631, 96 Am. St. Rep. 821, 51 S. W. 1126, 62 S. W. 419, the case was reversed because it was held that it was not competent for the legislature to ⁶²⁶ delegate the power to railroad companies to make the sale of certain tickets a penal offense. Here no penal statute is involved. It seems certain railroads, under some sort of agreement, issued railroad tickets on excursion rates and marked the same nontransferable. The sale of these was enjoined by the court, and for violating this injunction relator was proceeded against and fined for contempt. We understand an injunction against a sale of this character of ticket was held valid in *W. J. Lytle et al. v. Galveston, Harrisburg and San Antonio Railroad Company et al.*, 100 Tex. 292, 99 S. W. 396, 10 L. R. A., N. S., 437, recently decided by the

supreme court on certified questions from the fourth civil supreme district. We accordingly hold that the relator is not entitled to be discharged, and he is accordingly remanded to the custody of the sheriff.

Injunctions Against Ticket-scalping are discussed in *Schubach v. McDonald*, 179 Mo. 163, 101 Am. St. Rep. 452; and the constitutionality of statutes prohibiting ticket-scalping is discussed in *People v. Steele*, 231 Ill. 340, 121 Am. St. Rep. 321; note to *Jannin v. State*, 96 Am. St. Rep. 828.

Contempt of Court may be Committed by disobeying an injunction erroneously issued: *Barnes v. Chicago Typo. Union*, 232 Ill. 402, 122 Am. St. Rep. 129, and cases cited in the cross-reference note thereto.

YARDLEY v. STATE.

[50 Tex. Cr. 644, 100 S. W. 399.]

JURORS—Investigation of Bias.—The fact that two of the state's witnesses in a homicide case may have been adverse to the accused because of previous local option cases does not authorize an investigation of how the jurors had voted at the last local option election, the contention of the accused being that the prosecution has arisen out of violation of the local option law. (p. 871.)

ATTORNEY AND CLIENT—Privileged Communications.—When the accused in a homicide case testifies in open court as to facts which had been a privileged communication with his attorney, the privilege ceases, and in a subsequent trial of the case the attorney may be compelled to testify as to the statements thus made in court. It would be better practice, however, to prove them by some other witness than the attorney. (p. 872.)

HOMICIDE—Instruction on Self-defense.—Where there is evidence in a homicide case showing that the deceased made, or was about to make, an attack on the companion of the accused, an instruction on self-defense is not reversible error. (p. 872.)

HOMICIDE—Attack on Companion—Self-defense.—Where the evidence in a homicide case shows that the deceased made an attack with a deadly weapon on the companion of the accused, the duty of the court is imperative to instruct the jury that if such were the case, it is presumed that the deceased intended to kill such companion, and that the accused had a right to slay him. (p. 873.)

The statement of facts in *Woodward v. State*, 50 Tex. Cr. 294, 97 S. W. 499, referred to in the opinion below, is as follows: "The theory of the state, which is supported by evidence, is to the effect that appellant had some grudge against deceased, and had made threats against him. On the night of the homicide the parties met at or near a clubhouse in the

town of San Saba, and appellant and Yardley (his companion) made an attack on Pat Carroll (deceased) and in the fight which ensued they shot and killed deceased. Appellant's theory was to the effect that he was constable of that precinct, and that the sheriff on that occasion was absent. There was a show in town that night, and he had been requested to look out and keep down any trouble or breach of the peace, and that he summoned Yardley to assist him. That after the show he and his companions went to the clubhouse, and after sitting there awhile they left. The clubhouse seems to have been shut up at this time. The owner testified that he shut it up for the purpose of dispersing the crowd, so he and some of his companions could eat a lunch. Appellant and Yardley went off a short distance, and in a short time returned, as appellant testified, to participate in eating the lunch. After arriving there they heard talking and cursing, and heard deceased say to some one, "God damn you, turn my gun loose." That he thus went out to where the parties were in a vacant lot, near the clubhouse. When he got there Jim Meachum had hold of Pat's (deceased) gun. Appellant asked what was the matter, and they said, "Nothing." Appellant said, "I want you to cut out that roaring." Brown said he was not roaring; and Pat said, "I guess, by God, you are throwing that at me." Appellant said, "No." Pat walked around at this, and raised his gun (a Winchester) and said, "Jim Meachum, you are the cause of this whole God damned business." Pat said the officers had dragged him around until he was tired, and he was not going to be dragged around any more. Appellant told him to put his gun down or he would throw him in jail. At this deceased said, "God damn you, I will kill you," and raised his gun and fired. About the time deceased fired the second time appellant got his pistol out and fired. Deceased's second shot powder-burned appellant. Appellant shot four or five times, and Pat turned and ran off, fell near the sidewalk, where he shortly afterward expired."

James Flack & Dalrymple and Leigh Burleson, for the appellant.

F. H. McCord, assistant attorney general, for the state.

645 HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at twenty-

five years' confinement in the penitentiary, and prosecutes this appeal.

The companion case to this (see *Woodward v. State*, 50 Tex. Cr. 294, 97 S. W. 499) was tried upon substantially the same facts as are here presented. For statement of facts see said case.

Appellant claims that the court committed an error in not allowing him, when the jury was impaneled to prove how the jurors had voted at the last local election, his contention being that this case arose out of violations of the local option law in some way, and particularly two of the witnesses, Dulaney and Derrick, who testified against him that they were the owners of the clubhouse and that Woodward, appellant's co-defendant, had been instrumental in reporting said parties, and that, therefore, he had a right to ascertain how the jurors stood upon the local option question in order to exercise his peremptory challenges. It does not occur to us that the question presented here is sufficiently supported by the facts of this case as to have authorized appellant to investigate the standing of the jurors as to local option. The fact that two of the witnesses may have been adverse to appellant because of some previous local option cases, it does not occur to us this would authorize an investigation of this sort in order to exercise a peremptory challenge; at least, it does not occur to us that the action of the court shows reversible error.

Appellant questions the action of the court in compelling James Flack, an attorney of the defendant, to go on the stand over his objection and testify to what defendant had testified to upon a former trial of this case, the said attorney claiming that his knowledge was derived as an attorney and was privileged communication. The bill shows the matter came up in this wise: James Flack was one of the attorneys for appellant and he was placed on the stand by the state ⁶⁴⁶ and compelled to testify that he was present at the last term of the district court as appellant's counsel, and that appellant went on the stand in his own behalf, and that he there testified that he did not go to the residence of the witness Mitch Alexander on the night of and after the homicide and have a conversation with said Alexander. The defendant also testified that he did not have a conversation with Mitch Alexander on the next day after the homicide, Sunday, at the feed pens. Defendant testified that he went fishing on that day and was not at the feed pens on that day; that the point on

the river where he went fishing was a different direction than the feed pens. He further testified that he did have a conversation with Mitch Alexander at the courthouse, while the deceased's body was in there. This was objected to because it was proving before the jury that a former trial had taken place of the case, and was compelling him to testify as to previous communications between himself and his client; explaining this bill of exceptions the court says: "That the witness was not required to testify to any fact or statement made by defendant, except statements made in open court, under oath as witness in his own behalf at a former trial, and defendant had other counsel engaged in his defense at the time the witness Flack testified, and said witness was also engaged in making objection to testifying, and the defendant was in no wise deprived of his services as an attorney." It is competent to prove at a subsequent trial what a defendant may have testified to at a former trial, but it is not competent to require an attorney to disclose against his client communications that may have come to him by virtue of his professional relationship to his client. In support of his contention appellant refers us to *Hernandez v. State*, 18 Tex. App. 134, 51 Am. Rep. 295. An examination of the points in that case will disclose that the question did not arise in the same way as here presented. It may be true that Mr. Flack, the attorney here, originally came to his knowledge of the witness' statement on account of his relationship to him as attorney, but when the witness testified in open court to the matter, it then ceased to be privileged communications and proof thereof could be made by any witness. Of course, in such case, it would be better practice to prove the statement made in open court by some other witness than appellant's attorney, but we do not believe it was error to permit this testimony. It does not occur to us that there was sufficient testimony in this case suggesting an arrest or an attempted arrest by Woodward, is such as to have required the court to charge on that subject in connection with rights and duties of officers in making an arrest.

Appellant insists that the court committed an error in charging on self-defense—that is, that there was no testimony showing that deceased made or was about to make an attack on appellant; that the only attack the testimony shows deceased made was on Woodward. We are inclined to this opinion. However, under the circumstances of this case, we

do not believe that such a charge was reversible error. ⁶⁴⁷ Of course, there might be circumstances where a charge on self-defense would constitute error, as where the sole defense was alibi. In such a case, for the court to charge on self-defense would constitute reversible error.

Appellant reserved an exception to the action of the court in failing to charge article 676, Penal Code, to wit: That the facts of this case imperatively required the court to charge on the presumption of the weapon that deceased was shown to have used; that in such case the court should have told the jury if the deceased had unlawfully attacked Woodward with a deadly weapon, it is to be presumed that he intended to kill said Woodward, and in such case appellant had the right to slay at once. An inspection of the court's charge discloses that while he gave a charge on appellant's right to act on behalf of Woodward under article 675, he nowhere charged the presumption from the use of a deadly weapon by deceased under article 676. All the authorities teach that in a proper case this charge is imperatively demanded, and a refusal to give it is error: See *Kendall v. State*, 8 Tex. App. 569; *Jones v. State*, 17 Tex. App. 602, and *Cochran v. State*, 28 Tex. App. 422, 13 S. W. 651, and other authorities cited in subdivision 1165a of White's Penal Code; and see *Scott v. State*, 46 Tex. Cr. 305, 81 S. W. 950, 10 Tex. Ct. Rep. 964. In this case, it occurs to us that the crucial point was, who began the difficulty. If Woodward began the difficulty, or if Woodward unlawfully provoked deceased to make the attack in order to have a pretext for killing him, and appellant was cognizant of that fact, then the right of defense of another did not accrue to him at all, but if when appellant and Woodward went down to the clubhouse and a casual difficulty occurred between Woodward and deceased, and deceased became the aggressor and made the first assault on Woodward, then the right of self-defense did accrue to Woodward and to his companion Yardley. There is no question that deceased Carroll used a deadly weapon. Most, if not all, the witnesses state that he fired the first shot with a Winchester rifle. Accordingly, appellant was entitled to a charge based on the presumption following from the use of a deadly weapon by deceased.

Appellant also complains because the court charged on provoking a difficulty. We notice in the opinion of the court in the case of Woodward (50 Tex. Cr. 294, 97 S. W. 499), we

stated that if the court was justified in charging on provoking a difficulty, he should certainly have charged on the converse of that proposition, to wit: If Woodward and his companion went to the clubhouse on a peaceful mission, and deceased and Meachum engaged in an altercation over a gun, and appellant interposed, not for the purpose of producing an occasion, for a difficulty, that his right of self-defense would not be impaired. In this case, while the court gave a charge on provocation, he gave the converse of this. We believe that there was enough testimony in the case to authorize this charge, and it further occurs to us that the charge as given was correct. It is not necessary to discuss other assignments, ⁶⁴⁸ but for the error pointed out the judgment is reversed and the cause remanded.

Attorneys as Witnesses are discussed in the note to *O'Brien v. Spalding*, 66 Am. St. Rep. 213. That the right to claim a communication between attorney and client as privileged may be waived by the client testifying to the matter as a witness, see page 241 of this note.

The Law of Self-defense is discussed in the notes to *State v. Gordon*, 109 Am. St. Rep. 804; *State v. Sumner*, 74 Am. St. Rep. 717.

The Effect of the Separation of a Jury in criminal prosecutions is the subject of a note to *Gamble v. State*, 103 Am. St. Rep. 155.

FANNIN v. STATE.

[51 Tex. Cr. 41, 100 S. W. 916.]

ROBBERY—Variance Between Indictment and Proof.—Where an indictment for robbery charges that the accused took from the prosecutor one ten dollar bill, and the evidence shows that he took ten dollars but returned two, there is no variance. (p. 875.)

ROBBERY—Proof of Prior Crime.—It cannot, as original evidence against one accused of robbery, be proved that he told the witness he had been previously charged with crime. (p. 876.)

ROBBERY—Coercion of Payment.—Robbery may be committed by compelling one, at the point of a pistol, to pay money which the assailant claims is due him for wages. (p. 879.)

No brief on file for the appellant.

F. J. McCord, assistant attorney general, for the state.

⁴¹ HENDERSON, J. Appellant was convicted of robbery, and his punishment assessed at five years' confinement in the penitentiary; hence this appeal.

Appellant contends that there was a variance between the proof and the allegations in the indictment. The allegation in the indictment is to the effect that appellant took from the prosecutor one ten dollar bill. The proof on this point shows that he leveled a pistol on prosecutor and demanded of him to pay him what he owed him, which he claimed was for a week's work, eight dollars. Prosecutor pulled out a ten dollar bill, and appellant told him to throw it down, which prosecutor did, and appellant then commanded another negro, who was present, to go and get that changed and bring him back the change. The other negro brought him back the change, and he paid appellant eight dollars, giving the other two dollars to prosecutor. This proof shows that while he only ⁴² claimed eight dollars, he compelled the prosecutor to deliver up a ten dollar bill, which is according to the allegation of the indictment. If this is robbery, the fact that he gave him back eight dollars out of the ten dollar bill which he took from him would make no difference. There would be no variance. Appellant also claims there is a variance in that the money was not taken directly by appellant, but the prosecutor threw the bill on the floor and appellant compelled another negro to take it and go get the change. There was no variance as to this matter, and the court properly instructed the jury that a taking in that way would be a taking by appellant.

During the trial, while the witness McFarlane for the state was on the stand, he was asked to state if the defendant did not state to him that he had been convicted of a crime and sent to the penitentiary, to which he answered, "Yes." This was objected to by counsel for defendant on the ground that defendant was not on trial for any other offense than that charged in this indictment; that if the testimony is admissible at all, the records of conviction are the best evidence, because irrelevant and immaterial. The court overruled this objection and the witness further stated, "Yes, sir; he told me that he had been in the penitentiary twice for burglary. He told me at the time where he went from, and who was the officer who arrested him, but I don't remember the place nor who was the officer that arrested him." The question of impeachment of a witness by showing that he had been charged with a crime or been guilty of some criminal offense has been before this court a number of times: See *Carroll v. State*, 32 Tex. Cr. 431, 40 Am. St. Rep. 786, 24 S. W. 100, *Brittain*

v. State, 36 Tex. Cr. 406, 37 S. W. 758. A witness can be impeached by showing that he has previously been guilty of some felony, or charged in a legal way with some felony or some misdemeanor importing moral turpitude. In the Brittain case it was said that the authorities seemed to indicate that this character of testimony can only be resorted to in the cross-examination of the witness, and that in such case the party will be bound by the answer of the witness and could not contradict him, and such appears to be the rule laid down in that case; but in Lee v. State, 45 Tex. Cr. 51, 73 S. W. 407, the rule above stated appears to be overturned. It was there held admissible that a witness could be impeached by the indictments against him. From the latter view the writer of this opinion dissented. In the present case we are asked to go beyond any rule heretofore laid down by this court, and to hold that as original testimony against the defendant, it can be proved by a witness that he told such witness that he had been previously charged with crime. This character of testimony is not admissible under any authority of which we are advised, and we do not feel authorized to extend the rule any further.

The court gave the following charge to the jury: "If the said W. T. Smith was indebted to the defendant, he would not have the right to extort money in payment thereof by assault, violence and by putting ⁴³ the said W. T. Smith in fear of life or bodily injury." This was objected to on the ground that it does not state the law, but that the contrary is the law, to wit: It is insisted that if the prosecutor Smith was justly indebted to appellant in the amount of money taken from him, that it would not be robbery for appellant to constrain him to pay it by force and violence; that it would not be depriving the prosecutor of his property. On this subject we are referred to a number of cases, both in this state and out of it: See Smith v. State (Tex. Cr. App.), 81 S. W. 712, 11 Tex. Ct. Rep. 1023; Bollen v. State, 48 Tex. Cr. 70, 86 S. W. 1025, 13 Tex. Ct. Rep. 148, and Glenn v. State, 49 Tex. Cr. 149, 92 S. W. 806, 15 Tex. Ct. Rep. 878. In the Smith case (Tex. Cr. App., 81 S. W. 712), the parties were shooting craps and a five dollar bill was up as the stake. The prosecutor claimed that the dice were cocked, and another throw was made. The prosecutor lost, and appellant went to get the money, and prosecutor started to pull his gun, and appellant drew his first and took the bill. A charge was asked in favor

of appellant presenting this view of the case for acquittal, which was refused. This was held error. As we understand it, the court decided that appellant, according to his testimony, having a right to the bill, and having procured possession of it, after the manner stated, that it would not constitute robbery. In Bollen's case, 48 Tex. Cr. 70, 86 S. W. 1025, it was simply held that the court should have instructed the jury that the property must have been taken fraudulently before there could be robbery. In the Glenn case, the following was the state of facts: Appellant and prosecutor slept in the same room; appellant claimed the next morning that prosecutor had stolen one dollar and twenty-five cents from him; that he saw appellant put his hand in his pocket, and his money was gone, and, under these circumstances, he, by force, compelled appellant to hand him over the money, which he claimed he had stolen from him. It was held on that state of facts that there was no robbery. In these cases, however, it seems that there was a claim to the specific property and not a mere debt as is presented here. In 24 American and English Encyclopedia of Law, second edition, 1004, we find it to be stated that, "As it is essential, to constitute robbery, that the thing taken must belong to another than the taker, it follows that though the property is taken from another forcibly or by putting in fear, this is not robbery, whatever else it may be, if the taker at the time has a bona fide belief that the thing taken is his own." Under this proposition a number of authorities are cited, including cases from various states as well as English common-law cases. These cases appear to turn on the right to claim the specific property and to recover it by violence, but it is further stated in the text that it is not robbery by violence to take money or other property in payment of a debt, unless more is taken than is due. Under this we find the following cited cases: Regina v. Coghlan, 4 Fost. & F. 316; Regina v. Hemmings, 4 Fost. & F. 50; Crawford v. State, 90 Ga. 701, 35 Am. St. Rep. 242, 17 S. E. 628; State v. Hollyway, 41 Iowa, 200, 20 Am. Rep. 586; State v. Brown, 104 Mo. 365, 16 S. W. 406, and State v. Carroll, 160 Mo. 368, 60 S. W. 1087. This last case appears to make it ⁴⁴ robbery to take more than is justly due. In the Georgia case, Crawford was tried for murder. The facts show that he and deceased had an altercation, deceased claiming that appellant owed him twenty-five cents, which appellant admitted, but stated that he did not have it

with him, but as soon as he got home he would pay him. Deceased in the meantime was taking a piece of meat belonging to appellant. Appellant told him to desist, and on appellant interfering, prosecutor cut at him several times with a knife while he continued taking the meat. Under these circumstances appellant killed deceased. The Georgia court appears to hold that it might be a good defense against robbery if the party was taking property in order to collect a debt. It was further suggested that deceased did not seem to desire payment of the debt but insisted on taking the meat wrongfully. In Hollyway's case, the Iowa supreme court holds to the doctrine that a person can collect a debt by force, and that this will not constitute robbery, and in such case there is no fraudulent intent to deprive the owner of his property. There were peculiar circumstances connected with that case. Hollyway, the defendant, it seems, was a poor man and owed a small debt to the prosecutor Hamilton, who had a store in the neighborhood. On the day of the alleged robbery, Hollyway, appellant, came to Hamilton's store to collect some money; the latter had a small store account, which appellant agreed might be deducted from the amount which he (Hamilton) owed him for some calves sold to him by defendant. When they went to settle Hamilton produced in addition to his account a note which he had bought against defendant and which, with his account, overbalanced the appellant Hollyway's account. Hollyway refused to receive the note and demanded payment of the balance of his claim after deducting the store account, and threatened Hamilton with violence if he did not pay such balance. Under these threats Hamilton paid the defendant ten dollars and fifty cents, being the balance due him for the calves after deducting his store account. This was the state's case. Against this, "appellant proposed to prove that the day prior to the alleged robbery Hamilton had gone to the residence of the defendant for the purpose of purchasing of him some calves; that defendant told Hamilton that his (defendant's) family had been sick for a long time, that he was poor, and his family were out of groceries and provisions and in need of medicines, none of which he could buy without money; that he had nothing else out of which he could make the money, and was therefore compelled to sell the calves, otherwise he would not sell them at all; that they agreed upon the price, Hamilton paying five dollars down and agreeing that the defendant should come

to town the next morning and he (Hamilton) would pay him the balance, after deducting a small account held by Hamilton against defendant in money; that the defendant agreed to this and delivered the calves to Hamilton, who took them home with him. The defendant further proposed to prove that Hamilton had purchased the note on defendant after he had bought and agreed ⁴⁵ to pay for the calves in cash. All of this evidence the court rejected, and also ruled from the jury all the evidence before given in regard to the note. The defendant also proposed to prove that the money received from Hamilton was applied in payment of his claim for the calves sold. This was also rejected." The court says: "In robbery, as in larceny, it is essential that the taking of the goods be *animo furandi*. Unless the taking be with a felonious intent it is not robbery. If a man, under a bona fide belief that the property is his own, obtain it by menaces, that is a trespass, but no robbery"; citing a number of English common-law cases to support the doctrine announced." The court further holds that "in all cases of this kind, the question whether the act was done with a felonious intent is one of fact for the jury. The evidence rejected by the court below tended to show there was no felonious intent on the part of the accused, and it should have been admitted for that purpose. While the evidence rejected did not afford a justification of the act of the defendant, it was admissible to show that it was not a felony, and in this case might authorize a verdict of not guilty of the crime of robbery for which he is indicted." We take it that is an extreme case, and the facts detailed doubtless appealed very strongly to the court to extend the doctrine to the effect that where a man collects a just debt by force it is not robbery. In that case, no doubt in any court, Hollyway would have been entitled to have recovered his calves back on failure of Hamilton to pay him the cash money as he promised on restoration by Hollyway of the money he had already received. Extreme cases sometime make bad law. At any rate, we are not willing to lay down the proposition that if a man collects a debt by force and threats, and putting in fear, he will not be guilty of robbery. There might be peculiar facts and circumstances which would exonerate him, and which the jury might consider in mitigation of the punishment, but no man has a right, as we understand the law, to take the law in his own hands, and at the point of a six-shooter, putting his debtor in

fear of his life or serious bodily injury, collect a debt, however just, and then defend against it on the ground that the property was not fraudulently taken because appellant owed him the money and would not pay him. This is more than a simple trespass, and it will be a dangerous doctrine to hold that a man can thus collect his debts. If it was specific property that appellant had a right to, under the circumstances he might use force to get or regain possession of same without being guilty of robbery; and under the circumstances of this case where appellant had no right to any specific property, the prosecutor owing him a debt for wages, the amount of which was even controverted, and he simply drew a pistol and made prosecutor pay him what he (appellant) claimed was due, we hold that this was not a good defense, and the court did not err in charging the jury as he did. The court, however, should have instructed the jury, on the evidence of appellant, that if prosecutor assaulted him with a stick and ⁴⁶ he then drew his pistol in self-defense against a threatened assault of prosecutor, and that he did not use said pistol to coerce prosecutor to pay him his debt, but merely to defend himself, and prosecutor paid him the money without being forced to do so by appellant, that they would acquit him. For the errors discussed, the judgment is reversed and the cause remanded.

The Crime of Robbery is the subject of a note to *State v. McCune*, 70 Am. Dec. 178. To constitute robbery there must be force or intimidation, asportation without the consent of the owner, and an intent to steal. Hence it has been held that when a person takes property from another under a bona fide claim of right, and for the purpose of applying it to the payment of a debt due from the latter, the crime of robbery is not committed; but that it is otherwise if the claim of right is a mere pretense, and when the question whether or not such claim is bona fide, or a mere pretense, is in doubt, it should be submitted to the jury for determination: *Crawford v. State*, 90 Ga. 701, 35 Am. St. Rep. 242.

KING v. STATE.

[51 Tex. Cr. 208, 101 S. W. 237.]

HOMICIDE—Self-defense—Provoking Difficulty.—One has a right, whether in a peaceable manner or not, to go and seek out another and obtain from him an explanation of any conduct that reflects upon him; it is not necessary that he should go in a friendly spirit. (p. 882.)

HOMICIDE—Self-defense—Violation of Law.—It is error to instruct the jury in a homicide case that when the defendant's "own original act was in violation of law, then the law takes that fact into consideration in limiting his right of defense and resistance while in the perpetration of such unlawful act." (p. 882.)

CRIMINAL TRIAL.—No Argument Should be Made and no Facts should be brought forward to determine the guilt or innocence of one on trial for crime that are not testified to and not produced as evidence. (p. 883.)

Crawford & Crawford, for the appellant.

F. J. McCord, assistant attorney general, for the state.

²⁰⁹ BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for twenty-five years.

Appellant excepts to the following portion of the court's charge: "But you are further instructed that a party cannot avail himself of a necessity which he has knowingly and willfully brought upon himself, whenever a party by his own wrongful act produces a condition of things wherein it becomes necessary for his safety that he should take life, or do serious bodily harm, then the law imputes to him his own wrong and its consequences to the extent that they may and should be considered in determining the grade of his offense (if any) which, but for such acts, would never have been occasioned. How far or to what extent he will be excused or excusable in law depends upon the nature and character of the act he was committing (if any) which produced the necessity that he should defend himself. When his own original act was in violation of law, then the law takes that fact into consideration in limiting his right of defense and resistance while in the perpetration of such unlawful act (if any); the court charges you ²¹⁰ that the defendant herein, J. N. King, under the law had a right to visit the place of business of the deceased Wilson in a friendly spirit, to settle a difficulty or

misunderstanding, and if you believe from the evidence that the defendant visited the place of deceased Wilson in a friendly spirit to settle a difficulty or misunderstanding between them, and under these circumstances defendant shot and killed deceased from either real or apparent danger, that from his, the defendant's, standpoint, reasonably threatened him, the killing of the deceased by the defendant would be justifiable homicide, and you should acquit the defendant, but if you believe from the evidence that the defendant sought the interview in evidence for the purpose of provoking a quarrel for the purpose of killing deceased, it would be murder, though done in self-defense." This charge is erroneous: See *Airhart v. State*, 40 Tex. Cr. 470, 76 Am. St. Rep. 736, 51 S. W. 214. Under the authorities of this court defendant had a right, whether in a peaceful manner or not, to go and seek out deceased and obtain from him an explanation of any conduct that reflected upon him. It is erroneous to limit the right of a defendant to the fact that he must go in a friendly spirit. Furthermore, the charge is on the weight of evidence in that the court says: "When his own original act was in violation of law, then the law takes that fact into consideration in limiting his right of defense and resistance while in the perpetration of such unlawful act." The jury may take said original act of violence or evil intent into consideration in measuring the guilt or the innocence of defendant in the perpetration of the offense, but it is erroneous for the court to tell the jury that the law takes said fact into consideration. Furthermore, the latter part of the charge wherein the court says: "But if you believe from the evidence that the defendant sought the interview in evidence for the purpose of provoking a quarrel for the purpose of killing deceased it would be murder though done in self-defense." The law of this state is the defendant may seek a party for the purpose of provoking a quarrel for the purpose of killing deceased, and yet there is no law that punishes the defendant for seeking the deceased with a purpose to kill. He must then and there perform some act evidencing an intention to provoke a quarrel or difficulty with said specific purpose to kill before it could be murder in the first or second degree. The entertaining of a desire to kill is not a predicate for a charge on provoking a difficulty. The party at the time must do some act, utter some word, or do both, thereby evidencing an intent to commit violence upon the person of the deceased before

his right of self-defense is forfeited. If appellant seeks out the deceased and does some act showing an intent to kill, thereby causing a difficulty or provoking a difficulty, he would be guilty of murder, but if he provoked a difficulty by words or acts after meeting deceased without the intention to kill, he would only be guilty of manslaughter. These matters, however, are thoroughly discussed by this court in the case above cited, and various other decisions too numerous here to collate. It follows, therefore, ²¹¹ the charge of the court is erroneous and prejudicial to the rights of appellant.

Appellant also complains of the misconduct of the jury in the trial of this case, and of the county attorney in his argument to the jury. Neither of these matters do we deem it necessary to pass upon in view of the fact that this case is reversed upon the proposition above discussed, and we do not deem it necessary here to discuss same. However, we again emphasize the importance of prosecuting attorneys discussing the evidence adduced without indulging in any character of abuse either of the witnesses or opposing counsel, and we urge the trial courts to instruct the jury in their charge that they must not consider any extraneous matter as a reason or predicate for a decision, nor must they consider same or mention any matter not proved in evidence as a basis for argument in determining the guilt or innocence of the party on trial. The defendant is entitled under the constitution of this state to a fair and impartial jury, and under the laws of this state he is entitled to a fair trial. No argument should be made and no facts should be brought forward to determine his guilt or innocence by the jury that are not testified to and not produced as evidence upon the trial.

For the error discussed, the judgment is reversed and the cause remanded.

The Law of Self-defense is discussed in the notes to *State v. Gordon*, 109 Am. St. Rep. 804; *State v. Sumner*, 74 Am. St. Rep. 717.

WILLIAMS v. STATE.

[51 Tex. Cr. 361, 102 S. W. 1134.]

ROBBERY of Sick or Drunken Man.—Robbery is committed where a liquor seller, without the consent of a patron of the saloon who is vomiting from the effects of liquor, takes hold of the latter, runs his hand in his pocket, and steals money therefrom, and afterward denies having it. (p. 887.)

CRIMINAL TRIAL—Evidence of Former Crime.—In a prosecution for robbery the state may prove by the accused on cross-examination that he had been convicted of murdering his wife. (p. 887.)

CRIMINAL TRIAL—Repetition of Questions to Witnesses.—In a criminal prosecution it is within the sound discretion of the court to control the examination of witnesses and prevent the repetition of questions and answers. (p. 887.)

F. J. McCord, assistant attorney general, for the state.

Buck, Cummings, Doyle & Bouldin, for the appellant.

³⁶² **HENDERSON, J.** Appellant was convicted of robbery, and his punishment assessed at confinement in the penitentiary for a term of thirty-five years, and prosecutes this appeal.

The circumstances of the case briefly stated, on the part of the state, show that appellant was a saloon-keeper or bartender in the city of Fort Worth; that prosecutor arrived on the train at Fort Worth sometime after midnight, and came into appellant's saloon and called for a drink; subsequently he called for another drink. In the meantime he had begun playing dominoes with appellant, and after taking the second drink he became sick and began vomiting on the floor. Appellant told him that would cost him seven dollars and fifty cents, and that he had better go back to a bucket toward the rear. Prosecutor started there, and appellant came up behind him and first ran his hand in prosecutor's left pocket, and prosecutor says he knew there was nothing in there and told appellant there was no money in there, to keep out of his pocket, ³⁶³ and that appellant immediately withdrew his hand and threw his left hand around him and ran his right hand in prosecutor's right pocket. Prosecutor in the meantime was vomiting and had his hands on his head, but pulled his leg up to keep appellant's hand out. Appellant, however, got hold of his pocketbook and jerked his hand out. Prosecutor subsequently demanded his pocketbook, and

appellant denied getting it. Subsequently prosecutor procured an officer, and appellant was arrested and the money, or most of it, was recovered. Prosecutor states that he was robbed of two twenty dollar gold pieces and four dollars and fifty-five cents in change.

Appellant's testimony tends to show that prosecutor came into his saloon late at night and called for the best whisky he had. He gave him Scotch whisky at twenty-five cents a drink. Subsequently appellant and himself and another party began playing dominoes, and prosecutor was stuck two or three games, took a drink of Scotch whisky each time, and it made him sick, and he vomited on the floor, and he gave appellant his purse and money to keep for him; that he only had one twenty dollar gold piece and ten cents in change; that prosecutor lost several games of dominoes, and spent four or five dollars with him before he gave him his purse to keep. The next morning, when appellant was arrested, he told the officers that he only got twenty dollars and ten cents from prosecutor, and that he left that with another bartender, who relieved him at the saloon. Prosecutor, however, insisted that appellant got two twenty dollar gold pieces from him, and appellant wanted to get off and go on his hunt, and paid the officers twenty dollars, and sent him to the saloon man for the other twenty dollars and ten cents, which the saloon man gave to the officer. Appellant testified that he did not get from prosecutor but the one twenty dollar gold piece and ten cents in change, but that being en route for the hunt at the time the officers came to him, he gave them the other twenty dollars to get off. This is a substantial statement of the case.

Appellant insists that this was not robbery; that from the state's case no force was used and no assault was made, and the money was taken without violence and putting in fear. In order to support his contention he refers us to *Johnson v. State*, 35 Tex. Cr. 140, 32 S. W. 537. In that case there was no force used in taking the property. The prosecutor had his purse in his hand to make change, and while he was holding it in his hand appellant suddenly snatched the purse from him. It was held in that case that merely snatching a purse from one's hand, under such circumstances, under the authorities, would not constitute robbery. In *Tones v. State*, 48 Tex. Cr. 363, 122 Am. St. Rep. 759, 1 L. R. A., N. S., 1024, 13 Tex. Ct. Rep. 722, the question of force necessary to constitute robbery was considered by this court. Our statute says that if

any person, by assault or violence or by putting in fear of life or bodily injury, shall fraudulently take from the person or possession of another property with the intention to appropriate the same to his own use, he shall be guilty of robbery, etc. So that it would seem from the wording of this statute where one taking property by assault or by violence, or by putting in fear of life or bodily injury (without assault and violence), would be guilty ³⁶⁴ of robbery. However, concede, as appears to be conceded in some of the cases, that there must be an assault or violence and putting in fear, do the facts in this case show the essential elements of robbery? As heretofore stated, in *Tones v. State*, 48 Tex. Cr. 363, 122 Am. St. Rep. 759, 88 S. W. 217, 1 L. R. A., N. S., 1024, 13 Tex. Ct. Rep. 722, the question as to what amount of violence should be used in order to constitute the offense was discussed and the authorities examined, and we held in that case that where the parties, who were officers, arrested prosecutor and took him into custody, and after they got him in jail or the calaboose they backed him up against the wall and held his hands up while one of them thrust his hand into his pocket and took therefrom the money, this was held to be sufficient force to constitute the offense. In the above case it was conceded the parties may have had a right to search prosecutor and take from him his valuables for safekeeping, and this was a part of their defense. It is further suggested in that case that there must be some degree of force used and the taking must be against the will of the person robbed, yet it may seem to be with his consent when it is really delivered with fear. Now, what were the facts in this case? Evidently the prosecutor was nauseated in vomiting either from the effect of the liquor drank, or that in conjunction with some drug administered with the liquor, and he was in a measure helpless. Appellant, without prosecutor's consent, took hold of him, ran his hand first in prosecutor's left pocket. Prosecutor told him to take his hand out. Appellant then withdrew his hand from that pocket, threw his left hand around prosecutor as if to hold him, and then ran his right hand in prosecutor's right pocket. This prosecutor endeavored to prevent by lifting his leg and endeavoring to tighten his pocket against the insertion of appellant's hand, prosecutor in the meantime telling him to "Let my money alone; I ain't drunk at all, I am just only sick. I know what I am doing; let my money alone," and appellant, while prosecutor was still vom-

iting, seized his pocketbook and jerked it out of his pocket with the money in it. Prosecutor says that after this appellant went back and sat down, and as soon as he got through vomiting he went to him and asked him for his money, and he said he did not have it. Prosecutor then walked across the street seeking assistance to recover his money, and subsequently got a policeman. It occurs to us that this conduct of appellant was an assault. He laid his hand on prosecutor without his consent for an evil purpose; that is, with the intent to injure him. He ran his hand in prosecutor's pocket, and this was a continuation of the violence, and manifested his intent and purpose, and without prosecutor's consent took from him his money, and he did this while prosecutor was protesting against it. It is true prosecutor does not say that he was made afraid or was duressed, but evidently he was either impotent to resist appellant's assault by the whisky or some dope medicine, or he was put in fear. This is evidenced by his not insisting on the return of the money when he demanded it, and appellant told him he did not have it; he then sought an officer to recover it. It appears to us that this testimony ³⁶⁵ brings it within the rule as laid down in the Tones case (48 Tex. Cr. 363, 122 Am. St. Rep. 759, 88 S. W. 217, 1 L. R. A., N. S., 1024, 13 Tex. Ct. Rep. 722), and differentiates it from the case of Johnson v. State, 35 Tex. Cr. 140, 33 S. W. 537, relied on by appellant.

Appellant, by his first bill of exceptions, calls in question the action of the court in permitting the state to prove by appellant on cross-examination that he had been convicted for murdering his wife. This testimony was admissible as going to his credit. Appellant complains that the court did not allow him to ask the same question and elicit the same answer thereto for the third time, to wit: He asked the following question of prosecuting witness T. M. Miles: "How did you have your hands at the time the money was taken from you?" We believe it is within the sound discretion of the court to control the examination of witnesses and to prevent the repetition of questions and answers.

It may be that the prosecuting attorney should not, in connection with his objection to the testimony of the witness DeWitt, have remarked: "We object, because it doesn't show it is the same transaction or anything of the kind; it might be some other theft that the defendant committed or something of that kind." On exception to this remark, the court

told the jury not to consider it for any purpose, and also gave the special requested instructions of appellant on this subject. This cured any possible error.

Appellant objected to the remarks of the county attorney, in his argument to the jury, stating that "defendant Ed Williams had drugged the prosecuting witness and thereby rendered him helpless, and while in this helpless condition had robbed him of his money." We believe there is some testimony tending to show that the whisky was drugged with something to make prosecuting witness sick, and that the remarks were referable to the testimony in the case.

We do not believe it was incumbent on the court to instruct the jury further than was done as to how they should consider other offenses shown on appellant's cross-examination that he had committed.

From the discussion heretofore made with reference to the force used to constitute the offense, we believe that the court's charge on that subject was sufficient, and it did not become necessary for the court to give appellant's special requested instructions on that subject. In the view we take of it, from the state's evidence, there was no question of an assault and force used in taking the money, and an instruction embracing this proposition was given authorizing the jury to convict if they believed beyond a reasonable doubt that appellant took the money from prosecutor by means of an assault and without his consent, and, on the other hand, if they had reasonable doubt as to whether defendant committed an assault upon the prosecutor, and by reason thereof took said money from him, as charged in the indictment, then to acquit him. This charge adequately protected appellant, and it did not become necessary for the court to charge that a mere snatching of the money from prosecutor by appellant did not constitute an offense. No such case was made here. The defense set ³⁶⁶ up by appellant was that the money was given to him by the prosecutor for safekeeping. Appellant denied even that he put his hand in prosecutor's pocket, and this defense was properly presented in the court's charge. Furthermore, we would observe that the court gave a special charge requested by appellant to the effect that appellant must have had an intent to appropriate the money in question at the very time he obtained same, and unless the jury so believed beyond a reasonable doubt to acquit him, and if they believed or had a reasonable doubt that appellant formed the intent

to appropriate the money subsequent to the taking, to acquit him. This adequately covered the whole proposition of appellant's defense as set up by him.

There being no error in the record, the judgment is affirmed.

The Crime of Robbery is the subject of a note to *State v. McCune*, 70 Am. Dec. 178. Whenever the elements of force and being put in fear enter into the taking and are the cause inducing the owner of personal property to part with it, the taking is robbery, no matter how slight the act of force or the cause creating the fear may be, nor by what other circumstances the taking may be accomplished. If two persons, finding a third in an intoxicated condition, announce themselves as policemen, threaten him with arrest for drunkenness, tell him he must go to jail, and that they must search him, and thereupon go through his pockets and take money from him, he not resisting because he believes them to be policemen and that they will inflict personal injury on him unless he keeps still, they may be convicted of robbery: *State v. Persons*, 44 Wash. 299, 120 Am. St. Rep. 1003; and if, after making an arrest and taking a prisoner to jail, the arresting officer, without asking the consent of the prisoner to be searched, rudely backs him against the wall, and hold his hands up while he thrusts his hands into his pocket and extracts his money therefrom with a present intent to appropriate it to his own use, there is sufficient force used to constitute robbery: *Tones v. State*, 48 Tex. Cr. 363, 122 Am. St. Rep. 759; but if one struggles or clinches with another, without using more force than is necessary to remove the property from such pocket, is not robbery, but larceny: *Colbey v. State*, 46 Fla. 112, 110 Am. St. Rep. 87.

EARLY v. STATE.

[51 Tex. Cr. 382, 103 S. W. 868.]

CONTINUANCE—When Properly Denied.—A motion for a continuance in a homicide case, based on the absence of a witness, is properly denied when his testimony will not have any material effect on the verdict, and due diligence in procuring his attendance is not shown. (p. 891.)

NEW TRIAL—Impeaching Testimony.—A new trial will not ordinarily be granted on account of impeaching testimony. (p. 892.)

JURORS—When not Disqualified by Knowing of Former Conviction.—The fact that jurors in a criminal case have heard of the previous trial and conviction of the accused does not disqualify them if they have not formed any opinion as to his guilt or innocence. (p. 892.)

CRIMINAL TRIAL—Declarations of Deceased.—It is proper in a homicide case to reject evidence for the defense of a statement made by deceased of what he would have done in a former altercation if he had not been interfered with. (pp. 892, 893.)

CRIMINAL TRIAL—Evidence of Collateral Fact.—In a homicide case it is permissible to show the conduct and movements of the

accused during the entire night on which the crime was committed. (p. 893.)

HOMICIDE—Deadly Weapons.—An instruction under article 717 of the Penal Code is not called for unless the weapon is of a nondeadly character; but if the weapon is unquestionably of a deadly character, it ordinarily is not error to give such article in the charge. (p. 894.)

JURORS—Conversation with Third Persons Over Telephone.—When some of the jurors in a homicide case converse over the telephone with third persons, the burden is on the state to show by the testimony of others than the jurors that the latter were not tampered with. (p. 900.)

HOMICIDE—Self-defense—Instruction.—If the evidence in a homicide case shows that the accused did not actually kill the deceased, and does not call for a charge on self-defense, an instruction on the law of self-defense is error. (p. 901.)

HOMICIDE—Animus from Former Difficulty.—Where a homicide case is supported mainly by proof of the animus of the accused toward the deceased growing out of a former difficulty between them, evidence is admissible to show that such difficulty had been settled and the parties had become friendly. (p. 902.)

F. J. McCord, assistant attorney general, J. E. Clarke, county attorney, H. G. Hart, assistant county attorney, Walter Collins and B. Y. Cummings, for the state.

Morrow & Smithdeal, for the appellant.

³⁸³ HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at twelve years' confinement in the penitentiary; and prosecutes this appeal.

This is the second appeal of this case, it having been previously reversed and remanded at the fall term of this court in 1906: See 50 Tex. Cr. 344, 97 S. W. 82. The facts developed on this trial are substantially the ³⁸⁴ same as those on the former, and we refer to the statement of facts contained in that opinion.

Briefly summarized, the deceased was a policeman in the town of Mt. Calm in Hill county, and appellant and his companion Harmie Horn, who were related to each other, were on the way from a livery-stable in said town to the boarding place of appellant some time about midnight, both being under the influence of liquor—Horn, it seems, was more under its influence than appellant; that the deceased had been out in the country that night and returned to the stable with the team shortly after appellant and his companion left the stable. As soon as deceased turned his team in he left, going in the same direction that appellant and his companion had gone.

It appears that after overtaking the parties that he attempted to arrest Horn for drunkenness, when a fight ensued, in which the deceased lost his life. The testimony tends to show that Horn used a knife and deceased had a whip handle, which he used as a club, and also a pistol. There is some evidence that besides the wounds inflicted on deceased with a knife that a contused wound was inflicted on deceased's head, and the state's theory is that this may have been done by appellant with a pistol. There is also some evidence to the effect that a grudge existed between deceased and appellant, beginning some weeks prior to the homicide. In this connection there is also evidence that the parties had made friends after the former altercation. This is a sufficient statement in order to discuss the assignments of error.

Appellant made a motion for continuance, which the court overruled, and this is assigned as error. The application was based on the absence of the witnesses Hamp James and George Robertson. The court, in approving the bill of exceptions, as to the witness James, states that, as to him, "It was developed by sworn testimony during the progress of the trial that he had left Hill county two or three months before the case was called for trial, and that it was generally known in the community of Mt. Calm that he had gone to Oklahoma Territory, and it was so known at the time he left, and there was no effort made to procure his testimony, and consequently no diligence was used." In view of this explanation, it would seem that there was a lack of diligence to get the testimony of this witness. However, it is said that this witness would testify that Harmie Horn was not drunk. It does not occur to us that the testimony of this witness, if he would so swear, would have had any material influence as to the verdict of the jury in the light of all the other evidence in the case.

As to the witness George Robertson, it does not seem that diligence was used for him. Appellant seeks, however, to excuse his lack of diligence by saying that he did not discover the testimony of said witness before he had process issued for him. The testimony of this witness would be merely contradictory evidence; that is, testimony to impeach the state's witness Will Harriss; that is, he proposed to prove a different statement made by the state's witness, Harriss, a short time 385 after the homicide, which he states said witness would testify to on the trial. If it be conceded that the testimony,

of said witness would contradict the testimony of the state's witness, Harriss, a new trial will not ordinarily be granted on account of impeaching testimony. We do not think the court erred in overruling the motion for continuance, or in overruling the motion for a new trial based on overruling the motion for continuance.

A bill of exceptions was reserved to the action of the court in the selection of the jury. A number of jurors answered that they had heard of the case against appellant and his codefendant Harmie Horn; that they had heard of the previous trials of said parties, and of their conviction and term of punishment, but that same would not influence them in finding a verdict; that among the jurors who sat on the trial of the case were J. B. Orenbaum, O. Bratcher, A. M. Johnson, J. C. Gunn, J. T. Mitchell, and W. E. Hayes, who knew of the former conviction of appellant, and that appellant had in the meantime, before the taking of these jurors, exhausted his peremptory challenges, and the court overruled his challenge for cause on the ground assigned, and he was compelled to take said named jurors. In this action of the court there was no error. There is no contention, as we understand, that either of said jurors had any opinion formed as to the guilt or innocence of appellant caused from having heard of the previous trial and conviction, and the mere fact that they had heard of same did not disqualify them from trying this case.

Appellant complains at the action of the court in refusing to permit defendant to prove by Charlie Shaw that some time prior to the homicide and after the altercation in Shaw's barber-shop between appellant and deceased that deceased stated to the witness Shaw that "it was a good thing he [Shaw] interfered in the difficulty when he did, because if he had not deceased would have knocked Early down with his pistol." In order to sustain his contention appellant refers us to a number of cases, but it does not occur to us that any of them sustain his contention. This was not a threat. It was a mere relation connected with a previous altercation of what the deceased said he would have done after the difficulty if he had not been interfered with; nor was it a part of the *res gestae* of this difficulty. This difficulty did not grow out of that difficulty, nor, in our opinion, was the character of statement attributed to deceased of that kind which would tend to show who was the actual aggressor in the subsequent

difficulty. If the altercation at the barber-shop had been a part of this difficulty, or if it had been even on the same day, the particulars of that former difficulty or what was said afterward might serve to shed some light upon the homicide. In *Everett v. State*, 30 Tex. App. 682, 18 S. W. 674; *Nelson v. State* (Tex. Cr. App.), 58 S. W. 107, and *Poole v. State*, 45 Tex. Cr. 348, 76 S. W. 565, referred to by counsel, the question did not come up at all as here presented. In all of said cases the testimony admitted was part of the *res gestae* and showed appellant's state of mind toward deceased, ~~and~~ and same was held admissible. In Poole's case (45 Tex. Cr. 348, 76 S. W. 565), the question was as to the state of mind and apprehension of appellant on the day of the difficulty and a very few minutes prior thereto, and what Poole said when he was informed that deceased was seeking him or was at a certain place waiting for him, was held admissible as showing Poole's state of mind and his desire to avoid a difficulty with the deceased. There was no such question here. We would further add that the testimony offered was no part of the details of the former difficulty. As heretofore stated, it was not a threat, but merely a statement of deceased of what he might have done in the difficulty if he had not been interfered with. We fail to see how this testimony would have served the purpose of shedding any light on the subsequent difficulty in which the homicide occurred.

Appellant contends that the court committed an error in allowing the state to show that when appellant came back to the livery-stable he left the stable in a buggy with a couple of negro women and was gone some half an hour. The contention is that this sort of evidence was inadmissible, and went to the character of appellant. We think it was permissible to show the movements of appellant during that entire night, not only his visit to Axtell to get whisky, and his drinking whisky, and his return to Mt. Calm, but what he did after he arrived there. If his conduct and movements brought him in contact with circumstances calculated to bring him into disrepute before the jury, that was his own fault. It was part of the *res gestae*; showed appellant's surroundings, and, however such surroundings might reflect on him, he could not escape his environments, especially of his own choosing, nor could he complain that reference was made as to what he was doing that night, and as to his movements immediately preceding the homicide.

Appellant assigns as error the tenth paragraph of the court's charge, which is as follows: "The instrument or means by which the homicide is committed is to be taken into consideration in judging the intent of the party offending; if the instrument be one not likely to produce death, it is not to be presumed that death was designed unless from the manner in which it was used such intent evidently appeared." Appellant contends that there is no pretext here that appellant himself slew deceased, but that his companion Harmie Horn did the killing, and if it be conceded that Harmie Horn committed the homicide with a knife, which was a deadly weapon, the effect of the charge was to fasten the act of Harmie Horn, together with the presumption flowing from that act upon appellant. Evidently from the character of the wounds and the weapon Horn was shown to have owned, it was a deadly weapon, and the court's charge, if appellant himself had used the weapon, while not called for, would not be erroneous; and we believe that the other portions of the charge sufficiently safeguarded the appellant's rights in the premises, because when the court came to apply the law to the facts the jury were distinctly told that if Harmie ³⁸⁷ Horn committed the homicide, that appellant must have acted with him and must have been actuated with the same intent which actuated Horn, before they could convict him. As we understand the case, a charge of article 717 is not called for unless the weapon is of a nondeadly character; but if the weapon used in the homicide is unquestionably of a deadly character, then it is not error ordinarily to give said article in the charge. In some cases where the weapon is deadly and the defense is insanity or accident, it has been held that it might be error to give this article in the charge, but this was not such case.

In motion for a new trial appellant alleges misconduct of the jury. It was alleged in this wise that the following jurors, to wit, O. Bratcher, R. L. Utley, J. M. London, Burt Mitchell and G. E. Vessell, and other members of the jury, while they had the case under consideration, talked over the long distance telephones to their families and others without leave of the court or the consent of appellant or his counsel. As to these jurors the evidence shows substantially that five or six of the jurors, to wit, those named, and perhaps others, lived several miles from the county seat in the country; and in the presence of the deputy sheriff who had them in charge

they were permitted to call their wives, and in one instance one of the jurors was permitted to call a lady who lived near his wife and talk to her over the phone. The talk was simply an inquiry after the condition of their families, and nothing was said with reference to the case on trial, and no allusion thereto was made. These conversations were by permission of the officer in charge of the jury; he heard in almost every instance what was said at that end of the line, but not what was said at the other end of the line. The jurors themselves testified as to what their conversations concerned, and each and all testified that it was merely with reference to something at home and nothing in regard to the case. Appellant contends that this was such a separation of the jury, and conversing with other persons in regard to the case, as comes under article 817, Code of Criminal Procedure, subdivisions 7 and 8, and article 725 relating to the separation of the jury. Article 725, relating to the separation of the jury, has often been construed, and the rule adopted is that where an actual separation has been shown, the court will not speculate as to the effect of such separation, or that any undue influence was exercised on the jury while so separated, but will reverse the case because of such actual separation: See *McCampbell v. State*, 37 Tex. Cr. 607, 40 S. W. 496; *Lamar v. State* (Tex. Cr. App.), 39 S. W. 677; *Walker v. State*, 40 Tex. Cr. 544, 51 S. W. 234, and *Neal v. State*, 50 Tex. Cr. 583, 90 S. W. 1012. This, however, was not an actual separation, as the jurors were altogether at the time, and were in the immediate custody of the sheriff. Subdivision 7 of article 817 provides for a new trial where a juror has conversed with some person in regard to the case. The examination developed that no conversation was had in regard to the case. Was it such misconduct as comes under subdivision 8? This article would seem to cover any character of misconduct calculated to ³⁸⁸ prejudice the rights of appellant and not provided for specially by other statutes. When these articles of the Code of Criminal Procedure were enacted there was no such thing as a telephone, and evidently the lawmakers did not provide against the use of such an instrument by a jury, as they could not have foreseen this modern improvement in the development of our civilization. However, it must obviously appear that by the use of this means a juror might be tampered with and in the very presence of the officer who has him in charge, and there ought to be some special legislation

on the subject. The question, as it here presents itself to us, is: Was any injury shown or suggested in the testimony in regard to the conduct of these jurors in talking over the phone to members of their respective families? The jurors were critically examined and nothing was disclosed calculated to injure appellant. We accordingly hold the court did not err in overruling the application for a new trial predicated on this ground.

Appellant objected to the charge of the court on arrest, insisting that it was a charge on the weight of testimony. We have examined said charge, and in our opinion it is not subject to the criticism of appellant. We do not believe the charge assumes that appellant assisted Harmie Horn in resisting the officer in the exercise of his duties, nor did it authorize the jury to conclude from the charge that it was not even necessary for Horn to be drunk in a public place in order that Calloway should have the right to arrest him. This particular charge does not treat of the use of force required to make the arrest, or the use of more force than was necessary to consummate the arrest. As far as the charge went, it was, in our opinion, a proper charge. Other portions of the charge related to the question of force and the use of more force on the part of Calloway than was necessary to accomplish the arrest and to define appellant's rights under such circumstances. Of course, the officer had no right to make the arrest in a wanton or violent manner, or to use more force than was reasonably necessary, but we think a review of the whole charge will show that appellant's rights were sufficiently safeguarded on this subject.

Appellant says there was no testimony authorizing the court to give a charge of self-defense. The case is one of circumstantial evidence, and appellant's complicity in the offense, or his want of complicity, is to be measured by the circumstances as they were developed in the testimony. Appellant claims that he had nothing whatever to do with the killing of Calloway, but the state introduced testimony more or less inculpatory of appellant, and he might have just grounds to complain had the court failed to give a charge on self-defense. At any rate we fail to see how it could have injured him. It was not like the case where the claim is that defendant was not present at the homicide at all; in other words, where his defense is an alibi.

Appellant complains at subdivision 21 of the court's charge, which is as follows: "Now, if you have a reasonable doubt from all the evidence ³⁸⁹ as to whether the said Harmie Horn was drunk in a public place, and as to whether, if he was drunk, the deceased, Terrell Calloway, was attempting to arrest him, or even if you should believe beyond a reasonable doubt that said Harmie Horn was drunk and that said Terrell Calloway was trying to arrest him, in the event you should have a reasonable doubt from the testimony as to whether the said Terrell Calloway attempted to use or was using more force than was necessary to make said arrest, and that the said Terrell Calloway struck the said Harmie Horn with an instrument reasonably calculated to produce death or serious bodily injury, and the said Terrell Calloway and the said Harmie Horn engaged in a struggle and in the night-time, and that while they were so engaged in a struggle and the contest was going on between the said Terrell Calloway and the said Harmie Horn under such circumstances as that it reasonably appeared to the defendant that the said Terrell Calloway had unlawfully assaulted and was about to kill the said Harmie Horn or inflict upon the said Horn serious bodily injury, then you will acquit the defendant. In this connection, however, you are charged that the law which justifies a homicide by one to prevent the infliction of serious bodily harm or death by the deceased upon another applies to a defensive and not an offensive act, and is limited to necessity or apparent necessity, and cannot exceed the bounds of mere defense and prevention. If, therefore, you believe from the evidence beyond a reasonable doubt that the defendant interfered in the combat between the deceased and Harmie Horn for the purpose of preventing the deceased from killing Harmie Horn or inflicting upon him some serious bodily harm, but you should believe beyond a reasonable doubt that the defendant engaged in said combat knowing that the said Harmie Horn was drunk, and that the said Terrell Calloway was trying to arrest him on account of his being drunk, and to assist the said Harmie Horn in an unlawful assault upon the deceased, then the doctrine of defense of another would not apply and he would not be justifiable, and this would be the case no matter to what extremity he may have been reduced in the course of the difficulty." This was a charge which, in the first portion thereof, instructed the jury

as to appellant's right to interfere in case his friend Harmie Horn was put in danger of his life or serious bodily injury from an assault by Terrell Calloway. We think this portion of the charge very properly instructed the jury that appellant had a right to interfere if they had a reasonable doubt whether Harmie Horn was drunk in a public place and Terrell Calloway was attempting to arrest him, or if Calloway attempted to use more force to make said arrest. In the latter portion of the charge the jury were instructed that if appellant knew Harmie Horn was drunk and deceased was trying to arrest him, he had no right to interfere to keep him from being arrested, and in such case the doctrine of defense of another would not apply. In the twentieth paragraph of the court's charge, just preceding the above charge, the jury were fully instructed in regard to the arrest or attempted arrest of Harmie Horn by deceased Calloway, ³⁹⁰ and appellant's right to interfere on behalf of Horn in case the jury believed the arrest of Horn illegal; that is, if it was illegal either by reason of Horn not being drunk, or was rendered illegal by Calloway using more force than was necessary and appellant interfered; under such circumstances he was authorized to repel force by force to prevent said arrest. Of course, the jury took this charge, and all the court's charges on this subject, and considered them in connection with one another, and so considered we do not believe the court's charge was erroneous—certainly not to the extent of constituting reversible error.

Appellant insists that the evidence does not sustain the verdict. We have carefully examined same, and in our opinion we believe it does.

There being no errors in the record, the judgment is affirmed.

Brooks, J., absent.

ON MOTION FOR REHEARING.

HENDERSON, J. Appellant has predicated a motion for rehearing based on several grounds heretofore treated in the original opinion by the court, and on one or two grounds not discussed. Among other things, he insists that the court was in error in holding that the misconduct of certain jurors in talking over the phone to members of their families and others was without prejudice to him, and in this connection he

suggests that the court did not discuss articles 728 and 729, Code of Criminal Procedure, and he further suggests that said articles have direct reference to such misconduct as said jurors were guilty of. It is true, as stated, that said articles were not discussed in relation to said matter, and it may be further observed that they have a more direct bearing on the question than articles mentioned in the opinion. Article 728 uses this language: "No person shall be permitted to be with the jury while they are deliberating upon a case, nor shall any person be permitted to converse with a juror after he has been impaneled, except in the presence and by the permission of the court, or except in a case of misdemeanor where the jury have been permitted by the court to separate, and in no case shall any person be permitted to converse with a juror about the case on trial." Article 729 provides: "Any juror or other person violating the preceding article shall be punished for contempt of court by fine not exceeding \$100." As stated in the opinion, at the time of the passage of these articles there was no such invention in existence as a telephone, and the method of talking by phone was then unknown; but if said articles are broad enough to include a conversation over a phone, of course, said articles will be applied, and such conversations embraced within the spirit of prohibition. As heretofore intimated, we believe that the purpose of said articles was to inhibit any character of conversation between the jurors and other persons, ³⁹¹ except as therein provided. Not only would a conversation, as we ordinarily understand it, between persons directly talking to each other, but indirectly talking to the jurors through others or talking to the jurors by means of signs or gestures, as well as the modern method of talking over phones, though the persons be not actually present, would be prohibited by both the letter and the spirit of this statute. Indeed, we apprehend that if jurors are permitted to talk with persons indiscriminately over phones out of the presence of the court, and without the permission of the court, it would be fraught with more danger to the integrity of the jury system than if such conversations were had between persons directly present with the jury and in view of the officer, and the establishment of such a precedent would be calculated to imperil the integrity of the jury and the guaranty of a fair trial by an impartial jury. It is insisted that where it is shown that a conversation occurred between members of the jury and others over the phone not

in the presence and not by permission of the court, as here, that either one of two rules should apply. First, that it will be absolutely presumed that injury occurred to appellant, or if this presumption is not indulged, that the burden is on the state to show that such injury could not have occurred. With regard to the misconduct of the jury, which related to their separation, which is analogous to the proposition herein involved, since *McCampbell v. State*, 37 Tex. Cr. 607, 40 S. W. 496, the doctrine therein announced has been followed without a break, to wit, that where a separation of the jury trying a felony case has been shown and opportunity presented for the juror or jurors to be tampered with, that injury to appellant will be presumed. Whether this rule be applied and adopted here or the milder one, to the effect that where jurors are shown to have conversed with others that the burden is then on the state to show what the conversations were about, and that no possible injury accrued to appellant, the result, so far as this case is concerned, must be the same. On the examination of this issue before the court some of the jurors were examined, but not all; they stated that they talked with their wives and in one instance one of the jurors with another lady neighbor about home matters. All of the jurors were not examined. The deputy sheriff was examined; he heard some things that the jurors said, but he could not hear what was said at the other end of the line. None of the parties conversed with by jurors were summoned or examined. Heretofore, we have held with reference to the separation of jurors that these would be liable if tampered with to suppress the fact, and that, therefore, little reliance should be placed on their testimony, and the same rule would apply with reference to conversations. So that the necessity for the examination of others than the jurors with whom such conversations may have occurred seems to be necessary. This was not done. We accordingly hold that the burden thus shifted to the state was not discharged by it. We believe in the face of the statutes above cited that it would be a bad precedent to hold that jurors out of the presence of the court, and not by permission of the court, should be permitted ³⁹² to converse with other persons over phones, and certainly where such conduct does occur it should be held obligatory on the state to show beyond any question that the jurors were not tampered with. Any other rule would destroy a barrier set up by the legisla-

ture intended to protect the purity and integrity of the jury-box.

We held in the original opinion that the charge of the court on self-defense, though not called for, was not calculated to injure appellant. In the motion for rehearing appellant invokes the case of *Monroe v. State*, 47 Tex. Cr. 59, 81 S. W. 726, and he calls our attention to the facts of that case as being in line with the facts of this case. An examination of the case cited bears out appellant's insistence. There we held: "In the absence of testimony a charge of this character was calculated to involve appellant unduly and prejudice his rights with the jury." A more careful examination of the record in this case leads us to believe that the facts of the case did not authorize the court to give a charge on self-defense, and we are not prepared to say that such a charge may not have worked injury to appellant in the minds of the jury. For other authorities on this subject, see *Mooney v. State* (Tex. Cr. App.), 65 S. W. 926; *Randell v. State* (Tex. Cr. App.), 64 S. W. 255; *Bell v. State* (Tex. Cr. App.), 56 S. W. 913; *Ballew v. State* (Tex. Cr. App.), 34 S. W. 616, and *Spillman v. State*, 38 Tex. Cr. 607, 44 S. W. 149.

In the original opinion we failed to treat one of appellant's assignments predicated on his twenty-sixth bill of exceptions, relating to the excluded testimony of Cleve Sanders. Appellant sought to prove by this witness that after the difficulty in the barber-shop between Calloway and Early that they had made friends. It appears that the state, in order to show animus on the part of appellant toward deceased, proved a difficulty between Early and deceased about two or three weeks before the homicide in the barber-shop at Mt. Calm, and this was followed up by proof on the part of the state by the witness Stirman; that on the day preceding the homicide appellant had used language manifesting ill-will toward deceased on account of the previous difficulty at the barber-shop, and in addition to this testimony indicating ill-will, the state also proved by Guion that appellant had said Calloway was a rascal, and he could not arrest him. In the face of this testimony on the part of the state, appellant himself testified that he and deceased had made friends with regard to the difficulty at the barber-shop subsequent thereto. In addition to this he offered to show by the witness Sanders that he knew the defendant and deceased were friendly after the difficulty at the barber-shop, because he had been in-

formed by the deceased and the defendant that they had made up, and had agreed to forget and overlook said trouble, and that deceased and defendant informed said witness after the difficulty their feelings were friendly toward each other. We believe this testimony was admissible. The state's case against appellant was purely of a circumstantial character. The state proved appellant was present when Harmie Horn slew deceased, but was not able to prove any direct act ³⁹³ on the part of appellant showing any actual participation in the difficulty. The case against appellant was mainly supported by proof of his animus growing out of a former difficulty between himself and deceased at the barber-shop, and any proof, it occurs to us, was admissible which would show that the former difficulty had been settled and the parties were friendly, and here appellant proposed to show it both by expressions from appellant and from the deceased to the witness Sanders. This could hardly be said to be purely self-serving declarations; certainly not coming from deceased, and we hold this testimony was authorized: See *Gaines v. State*, 38 Tex. Cr. 202, 42 S. W. 385; *Turner v. State* (Tex. Cr. App.), 46 S. W. 830; *State v. Leabo*, 84 Mo. 168, 54 Am. Rep. 91.

On another trial of the case we would suggest that the court do not instruct the jury with reference to the presumption arising from the use of a deadly weapon in committing the homicide. We would further suggest that the court eliminate so much of the testimony introduced on the previous trial showing that appellant, shortly before the homicide, drove a couple of negro women from the livery-stable to some place in the suburbs of Mt. Calm, and was gone about half an hour. A discussion by appellant in his motion for rehearing as to this matter, and his illustrations, convinces us that said testimony was appropriated to an improper use.

The motion for rehearing is accordingly granted, and the judgment reversed and the cause remanded.

Brooks, J., dissents.

Continuances in Criminal Cases because of absence of witnesses is discussed in the note to *Blackburn v. State*, 122 Am. St. Rep. 745.

The Law of Self-defense is discussed in the notes to *State v. Gordon*, 109 Am. St. Rep. 804; *State v. Sumner*, 74 Am. St. Rep. 717.

The Effect of the Separation of a Jury in criminal prosecutions is the subject of a note to *Gamble v. State*, 103 Am. St. Rep. 155.

McCRARY v. STATE.

[51 Tex. Cr. 496, 103 S. W. 926.]

EMBEZZLEMENT—Persons Standing in the Relation of Partners.—Where A agrees to furnish B with a team and vehicle, and B is to sell organs which A obtains from an organ company, at what they cost, the two to divide the profits, and to pay the freight and the interest on deferred payments equally, and B to defray the expenses of the team and vehicle, the parties are partners so that B cannot be charged with the embezzlement of the organ or its proceeds. But if B takes the organ at cost and carriage price, and appropriates the same, he cannot be guilty of embezzlement, because he is then a purchaser, nor would he be guilty of embezzling trust funds. (p. 904.)

Chambers & Chambers, for the appellant.

F. J. McCord, assistant attorney general, for the state.

497 DAVIDSON, P. J. There are two counts in the indictment charging appellant with embezzlement—the first of an organ, and the second of the proceeds from sale of the organ. The facts show that Maxfield entered into some sort of a contract with the Farrand Organ Company, and obtained the organs for sale, and inaugurated him a music establishment, and later on employed appellant to assist him in the sale of these organs, carrying them about the country and retailing them wherever purchasers might be found. Appellant sold one to Clark Elmore, receiving in payment a watch and cow and twenty-two dollars and fifty cents in money. Appellant asked Elmore sixty-five dollars for the organ, which was a second-hand instrument. Elmore, without discussing further the matter with him, told him that he would give him a cow and watch and twenty-two dollars and fifty cents in money. The watch seemed to have been in use for quite a number of years, and was worth about five dollars, although it went in on the trade at ten dollars, and the cow passed in at the value of twenty dollars. Appellant sold the cow for five dollars and fifty cents to one of the witnesses in the case, who testified she was in poor condition, and that after he fattened her sold her for eight dollars. Appellant was charged with embezzling the organ. It was not denied that he had used the five dollars and fifty cents for which he sold the cow, and the twenty-two dollars and fifty cents in money collected. It is further shown that he had authority,

to sell and make such trades as he saw proper. The watch was still on hand. The contract, as stated by the state's witness Maxfield, is as follows:

"Q. What was the agreement between you two by which he became your agent and sold musical instruments over this county? A. I was to furnish him a team and hack and feed the team in town, and he was to sell the goods and take the goods at what they cost, and we were to divide the profits; he was to pay half the freight and I was to pay half, and all the profits made we were to divide the profits equally and he was to pay his expenses for his team and himself while he was on the road."

Some parts of the book kept by Maxfield showing the account of appellant was placed in evidence, which showed that he paid from two dollars and twenty-five cents to four dollars freight on the instruments. It is also shown by the state's witness Maxfield, in obedience to stipulations of this contract, that appellant was to pay his part of the interest due Farrand Organ Company on the instruments where there were deferred payments, and some of the testimony shows that he did pay some of the interest which went to the organ company. This is a sufficient statement of the case, in our judgment, to show that they were partners: See *McCrary v. State*, 51 Tex. Cr. 502, post, p. 905, 103 S. W. 924, for collation of authorities. If, however, appellant took the instruments at cost and carriage price, which would amount to less than forty-seven dollars, and appropriated the instrument, he could not be charged with embezzlement, because he would be the purchaser from Maxfield under that state of case, and Maxfield states that he was to take the goods at what they cost and they were to divide the profits on it. If he meant by that that the contract was that appellant was to take the goods at cost as a sale to him or become responsible for the instrument at the cost, which was forty-one dollars and some cents, the freight being four dollars and fifty cents, then ⁴⁹⁸ he would not be embezzling trust funds. Under either event appellant would not be, in our opinion, guilty of embezzlement: See *McCrary v. State*, 51 Tex. Cr. 502, post, p. 905, 103 S. W. 924. It is unnecessary in this case to go further into the questions involved: *Ray v. State*, 48 Tex. Cr. 122, 86 S. W. 761; *Manuel v. State*, 44 Tex. Cr. 433, 71 S. W. 973; *Dancy v. State*, 53 S. W. 886; *Reed v. State*, 16 Tex.

App. 586; Kelly Island & T. Co. v. Masterson (Tex. Cr. App.), 93 S. W. 427.

Again, under the terms agreed on, appellant took the organ at cost, or in this case at forty-one dollars and forty-five cents for the instrument and four dollars and fifty cents freight, which is a misdemeanor. Judgment reversed and cause remanded.

Brooks, J., absent.

The Crime of Embezzlement is the subject of a note to Eggleston v. State, 87 Am. St. Rep. 19. For a decision somewhat similar in its facts and holding to the principal case, see McCrary v. State, 51 Tex. Cr. 502, post, p. 905.

McCRARY v. STATE.

[51 Tex. Cr. 502, 103 S. W. 924.]

EMBEZZLEMENT—Persons Standing in the Relation of Partners.—Where A and B in selling organs agree that when an organ is placed in the hands of A to sell he is to account to B for the original purchase price of the instrument plus the freight; that when this is paid over, A and B are to share equally in the profits; that B is to furnish A a team and vehicle and pay his board while in town; that B is to be responsible to the organ company for the purchase price and freight of the organ; and that the instrument is to remain the property of the organ company until sold, A and B are partners, so that when A sells an organ and appropriates the proceeds, B cannot charge him with embezzlement. (p. 907.)

EMBEZZLEMENT.—Where One has Authority as an Agent of another to sell an organ on certain terms, and he sells it on those terms and as the property of such other, he cannot be charged with embezzling the organ, although there may be a subsequent embezzlement of the proceeds. (p. 908.)

Chambers & Chambers, for the appellant.

F. J. McCord, assistant attorney general, for the state.

503 HENDERSON, J. Appellant was convicted of embezzlement, and his punishment assessed at two years' confinement in the penitentiary, and prosecutes this appeal.

Briefly stated, the facts show the prosecutor, G. A. Maxfield, was, during the years 1905-06, a music dealer in the town of Clarksville, Red River county, under the firm name and style of Maxfield Music Company. Prosecutor rented a house there for the conduct of his business, and, among others, dealt with the Farrand Organ Company; he received organs from said firm and sold same on commission, being respon-

sible to the firm for the price of each organ, which was put to him at a certain amount with the freight added. Said organs were to remain the property of Farrand Organ Company until sold. The price of the organ in question for which Maxfield was responsible was forty-five dollars plus the freight, which was on each organ four dollars and fifty cents. Maxfield, in the course of his business, employed appellant, the terms being that Maxfield was to furnish appellant with a team and vehicle, and to pay his board while in town, which was estimated at six dollars a month, and was to take care of the team; that on trips appellant was to pay his own expenses. Appellant was to sell organs, taking notes, etc., therefor, and he and Maxfield were to share equally in the profits, which was all the money received by appellant over and above the price fixed for organs by Farrand Organ Company, and the freight added. Appellant sold the organ in question some time in the summer of 1906 to one N. B. Humphreys, who lived in the county of Red River. The style and number of said organ was E3A 96877. The consideration of the sale was a cow and wagon received by appellant at the time of sale, and a note for thirty dollars executed by Humphreys to Maxfield Company on July 19, 1906, due November 1, 1906. The testimony of the state tends to show that this sale was concealed at the time and for some time afterward by appellant, and when he was pressed to know what he had done with the instrument, he reported that he had sold it to one Williams. Appellant's testimony tends to show that he made no concealment of the sale, but got the sale of the particular organ mixed with one he sold to Williams, which accounted for his failure to report this particular sale; and he further claimed that Maxfield owing him, was the reason he did not report and account for the money which was received on the note sometime in November. The proof on the ⁵⁰⁴ part of the state showed that this was not correct, but that in addition to the organ appellant sold Humphreys, he also owed Maxfield over one hundred dollars. It was in proof that the wagon was worth twenty-five dollars and the cow fifteen dollars, the two items appellant received as a part of the consideration for the organ.

There were two counts in the indictment: the first count charged appellant with embezzlement of an organ of the value of one hundred and ten dollars, the property of G. A. Maxfield, which he had received as the agent of said Maxfield. The

second count in the indictment charged appellant with a conversion of one hundred and ten dollars, the proceeds of the organ alleged to have been received by him as the property of G. A. Maxfield. Both counts were submitted to the jury, and they found appellant guilty under the first count.

Appellant insists that the organ in question, including the profits, was partnership property between himself and Maxfield, and as such was not the subject of embezzlement. The facts on this point show, as heretofore stated, that the Farrand Organ Company shipped the organ in question, with a number of others, to Maxfield at Clarksville, and that this particular organ was sold to Humphreys for the consideration as above stated by this appellant. It will be observed that this is not a charge of embezzlement of an organ, as the property of Farrand Organ Company, but an organ as the property of G. A. Maxfield, and the question is, Were appellant and Maxfield partners in the organ, as well as in the profits, or was the organ intrusted to appellant as Maxfield's organ, and was appellant only interested in the commissions over and above the cost of the organ, and were these commissions received by him as wages? We understand the books to make some nice distinctions on this question, but we believe a review of the testimony showing the relationship between appellant and Maxfield in the sale of organs constituted them copartners. There is a good deal of testimony in the record showing their course of business, which was in effect when an organ was placed in the hands of appellant he was to account to Maxfield for forty-five dollars, plus the freight, which was on each organ four dollars and fifty cents, and when this was paid off, then appellant and Maxfield were to share equally in the profits. Nothing is said in the contract as to appellant's receiving a share of the profits or commissions on the sale as wages, but simply the parties were to share equally in the profits, and it seems that some organs of the same character sold for one price and some for another, one hundred and ten dollars being the maximum price for such organs; sometimes property was taken in part pay, and sometimes payment was made in cash and notes. We understand the relationship between these parties is much like where two parties made a contract by which one furnishes the stock in trade, as of merchandise, and the other party takes charge of the business and makes sales, and they mutually share the profits, which is the balance after the stock is paid for. In

such case we understand the rule to be that such parties are copartners: See *Kelley Island & Transportation Co. v. Masterson* (Tex. Cr. App.), 93 S. W. 427; ⁵⁰⁵ *Dancy v. State*, 41 Tex. Cr. 293, 53 S. W. 635, 886; *Reed v. State*, 16 Tex. App. 586; *Ray v. State*, 48 Tex. Cr. 122, 86 S. W. 761; *Manuel v. State*, 44 Tex. Cr. 433, 71 S. W. 973. It is held in some of the above authorities that a person who is a copartner of another cannot be guilty of embezzling partnership property. According to our view, the property here involved, both the organ and the profits, if any arising from a sale thereof, was the property of the copartners as between said Maxfield and appellant, consequently he could not be guilty of embezzlement thereof as the property of Maxfield.

It is further insisted that appellant had authority to sell either for cash or notes, or in trade, the organ in question, and he, therefore, in the sale of same could not be guilty of embezzling the organ, although he might, under certain circumstances, be guilty of embezzling the proceeds of the sale. However, the state contends that appellant at the time he made sale of the organ intended to appropriate the proceeds thereof, and under such circumstances would be guilty of embezzlement, and to support this contention we are referred to the case of *Epperson v. State*, 22 Tex. App. 694, 3 S. W. 789. The facts of that case are in some respects different from this case. In said case appellant was intrusted with an organ as the property of his principal, and instead of making sale of same, on account of his principal, made sale thereof as his own property, consequently there was a conversion of the organ itself before the sale. Here the sale of the organ was made according to the written mortgage as the property of Maxfield, and there was no pretense of same as appellant's property. The sale having been made under authority as Maxfield's property, there was no conversion. If the organ had not been partnership property, as heretofore shown, and appellant in such sale simply acted as the agent of Maxfield in making the sale, and he did this under authority, then there was no conversion of the organ. If the sale had been made of the organ as the property of Maxfield and under authority from Maxfield, and there was a subsequent conversion of the proceeds, appellant might have been convicted of embezzling the proceeds of such sale as the property of his principal.

It is not necessary to discuss the assignments with reference to value of the organ, and whether appellant was guilty

of a felony or a misdemeanor, as the view we have taken of the case renders this unnecessary. However, if appellant had been indicted for embezzling said organ as the property of Farrand Organ Company, it would seem that he could not be convicted for any value of said organ greater than that which had been agreed upon as between Maxfield and said Farrand Organ Company as the purchase price thereof, to wit, forty-five dollars, with the freight added.

For the errors discussed the judgment is reversed and the cause remanded.

Brooks, J., absent.

The Crime of Embezzlement is the subject of a note to Eggleston v. State, 87 Am. St. Rep. 19. For a decision somewhat similar in its facts and holding to the principal case, see McCrary v. State, 51 Tex. Cr. 496, ante, p. 903.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

NIELSON v. SPONER.

[46 Wash. 14, 89 Pac. 155.]

RIPARIAN OWNERS, Rights of.—By the common law each riparian owner has the right to ordinary use for domestic purposes of the water in a definite stream passing through or over his land. (p. 911.)

RIPARIAN OWNERS, Constitutionality of Statute Interfering with Rights of in the Waters of a Spring.—A statute purporting to authorize a land owner to use all the spring water rising on his own land, and therefore destroying the right to use such water by a lower riparian proprietor, is unconstitutional as a taking away or destruction of property rights without due process of law. (p. 911.)

WATERCOURSES—Waters of a Spring, Right of Lower Riparian Proprietor to.—A land owner has no right to use all the waters of a spring rising on his land for irrigation, so as to prevent a lower riparian proprietor from having the use of any for domestic purposes. (p. 911.)

Crites & Romaine, for the appellant.

Walter B. Whitcomb, for the respondents.

¹⁴ **ROOT, J.** This action was brought by respondents, as lower riparian owners, to enjoin the appellant from unreasonably using and diverting the waters of Thomas or Spooner creek, a small stream flowing across the lands of appellant and respondents. From a judgment and decree in favor of respondents, this appeal is prosecuted.

It appears that there is very little water in said stream during the months of July, August and September; that at times during said period the appellant diverted said water for the purpose of irrigating his orchard. It is claimed by ¹⁵ respondents that this water was diverted by means of a small ditch running through soil that was very porous and which necessarily occasioned the loss and waste of much of

the water; that the water was not returned to the creek, and consequently respondents could get no water for domestic purposes from said creek during the summer period when the water was so diverted by appellant. The latter claims that during said summer months there is no water in the creek excepting such as comes from a spring situated upon his premises, and contends that he is entitled to take all of such water that is capable of being used upon his premises. He relies as authority for this upon section 4114 of Ballinger's Code (P. C., sec. 5829), a part of which reads as follows:

"Provided, that the person upon whose lands the seepage or spring waters first rise shall have a prior right to such waters, if capable of being used upon his lands."

This statute was enacted in 1890. The evidence in this case shows that respondents' land was patented in 1883, and that it has been occupied ever since. Under the common law, each riparian proprietor had a right to ordinary use for domestic purposes of water flowing in a defined stream past or through his land. In the case of *Geddis v. Parrish*, 1 Wash. 587, 21 Pac. 314, the supreme court of Washington Territory held that a lower riparian owner was entitled to, and could exercise, this right, even though the waters of such stream originated in a spring upon the land of the person seeking to divert them from the natural channel.

Under the authorities, it would seem that the privilege of the respondents' predecessors to use the waters of the stream in question here was a property right running with the land from the time it was patented by the government in 1883. This being true, an act of the legislature in 1890, authorizing a land owner to use all the spring water arising on his land and thereby destroying the use of such water to the lower riparian owner, would be unconstitutional as a taking or destroying of property without due process of law. Appellant¹⁶ had the right to make free use of this water whether it came from a spring on his land or otherwise, for the ordinary domestic purposes; but we do not think that irrigation, at least when conducted in the manner that this was, can constitute a use which will justify an upper riparian owner in taking all of the water to the destruction of the ordinary domestic uses thereof by a riparian owner below, in the absence of prior, legal appropriation: See, also, *Nesalhous v. Walker*, 45 Wash. 621, 88 Pac. 1032; *Smith v. Corbit*, 116 Cal. 587, 48 Pac. 725; *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. 254;

Benton v. Johncox, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 495, 39 L. R. A. 107; Union Mill etc. Co. v. Ferris, 2 Saw. 176, Fed. Cas. No. 14,371; Howe v. Norman, 13 R. I. 488; Brosnan v. Harris, 39 Or. 148, 87 Am. St. Rep. 649, 65 Pac. 867, 54 L. R. A. 628; Ellis v. Tone, 58 Cal. 289; Harris v. Harrison, 93 Cal. 676, 29 Pac. 325; Lord v. Meadville Water Co., 135 Pa. 122, 20 Am. St. Rep. 864, 19 Atl. 1007, 8 L. R. A. 202; Pomeroy on Water Rights, sec. 134; Gould on Waters, secs. 205, 536.

The judgment of the superior court is affirmed.

Hadley, C. J., Fullerton, Crow, Dunbar, and Mount, JJ., concur.

A Riparian Owner has no Absolute and Exclusive Right to the flow of all the water of the stream in its natural state, but only a right to the benefit and advantage of the water flowing past his land so far as consistent with a like right in all other riparian owners. An upper riparian owner, in using the water of a stream for irrigation, must not waste, needlessly diminish, nor wholly consume it, to the injury of other like owners, nor so as to prevent a reasonable use of it by them also: Meng v. Coffee, 67 Neb. 500, 108 Am. St. Rep. 697; Crawford Co. v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647.

The State by Statute may Prohibit the Abstraction from the Lakes, ponds and streams of the state of waters to be used for any other purpose than to meet the lawful uses of riparian owners and vested rights under grants already made, and when a statute has forbidden its abstraction for a stated purpose, not within such uses, abstraction for that purpose becomes unlawful, and may be restrained at the suit of the attorney general: McCarter v. Hudson County Water Co., 70 N. J. Eq. 695, 118 Am. St. Rep. 754.

WASHINGTON BRICK, LIME AND MANUFACTURING COMPANY v. TRADERS' NATIONAL BANK.

[46 Wash. 23, 89 Pac. 157.]

GARNISHMENT, Property Subject to.—A draft is property, and as such subject to garnishment under a writ against the payee. (p. 914.)

GARNISHMENT, Draft, When Remains the Property of the Payee so as to be Subject to.—If a draft is deposited in a bank by the payee, and he is credited with the amount thereof under an understanding or custom that if it is not paid, the amount shall be charged back to the depositor, he remains the owner of the draft, and it is subject to garnishment under a writ issued against him, though he has the right to check against his account until the draft is so charged back. (pp. 914, 915.)

Action by the Washington Brick, Lime and Manufacturing Co. v. Taplin, Rice & Company, a corporation, under which

an attachment was issued, and the Traders' National Bank was garnished. Judgment having been entered by default in the original action, the question was presented whether the bank was subject to garnishment on account of the draft referred to in the opinion of the court. Judgment against the bank, and it appealed.

Graves, Kizer & Graves, for the appellant.

Hamblen, Lund & Gilbert, for the respondent.

²⁵ DUNBAR, J. Respondent brought suit against Taplin, Rice & Company, a foreign corporation, and at the time of bringing the suit, on September 6, 1905, likewise garnished the appellant by service of writ of garnishment in the usual form. Appellant answered, denying that it was indebted to the defendant Taplin, Rice & Company, or that it had any goods or effects of said defendant. Respondent filed a controverting affidavit, alleging that, at the time of the service of the writ upon it, appellant had in its possession a draft drawn by defendant upon the Spokane Pottery Company, in ²⁶ favor of the Second National Bank of Akron, Ohio, in the sum of fourteen hundred and nineteen dollars, which draft was accepted by the drawee on August 26, 1905, and paid to the appellant September 17, 1905. The controverting affidavit being taken as denied without further pleading, under the statute, trial was had. Judgment in favor of respondent against defendant Taplin, Rice & Company having theretofore been obtained by default, the trial of the issue between respondent and appellant was had, and judgment rendered by the court in favor of respondent for the full amount demanded.

The court found, and the record sustains the findings, that at the time of the service of the writ of garnishment upon the garnishee defendant, the garnishee defendant had in its possession and under its control a certain draft drawn by Taplin, Rice & Company, a corporation, in favor of the Second National Bank of Akron, Ohio, upon the Spokane Pottery Company, dated August 19, 1905, for the sum of fourteen hundred and nineteen dollars, which said draft was accepted by the Spokane Pottery Company on August 26, 1905, payable September 17, 1905; and found, as a conclusion of law, that the draft so made and accepted was the property

of said Taplin, Rice & Company. It also found that Taplin, Rice & Company, at the time of the service of the writ of garnishment, was indebted to the respondent in the sum of two hundred and ninety-one dollars, and interest at the legal rate since January 1, 1900. The record shows that the draft was drawn by Taplin, Rice & Company, and that, pending its collection, Taplin, Rice & Company was permitted by the bank to check against the amount of the draft, and on this statement it is claimed by the appellant that the court erred in holding the draft to be the property of Taplin, Rice & Company instead of the property of the Akron bank. It is also insisted by the appellant that a draft is not property within the meaning of the garnishment statute, and is not the subject of the garnishment. An examination of the statute convinces us that it is broad enough to cover a draft, and that there was no error by the court in that particular.

²⁷ On the principal question in controversy there is some conflict of authority, and without reviewing the cases cited by appellant and respondent respectively, we think it is settled, and correctly settled on principle, that the test of the ownership of the draft must be the responsibility for the draft. In this case it was testified by the assistant cashier of the Akron bank that the bank had a rule to the effect that, in receiving collections, it acted only as an agent and did not assume any responsibility beyond due diligence on its part. The witness also testified that, in cases where drafts were given as this one was, and the depositor of the draft was credited with the amount of the draft, if the draft was paid that ended the matter, and that there was no charging back; but that if the draft was not paid, the amount of the draft was charged back to the party who drew the same. While the witness undertook to define agency, the facts that he testified to showed conclusively that the bank in its dealings in all this class of cases did act as the agent instead of the owner of the paper which it assumed to collect, and that it always charged the amount of the draft back to the drawer when it failed to make the collection. The bank either relies upon the draft or it does not rely upon it. If it does so rely absolutely, and the drawer of the draft obtains unconditional credit, then the condition of debtor and creditor is established. The draft is the property of the bank, and the credit is the property of the maker of the draft, who has no further interest in the draft nor responsibility for it. But this can-

not be, even if the maker of the draft is permitted to check against it, if the understanding is that, if the bank fail to collect the draft, the amount is to be charged back to the maker; for the credit in such case is really given to the maker, who is held responsible ultimately, and the permission to check against it is simply an accommodation extended to the maker, and the draft is taken only as additional security, indicating to some extent the responsibility of the maker.

A Bank Which Receives a Note or Draft for Collection does not owe the amount thereof to the sender until collected; and although it may enter a credit therefor in its books, the bank may treat such credit as provisional, and cancel it if the paper is afterward dishonored: *Midland Nat. Bank v. Brightwell*, 148 Mo. 358, 71 Am. St. Rep. 608; *Interstate Nat. Bank v. Ringo*, 72 Kan. 116, 115 Am. St. Rep. 176. See, also, *Steinhart v. National Bank*, 94 Cal. 362, 28 Am. St. Rep. 132; *Bank v. Cummings*, 89 Tenn. 609, 24 Am. St. Rep. 618.

STATE MEDICAL EXAMINING BOARD v. STEWART.

[46 Wash. 79, 89 Pac. 475.]

JUDGMENT—Retraxit, What is.—Where the parties to an action settle their dispute and agree to a dismissal, it is a retraxit, and amounts to a decision on the merits. (p. 917.)

JUDGMENT.—The Trial of an Action on a Plea of Former Action Pending, the sustaining of the plea, and the consequent dismissal of the action, do not amount to a determination of the action on the merits. (p. 918.)

JUDGMENT—Retraxit, Dismissal of Action on Stipulation, When is not a.—Under a statute providing that an action may be dismissed and a judgment of nonsuit entered by either party upon the written consent of the other, a judgment dismissing the action upon a stipulation that it may be dismissed without costs to either party does not amount to a retraxit, nor a decision on the merits, nor bar another action for the same cause. (p. 919.)

LIMITATION OF ACTIONS—Proceedings to Revoke a License to Practice Medicine.—Under a statute providing that an action for relief not hereinbefore provided for shall be commenced within two years after the cause shall have accrued, a proceeding to revoke a license to practice medicine is not barred though not commenced within two years after the conviction of the practitioner of an offense involving moral turpitude, where the statute under which the conviction was made makes such conviction evidence of unprofessional or dishonorable conduct. (pp. 919, 920.)

LIMITATIONS OF ACTIONS—Statute, When Creates a Rule of Evidence and not a Limitation of an Action.—Under a statute authorizing a proceeding to revoke a license to practice medicine when the practitioner has been guilty of unprofessional or dishonorable conduct, and making a conviction of any offense involving

moral turpitude, evidence of unprofessional and dishonorable conduct, the statute creates a rule of evidence, and the statute of limitations does not apply to the proceeding in which such evidence is employed. (p. 920.)

Proceeding before the State Medical Board to revoke the license of one Arntson, authorizing him to practice medicine. The statute of limitations, relied upon by the defendant, after specifying the numerous actions and proceedings to which the statute is applicable, adds by section 269a the following: "An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

John E. Humphries and George B. Cole, for the appellant.

Walker & Munn, for the respondents.

⁷⁹ MOUNT, J. On June 16, 1906, the respondent Arntson filed a complaint with the state medical board, seeking to revoke the license of appellant to practice medicine within the state. The complaint alleged that the appellant was guilty of unprofessional and dishonorable conduct, and particularly stated the facts showing a conviction of appellant on September 30, 1903, for an offense involving moral turpitude,⁸⁰ the facts in regard to which will be found in the case of *State v. Stewart*, 32 Wash. 103, 72 Pac. 1026. The appellant appeared before the board and contested the charges. The board, sitting in Pierce county, sustained the charges and made an order revoking the appellant's license to practice medicine in the state. The appellant appealed to the superior court of Pierce county. He thereupon filed an answer, not denying the charges in the complaint, but alleging that the same charge had been made against him on July 7, 1904, in Spokane county, and that under said charge the examining board revoked his license to practice medicine, and he thereupon appealed to the superior court of Spokane county; that in July, 1905, while the said appeal was pending in the superior court of Spokane county, another charge of the same offense was filed against him in King county, and that the board there again revoked his license, and he thereupon appealed to the superior court of King county; that the said appeal in King county was tried and the superior court of that county dismissed the proceedings, upon the ground that another action for the same offense was then pending in the

superior court of Spokane county; that the medical board thereupon appealed from said order to this court; that thereafter, by stipulation, the parties dismissed the actions pending in Spokane county and King county, and the appeal pending in this court; that said dismissals are a bar to the prosecution of this case. The answer then pleads both the two year and three year statute of limitations as a bar to the action. The lower court sustained a demurrer to this answer, and the appellant elected to stand upon the allegations of the answer; whereupon a judgment was entered affirming the action of the medical examining board in revoking appellant's license. This appeal is prosecuted from that judgment.

The appellant contends that the dismissal of the cases in King county and Spokane county amounts to a retraxit, and therefore is a bar to any further prosecution of the same ⁸¹ charge against the appellant. It is no doubt the rule that, where the parties to an action have settled their dispute and agreed to a dismissal, such dismissal is a retraxit and amounts to a decision upon the merits. It is not alleged in the answer, nor is it now claimed, that there was any settlement or agreement of settlement of the controversy between the parties to this action, but appellant maintains that the legal effect of the dismissal by stipulation amounts to a settlement and bar to further prosecution, and cites *Merritt v. Campbell*, 47 Cal. 542, and *Phillpotts v. Blasdel*, 10 Nev. 19, in support of that contention. The authorities are not in accord upon this question, as will be seen by section 33, volume 1 of *Van Fleet on Former Adjudication*. In *Haldeman v. United States*, 91 U. S. 584, 23 L. ed. 433, the supreme court of the United States said:

“It is a general rule, that a plea of former recovery, whether it be by confession, verdict or demurrer, is a bar to any new action of the same or the like nature for the same cause. This rule conforms to the policy of the law, which requires an end to the litigation after its merits have been determined. But there must be at least one decision on a right between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit. . . . Suits are often dismissed by the parties; and a general entry is made to that effect, without incorporating in the record, or even placing on file, the agreement. It may settle nothing, or it may settle the

entire dispute. If the latter, there must be a proper statement to that effect to render it available as a bar. But the general entry of the dismissal of a suit by agreement is evidence of an intention, not to abandon the claim on which it was founded, but to preserve the right to bring a new suit thereon, if it becomes necessary. It is a withdrawal of a suit on terms, which may be more or less important. They may refer to the costs, or they may embrace a full settlement of the contested points; but, if they are sufficient to bar the plaintiff, the plea must show it": See, also, *Bishop v. McGillis*, 82 Wis. 120, 51 N. W. 1075; *Butchers' etc. Assn. v. Boston*, 137 Mass. 186.

⁸² We think the rule above stated is the just and proper rule. The action which was brought in King county was tried upon the plea that another action between the same parties for the same cause was pending in Spokane county. That plea was sustained, and for that reason alone the action in King county was dismissed. But that dismissal had no effect upon the issues in the original action then pending in Spokane county. Those issues stood for trial unaffected by the abatement of the action in King county: *Tacoma v. Tacoma Light & Water Co.*, 15 Wash. 499, 46 Pac. 1119; 5 Current Law, p. 2; 1 Cyc. 21; 1 Ency. of Pl. & Pr. 776. The dismissal of the King county case was, therefore, not a determination of the cause of action upon the merits, and needs no further consideration. Subsequently the parties stipulated to dismiss the case pending in Spokane county, without cost to either party. There is nothing in the record to show that the case was settled or determined, except the mere fact of dismissal, and this, according to the rule above stated, is not sufficient to constitute a bar. The statute provides that, "An action may be dismissed or judgment of nonsuit entered in the following cases: . . . 2. By either party upon the written consent of the other": Bal. Code, sec. 5085 (P. C., sec. 727). "When a judgment of nonsuit is given, the action is dismissed, but such judgment shall not have the effect to bar another action for the same cause": Bal. Code, sec. 5087 (P. C., sec. 729). Notwithstanding the case of *Merritt v. Campbell*, 47 Cal. 542, apparently to the contrary upon statutes similar to ours, we think a written stipulation of both parties stating that, "The above-named cause now pending . . . be dismissed without costs to either party," falls squarely within the statute, and is just as effective to dismiss

the action without prejudice as if the stipulation were consented to by one party and signed by the other. We are, therefore, of opinion that the answer of the appellant was not sufficient to constitute a bar to the action.

Appellant next contends that the cause is barred by the ⁸³ statute of limitations. This is a special proceeding prescribed by the provisions of law relating to medicine and surgery: Pierce's Code, sec. 6284 et seq. (Laws 1905, c. 41). The statute provides that a license to practice medicine may be revoked by the state examining board upon complaint charging unprofessional or dishonorable conduct. And it is provided by Pierce's Code, section 6285 (Bal. Code, sec. 3015), that a conviction of any offense involving moral turpitude shall constitute unprofessional or dishonorable conduct. Pierce's Code, section 6287 (Bal. Code, sec. 3017), provides for an appeal from the board of examiners to the superior court of the county in which was held the last general meeting of such board; and also provides that such appeal shall stand for trial de novo in all respects as ordinary civil actions, and like proceedings shall be had thereon. No time is limited within which such proceedings shall be commenced. The appellant argues that, because no time is fixed, such actions must be commenced within two years, under the provisions of Ballinger's Code, section 4805 (P. C., sec. 289a). It is unnecessary for us to decide the technical question presented whether this is a civil action within the meaning of the statute, because we are satisfied such statute does not apply to this case in any event. The object of the statute was to prevent immoral or dishonorable persons from procuring licenses to practice medicine in this state, and if persons having licenses were found to be unprofessional or dishonorable, then their licenses might be revoked. The character of the person at the time the charge of unprofessional conduct is made controls his right to the license. This character is proved by his conduct in the past. A conviction of any offense involving moral turpitude is made conclusive evidence of unprofessional conduct. It is not contemplated by the statute that the examining board shall try the accused and find him guilty of an offense involving moral turpitude when there has already been a trial and conviction. Such former conviction by a court of competent jurisdiction is conclusive evidence of the moral character and ⁸⁴ professional conduct of the accused at the time the charge is made against him. The statute,

therefore, constitutes a rule of evidence in such cases, to which the statute of limitations does not apply.

In the case of *Hawker v. People*, 170 U. S. 189, 18 Sup. Ct. Rep. 573, 42 L. ed. 1002, the supreme court of the United States, in considering a statute similar to our own, said: "But if a state may require good character as a condition of the practice of medicine, it may rightfully determine what shall be the evidences of that character. . . . It is not open to doubt that the commission of crime, the violation of the penal laws of a state, has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the state shall be deemed lacking in good moral character it is not laying down an arbitrary or fanciful rule—one having no relation to the subject matter—but is only appealing to a well-recognized fact of human experience; and if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the state? The conviction is, as between the state and the defendant, an adjudication of the fact. So, if the legislature enacts that one who has been convicted of crime shall no longer engage in the practice of medicine, it is simply applying the doctrine of *res adjudicata* and invoking the conclusive adjudication of the fact that the man had violated the criminal law, and is presumptively, therefore, a man of such bad character as to render it unsafe to trust the lives and health of citizens to his care." In addition to the cases there cited, see, also, *In re Lowenthal*, 78 Cal. 427, 21 Pac. 7; *Ex parte Tyler*, 107 Cal. 78, 40 Pac. 33 to the effect that the statute of limitations does not apply in cases of this character.

We conclude, therefore, that the court properly sustained the demurrer to the answer. The judgment is affirmed.

Hadley, C. J., Fullerton, Crow, and Dunbar, JJ., concur.

A Technical Retraxit occurs where the plaintiff comes personally into court after the filing of his declaration and says that he will not proceed with it. This is equivalent to a verdict and judgment upon the merits, and is a bar to the action: *Lowry v. McMillan*, 8 Pa. 157, 49 Am. Dec. 501; *Thomason v. Odum*, 31 Ala. 108, 68 Am. Dec. 159. In *retraxit*, the plaintiff voluntarily abandons his cause, and admits that he has no cause of action; it is this admission upon the record which constitutes a bar to another suit, and operates as an estoppel to the party: *Coffman v. Brown*, 7 Smedes & M. 125, 45 Am. Dec. 299.

A Judgment Dismissing an Action, without prejudice to the plaintiff, is not a bar to a subsequent action: *Moore v. Russell*, 133 Cal. 297, 85 Am. St. Rep. 166.

The General Statute of Limitations is not applicable to proceedings for the revocation of a physician's license to practice medicine: *State v. Schaeffer*, 129 Wis. 459, 109 N. W. 522. Neither is it applicable to the proceedings for the disbarment of an attorney. An attorney may be disbarred although no action, civil or criminal, can be maintained against him, because the action is barred by the statute of limitations: *Ex parte Tyler*, 107 Cal. 78, 40 Pac. 33; *United States v. Parks*, 93 Fed. 414; *People v. Hooper*, 218 Ill. 313, 75 N. E. 826; *In re Smith*, 73 Kan. 743, 85 Pac. 584; *State v. Fourchy*, 106 La. 743, 31 South. 325; *In re Weed*, 26 Mont. 507, 68 Pac. 1115. Nevertheless, courts hesitate to entertain disbarment proceedings where a long period of time has elapsed after the commission of the wrongful acts complained of: *In re Lowenthal*, 78 Cal. 427, 21 Pac. 7; *In re Elliott*, 73 Kan. 151, 84 Pac. 750.

CITY OF SPOKANE v. PATTERSON.

[46 Wash. 93, 89 Pac. 402.]

EVIDENCE—Maps, When Admissible.—A map identified by a witness by whose testimony it appears to be reasonably accurate is admissible in evidence in connection with such testimony. (p. 922.)

BLASTING, What Amounts to.—An ordinance purporting to impose regulations for the blasting of rock or stone extends to "spring shots," though they are not so strong as regular blasts, if by such spring shots pieces of rock are thrown a great distance. (p. 923.)

MASTER AND SERVANT, Criminal Liability of the Former for an Act of the Latter Against His Instructions.—Where an employé is engaged under the general supervision and direction of his employer, but discharges a blast in a manner prohibited by statute and contrary to the instructions of his employer, the latter is liable to the penalty imposed. (p. 924.)

PARTNERSHIP, Criminal Liability of Member of.—A partner in the general supervision of blasting in a city, being prosecuted for blasting contrary to the provisions of a municipal ordinance, is not entitled to an instruction that if he was a member of a copartnership conducting business at the place of blasting, he should be found not guilty unless, as such partner, he participated in the act or assented thereto. There can, in such cases, be no distinction between his assent as a partner and his assent in his individual capacity. (p. 925.)

George W. Shaefer, for the appellant.

J. M. Geraghty and Lester P. Edge, for the respondent.

⁹³ HADLEY, C. J. The defendant in this cause was charged in the police justice court of the city of Spokane with

violating an ordinance of said city relating to blasting, in that he ⁹⁴ unlawfully discharged a blast without having the same securely covered so as to prevent danger to persons and property. On appeal to the superior court, the cause was there tried before a jury, a verdict of guilty was returned, judgment was entered that the defendant shall pay a fine of one hundred dollars and costs, and he has appealed. An ordinance of the city of Spokane provides as follows:

“Sec. 4. In all cases of blasting rock or stone within the city of Spokane, each blast, before firing it, shall be securely covered with chain aprons, brush or other materials, to be placed over and around such charge in such manner that all danger to persons and properties shall be absolutely prevented”: Ordinance No. A24, sec. 4.

There was sufficient evidence for the jury to find that the ordinance was violated in the arrangement of the blast in question. But appellant denies his own liability to punishment for the reason that he did not personally place and discharge the blast. It was done by his employé, and he claims that the failure to properly cover the blast was without his knowledge and against his instructions.

The first error assigned is that the court permitted respondent to introduce in evidence a certain map for the purpose of showing the location of the blast. The objection is on the ground that it was not definitely shown where the man said to have been injured was located, and also, that neither the location of the blast nor who discharged it had been sufficiently shown. We think there was sufficient evidence upon these subjects, and that it appeared from the testimony that the map was reasonably accurate. The locations were designated upon the map by pencil-marks made by a witness in the presence of the court and jury. The map was offered in connection with the testimony, and it was therefore proper to admit it as an aid to the court and jury.

“It is the common practice in the courts to receive private or unofficial maps, diagrams, models, or sketches for the purpose ⁹⁵ of giving a representation of objects and places which generally cannot otherwise be as conveniently shown or described by witnesses, and when proved to be correct or offered in connection with the testimony of a witness they are admissible as legitimate aids to the court or jury”: 17 Cyc. 412.

Several assignments of error relate to instructions of the court in relation to blasting and “springing.” Appellant

contends that a distinction should have been observed; that a "spring" shot is so arranged that it simply makes a chamber at the bottom of the drilled hole, while a blast proper is a stronger charge, and both tears and throws the earth and rock. It is contended that this was arranged for a spring shot, and that the provision of the ordinance covers only blasts. To the layman this appears to be a somewhat technical distinction when the purpose of the ordinance is considered. It was manifestly intended to protect persons against danger from discharges of powder or other explosives within the city limits when applied to the commonly understood purpose of blasting; that is to say, to the tearing or jarring loose of rock, earth, or other material. There was testimony that this shot burst forth from the hole, and that pieces of rock were hurled a great distance. It would therefore seem to be immaterial by what name it was called, since it was so adjusted that the effect produced was that which comes from blasting. The court did not err in this particular.

Several assignments of error are comprehended by the objection to the following instruction, which was given to the jury: "If you believe from the evidence beyond a reasonable doubt that at the time the blast was discharged, the man Miller actually discharged the same, was in the employ of the defendant, and was engaged by the defendant for the purpose of doing blasting, and was acting with the scope, within the course of his employment, even though the defendant did not authorize Miller to discharge said blast without having the same properly covered so as to render the same harmless to the public, and even though Miller disobeyed the defendant ~~in~~ in discharging the blast, you must find the defendant guilty as charged in the complaint."

The above presents the principal point in the case, viz., can an employer in any case be made criminally liable on account of the neglect of his employé, when he has not consented thereto and when he may even have instructed a different course? The evidence in the case shows that appellant was engaged in work about the place and in connection with loading and hauling the blasted and quarried rock, although he was at some distance from the blast itself. He was a principal, and the work was being done as a part of the business he was there conducting. Although he was not immediately present, yet the general work of blasting at that place was

being done under his general supervision, by his agents and by his authority. Is it material, therefore, that he may have instructed that the blast be covered? In volume 1 of American and English Encyclopedia of Law, second edition, page 1161, appears the following statement of the general principle: "The principal is in general not liable criminaliter for the act of his agent unless it is committed by his command or with his assent."

In the notes, however, the exceptions to the rule as stated in the above text are specifically mentioned, and cases are cited in support thereof. The exceptions involve cases arising under police regulations. The ordinance in question is purely a police regulation. It has been often held that where a saloon is open or liquors are sold in violation of a statute or ordinance, the owner is guilty of the offense, although he is not present, has no knowledge of it, and has given instructions to the contrary. This court approved that rule in *State v. Constantine*, 43 Wash. 102, 117 Am. St. Rep. 1043, 86 Pac. 384. In that case we quoted from the opinion in *People v. Roby*, 52 Mich. 577, 50 Am. Rep. 270, 18 N. W. 365, where Chief Justice Cooley made the statement, in effect, that many statutes are in the nature of police regulations and impose penalties without regard to any intention to violate them, in order to insure a degree of diligence for the protection of the public that will render violation practically impossible. In the case of *State v. Kittelle*, 110 N. C. 560, 28 Am. St. Rep. 698, 15 S. E. 103, 15 L. R. A. 694, there is a general discussion of this question, and it is there shown by the authorities that the intention is immaterial in this class of cases; that it is the duty of a principal to trust no one to do his work but such as he can safely trust to discharge his whole duty when such police regulations are involved by his work, and that if he does not do so, the law holds him answerable for the penalty. It is shown that one cannot, by setting another to do his work and by being himself elsewhere, reap the benefit of his agent's work and escape the consequences of the latter's conduct; that it would be impossible to effectually enforce a statute or ordinance of this kind if that were permitted, and that it would become a dead letter.

Appellant argues that the rule of the liquor cases should not be applied here, and that a distinction should be made. We believe no distinction in principle exists. A police regu-

lation has been provided in each instance, and a penalty has been provided for the violation thereof. The penalty has been provided for the actual violation of the regulation, and not necessarily because of an intent to do so. The violation in each instance was by an agent who was prosecuting the work of the accused. In the case at bar, the accused principal was near the work, and if not actually present to see what was done, it was nevertheless his legal duty to see that the ordinance was not violated. Failing in this, he must suffer the penalty for the violation, since if it were not so, then within the reasoning of the authorities, the public would not be adequately assured of protection from violation of the ordinary police regulations. The court did not err in giving the quoted instruction.

Appellant assigns as error the refusal to give an instruction which seems to proceed upon the theory that, if the jury ⁹⁸ found that appellant was a member of a copartnership which was conducting the quarrying business at the place of the blasting, then unless they should find that as such partner he participated in the act or assented thereto, they should find him not guilty. We see no force in this contention. There can be no distinction in such a case between his assent as a partner and his assent in his individual capacity. It is also immaterial that he may have had a partner or partners. That others may be also guilty, does not relieve him of liability for an offense jointly committed.

The judgment is affirmed.

Fullerton, Mount, Root, and Crow, JJ., concur.

The Liability of an Employer for the acts of his employes is the subject of a note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 71.

PHILBY v. NORTHERN PACIFIC RAILWAY COMPANY.

[46 Wash. 173, 89 Pac. 468.]

DEATH.—A Husband may Recover for Loss of Time and for Funeral Expenses directly resulting from negligent acts causing the death of his wife, notwithstanding there is no statute purporting to give him that right. (pp. 930, 931.)

B. C. Grosscup, A. G. Avery and G. C. Israel, for the appellants.

Troy & Falknor, for the respondent.

¹⁷³ CROW, J. Action by C. W. Philby against the Northern Pacific Railway Company and the Black Hills and Northwestern Railway Company, corporations, to recover damages ¹⁷⁴ for loss of time and funeral expenses, rendered necessary by the negligent and wrongful acts of the defendants in causing the death of Lula Bland Philby, the plaintiff's wife. From a judgment in favor of the plaintiff, the defendants have appealed.

The sole question on this appeal is whether the respondent, a husband, can recover for loss of time and funeral expenses directly resulting from negligent acts of the appellants, which caused the death of his wife. The trial court, following *Johnson v. Seattle Electric Co.*, 39 Wash. 211, 81 Pac. 705, held that the respondent was entitled to recover. The appellants contend that such holding was erroneous. They insist that in the *Johnson* case this court followed *Noble v. Seattle*, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822, by definitely holding that, under *Ballinger's Code*, section 4828 (P. C., sec. 256), a husband cannot maintain an action for damages resulting from the wrongful death of his wife; that the language in the *Johnson* case upon which the trial court based its decision was undoubtedly used by this court without consideration, and can be attributed to the fact that liability for funeral expenses was conceded by the respondent in its brief; that it would be an anomaly for us to hold a husband has no cause of action for the death of his wife, and at the same time permit him to recover damages growing out of her death; that the statute gives him no such right of action; that he could not sue at common law—citing *Baker v. Bolton*, 1 Camp. 493; that the only departure from the common-

law rule has been made by Lord Campbell's act, and similar statutes in this country; that such acts have only extended a right of action to certain specified beneficiaries; and that under section 4828, supra, the statute of this state, as repeatedly construed by this court, the husband of a deceased wife is not such a beneficiary. In brief, the appellants contend (1) that the respondent has no right of action at common law; (2) that no right of action has been conferred upon him by any statute, naming him as a beneficiary; and (3) that having ¹⁷⁵ neither a common law nor a statutory right of action he cannot recover.

Statutes permitting a husband or any other beneficiary to recover damages for the wrongful death of a wife or relative are based upon the idea of giving compensation for loss of services, companionship, etc. In other words, they were intended to award compensation for a human life, giving damages of a character which, although real, were theretofore not the subject of judicial computation, and could not be allowed or estimated by any exact rule of mathematical calculation. In such statutory actions the exact damages to beneficiaries cannot be accurately proven, but juries, after being advised of all the material facts and circumstances, such as the health, habits, age, expectancy of life, capacity to earn money, habits of economy, etc., of the decedent, are called upon to award such damages as in the exercise of their judgment they conclude will be a just compensation. Such damages in their very nature differ materially from the pecuniary loss for funeral expenses and loss of time sustained by a husband, whose wife is killed by the wrongful or negligent act of another. The wife's death imposes upon the husband the financial burden of funeral expenses which he must pay. At common law he was bound to bury his deceased wife in a suitable manner, and defray the necessary expenses thereof if he possessed the means: 13 Cyc. 273. Such expenses can be exactly estimated, and while in one sense they may have ensued from the death of the wife, they are more strictly speaking a financial loss resulting directly from the negligent acts of another.

Although the appellants have cited an English case, *Baker v. Bolton*, 1 Camp. 493, to show that, "In a civil court the death of a human being could not be complained of as an injury," they have failed to cite, and we are unable to find, any authorities going so far as to hold that, in the absence of ex-

press statutory provision therefor, a claim for funeral expenses such as the one presented in this action cannot be ¹⁷⁶ recovered. In *Dalton v. Southeastern R. Co.*, 4 Com. B., N. S., 296, the plaintiffs, husband and wife, were permitted to recover for the wrongful death of their son, who, although above the age of majority, had contributed to their support, the action being founded on Lord Campbell's act. The jury, with other items of damages, allowed ten pounds for funeral expenses and fifteen pounds for mourning. These and other items were resisted by the defendant, and the court in rendering judgment said: "As to the expenses of the funeral and mourning, however, we think they ought not to be allowed. The subject matter of the statute, is, compensation for injury by reason of the relative not being alive; and there is no language in the statute referring to the cost of the ceremonial of respect paid to the memory of the deceased in his funeral, or in putting on mourning for his loss."

According to this theory Lord Campbell's act would not permit any recovery for funeral expenses. Some of the American courts, however, have permitted such a recovery: See 13 Cyc. 374, and cases cited in note 29. In *Murphy v. New York Cent. etc. R. Co.*, 88 N. Y. 445, such an act was construed, and the court not only held that funeral expenses could be recovered, but also recognized them to be an item of pecuniary damages which only one of the plaintiffs was obliged to pay, and which were different from the ordinary damages allowed by reason of the statute: See, also, *Houghkirk v. President etc.*, 92 N. Y. 219, 44 Am. Rep. 370; *Roeder v. Ormsby*, 22 How. Pr. 270.

The appellants, in support of their contention that the respondent cannot recover, vigorously urge the construction placed upon the word "heirs" in section 4828, *supra*, in the following cases: *Noble v. Seattle*, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822; *Nesbitt v. Northern Pac. R. Co.*, 22 Wash. 698, 61 Pac. 141; *Robinson v. Baltimore etc. R. Co.*, 26 Wash. 484, 67 Pac. 274; *Copeland v. Seattle*, 33 Wash. 415, 74 Pac. 582, 65 L. R. A. 333; *Manning v. Tacoma etc. Power Co.*, 34 Wash. 406, 75 Pac. 994; *Johnson v. Seattle Electric Co.*, 39 Wash. 211, 81 Pac. 705.

¹⁷⁷ In *Manning v. Tacoma etc. Power Co.*, 34 Wash. 406, 75 Pac. 994, although adhering to the rule previously announced in *Noble v. Seattle*, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822, we said: "We think it proper to say that, as

this court is now constituted, if the question were now here as one of original statutory construction, it is not improbable that a different construction would be adopted."

While still adhering to the construction heretofore placed on this statute, we do not feel inclined to extend the same, and therefore decline at this time to announce the rule that the respondent cannot recover in this action for his loss of time and his disbursement for funeral expenses, which as damages resulted directly from the wrongful acts of the appellants.

In the early English case of *Higgins v. Butcher*, Yelv. 89, the plaintiff declared that "the defendant assaulted and beat, etc., A, his wife such a day, from which she died such a day following; to his damage," etc. Tanfield, Justice, speaking for the court, said: "If a man beats the servant of F. S. so that he dies of that battery, the master shall not have an action against the other for the battery and loss of the service, because the servant dying of the extremity of the battery, it is now become an offense to the crown, being converted into felony, and that drowns the particular offense, and private wrong offered to the master before, and his action is thereby lost."

This opinion was rendered in 1607, and no kindred English case seems to have been reported until 1806, when Lord Ellenborough held, in *Baker v. Bolton*, 1 Camp. 493, cited by appellants, that in a civil court the death of a human being could not be complained of as an injury. In *Worley v. Cincinnati etc. R. Co.*, 1 Handy (Ohio), 481, a husband sued to recover damages resulting from the wrongful death of his wife, asking five thousand dollars for the loss of her services, and also stating that he had expended a considerable sum for funeral charges. The ¹⁷⁸ question involved was his right to recover these damages independent of statute. Mr. Justice Storer, in a very able opinion, reviews the authorities, and, discussing *Higgins v. Butcher*, Yelv. 89, said: "The reasoning in *Yelverton* we could not adopt, as it is inapplicable to our judicial proceedings. We have no felonies as at common law or by the British statutes; the commission of crime here works no corruption of blood, or attainder of estate; the individual doing the wrong, though punishable to the extremity of the law, is still liable for the personal injury he inflicts, and his

estate may be legally subjected, by way of indemnity, to the injured party."

Referring to the later case of *Baker v. Bolton*, 1 Camp. 493, the learned justice further said: "The ground of Lord Ellenborough's opinion is more in consonance with our jurisprudence, and gives a broader rule for the decision of the question. It was confined, however, to a single point, and did not present, so fully as might have been expected from so profound a jurist, the whole argument; but we may well suppose that where no precedent could be found for the action, a simple negation of the right to recover was all that he deemed it necessary judicially to affirm. When it is said that the death of a human being cannot be made the subject of damages in a civil action, we must infer that to allow the remedy in such a case would be inconsistent with the policy of the law that will not permit the value of human life to become the subject of judicial computation."

The value of Mrs. Philby's life has not become the subject of judicial computation in this action. The respondent only seeks to recover money actually disbursed by him for funeral expenses, and the value of his own lost time. In the *Worley* case two items of damages were pleaded—(1) the husband's loss of the services of his wife in the care of his children and the management of his household affairs, and (2) the sum expended for funeral charges. Mr. Justice Storer, after discussing the English cases above mentioned, and also several early American cases, calls attention to the fact that the ¹⁷⁹ action was not brought under the Ohio statute, and, speaking of that statute, said: "The second section distributes the damages recovered between the widows and the next of kin, which presupposes that the wife is deprived of her husband, and very strongly indicates that it was not the intention of the legislature to extend the remedy to him should he survive the wife, and such is the construction, we believe, that is given to the statute of New York on the same subject."

The learned jurist closes his opinion by saying: "We can find no authority, and we are satisfied there is no sound reason, on general principles, to authorize a recovery by the plaintiff. On the whole case, we hold, there is no claim in the petition that can be legally supported, except for the expenditures actually made in consequence of the wife's death; and for these, as the husband would have been liable, he has the

right to recover; as to all the remaining claim for damages, the demurrer must be sustained.”

We adopt the conclusion reached in this exhaustive opinion, based upon the theory that a clear distinction exists between damages resulting to a husband from the death of his wife in the loss of her services and companionship, and pecuniary damages resulting to him, such as funeral expenses and loss of time. We hold that, while under our statutes and the previous decisions of this court, he cannot recover the former, he is nevertheless entitled to recover the latter, regardless of any statute. This doctrine is in harmony with the rule announced in *Johnson v. Seattle Electric Co.*, 39 Wash. 211, 81 Pac. 705, upon which the respondent relies, and which the appellants have sought to distinguish. It also harmonizes with *Dean v. Oregon etc. Nav. Co.*, 44 Wash. 564, 87 Pac. 824, where we said: “It is urged that respondent was not entitled to recover expenses for transporting the body of decedent to respondent’s home in Arkansas. The total amount for this and burial expenses was one hundred and seventy-eight dollars. We think this a moderate sum to ask. It was the duty of respondent to bury the body of his minor son, and it was but natural and fitting that the remains should ¹⁸⁰ be taken back to the old home. Appellant being responsible for decedent’s death, it is holden to pay the reasonable cost of burial and the expenses appropriately incidental thereto. In view of these considerations and the small sum expended and sought to be recovered, we think the allowance justifiable.”

The learned trial judge committed no error in permitting the jury to award the damages in question. The judgment is affirmed.

Hadley, C. J., Fullerton, Mount, and Root, JJ., concur.

For Authorities upon the decision in the principal case, see Southern Ry. Co. v. Coven, 100 Ga. 46, 62 Am. St. Rep. 312; Jackson v. Pittsburgh etc. Ry. Co., 140 Ind. 241, 49 Am. St. Rep. 192.

VOGLER v. ANDERSON.

[46 Wash. 202, 89 Pac. 551.]

APPEAL AND ERROR—Defects and Errors, When may be Disregarded.—Under the statutes of Washington, if a cause is tried on the merits as if upon a sufficient pleading, the appellate court will treat the pleading as having been amended, and try the cause de novo on the record. (p. 932.)

HIGHWAYS Over Public Lands, When Established by Adverse User.—Under the act of Congress granting a right of way for the construction of highways over public lands, no right to the use of lands as a public highway is created until there has been an adverse use of such land as such highway for at least seven years, that being the shortest period within which a highway can be established by prescription in that state. (p. 933.)

Zent & Lovell, for the appellants..

W. D. Schutt and A. C. Routhe, for the respondents.

202 FULLERTON, J. This action was brought by the appellants to restrain the respondents from trespassing on certain farm lands situated in Franklin county, it being alleged in the complaint that the respondents had, without color of authority, entered upon the appellants' premises, tore down the fences, drove with teams and wagons over their garden and fruit trees, and committed other injuries thereto, to the damage of the appellants in the sum of two thousand dollars. The respondents admitted entering upon the premises described and tearing down the fences, but justified their acts by pleading that they entered as county officers upon a county road, across which the appellants had wrongfully constructed **203** the fence which they removed, pleading further that a road had been established across the appellants' land by adverse user. The cause was tried by the court without a jury, and resulted in a judgment for costs in favor of the respondents.

In this court each party insists that the pleading of the other is insufficient, but as the errors pointed out consist of defects capable of being cured by amendment, and the case was tried in the court below on the merits as if upon sufficient pleadings, this court will treat the pleadings as amended, and try the case de novo upon the record.

The evidence tended to show that, prior to March, 1903, the land of the appellants was unoccupied government land, subject to entry under the land laws of the United States; that

some two years prior to that time certain settlers living in the vicinity began to drive over it on their way from their homes to a place where they obtained water, and that between that time and March, 1903, it was used as a highway by them for that purpose, and by other persons who had occasion to pass through that part of the country. At the date mentioned, the appellants settled on the land. They changed the travel somewhat, shortly after their entry, in order to accommodate their fences, but suffered it to continue over the route as changed for about one year thereafter, when they fenced up the entire tract, closing the road at the places where it entered and left the land. The respondents, as county commissioners of Franklin county, conceiving the road to be a public highway, ordered it opened, and the tearing down of the fences by the road supervisor constituted the trespass complained of in the appellants' complaint.

The trial court based its judgment on the theory that the act of Congress granting a right of way for the construction of public highways over public lands not reserved for public use was a grant in praesenti, and became effective the moment the public began using the way as a public highway, and that it is not necessary that a way should be used for any specific ²⁰⁴ time in order to constitute an acceptance of it as a grant under this statute. The case of *Okanogan County v. Cheet-ham*, 37 Wash. 682, 80 Pac. 262, 70 L. R. A. 1027, is cited as establishing this doctrine. In that case the trial court decided, by analogy to the statute of limitations for the recovery of real property, that, in order to constitute a way across public land, the user must have continued for a period of ten years or more. This court reversed that decision, holding that continuous user for a period of seven years was sufficient to establish the way as a public highway. But it was not said, or intended to be said, that a user for any lesser period than seven years would be sufficient for that purpose. On the contrary, to hold that a lesser period would suffice in this state would violate the terms of the grant made by Congress. The grant is for a right of way to establish a public highway, and a public highway must be established in some of the ways provided by statute before the grant takes effect. If the road is established under the statute providing for their establishment by the board of county commissioners, it takes effect when the commissioners lawfully establish the road; but if the road is established by adverse user, it takes effect

when the adverse user ripens into a right by prescription. The shortest period allowed by statute to establish a highway by user in this state is seven years (Bal. Code, sec. 3846; P. C. sec. 7860), and no user short of this period can therefore be held to be an acceptance of the grant contained in the act of Congress cited. As the use in the case at bar had continued for at most but two years before the appellants entered upon the land, no right by prescription had been acquired, and the court erred in holding the way in dispute to be a public highway.

The judgment appealed from is reversed and the cause remanded, with instructions to enter a judgment perpetually enjoining the respondents, and each of them, from interfering with the appellants' fences, or attempting to open or maintain the way in question across their premises as a public ²⁰⁵ highway. No judgment for damages will be allowed, but appellants will recover costs in both courts.

Hadley, C. J., Crow, Dunbar, and Mount, JJ., concur.

Highways by User are discussed in the note to *Whiteside v. Green*, 57 Am. St. Rep. 744. A public highway may be established by prescription (*Arndt v. Thomas*, 93 Minn. 1, 106 Am. St. Rep. 418), but not over public lands: See notes to *Schneider v. Hutchinson*, 76 Am. St. Rep. 479; *Northern Pacific Ry. Co. v. Ely*, 87 Am. St. Rep. 775.

DENNEY v. CITY OF EVERETT.

[46 Wash. 342, 89 Pac. 934.]

LIMITATION OF ACTIONS for Changing the Grade of a Street.—An action brought by an abutting property owner to recover damages resulting from changing the grade of a street is not an action for trespass, and falls within, and is barred by, a statute providing that "an action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued." (p. 936.)

Action to recover damages for changing the grade of a street. The question presented for decision was whether the action should be controlled by section 285 or section 289a of the Code of Civil Procedure of the state. The former section provides that there must be commenced within three years "(1) An action for waste or trespass upon real property; (2) An action for taking, retaining, or injuring personal

property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated"; and the latter section, that "an action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

W. G. McLaren, L. C. Gilman and B. O. Graham, for the appellant.

Padgett & Bell and Emory, Rourke & Denny, for the respondents.

243 CROW, J. Plaintiffs, Harriet M. Denney and John C. Denney, her husband, are the owners of an improved lot located at the corner of Hewitt and Lombard avenues in the city of Everett. In the year 1901 the defendant, the city of Everett, established and raised the grade of Lombard avenue along the west side of plaintiff's lot, for the purpose of constructing an approach to a bridge on Lombard avenue over a railroad track which was located some distance to the rear of plaintiffs' lot and extended east and west substantially parallel to Hewitt avenue. On December 24, 1904, the plaintiffs commenced this action to recover damages alleged to have resulted to their lot by such change of grade. The amended complaint alleged that the change of grade was made between May 13, 1901, and January 20, 1902. The defendant demurred to the amended complaint, for the reasons (1) that it did not state facts sufficient to constitute a cause of action; and (2) that the action had not been commenced within the time required by law. This demurrer was overruled, and the defendant answering denied that the grading had been done between May 13, 1901, and January 20, 1902, or that it had been done at any other time than between May 1, 1901, and November 30, 1901. The defendants also affirmatively and separately pleaded the two year and three year statutes of limitations. Upon a trial, the jury returned a verdict in favor of the defendant. The plaintiffs moved for a new trial upon the following grounds: 1. Insufficiency of the evidence to justify the verdict, and that the same was against the law; 2. Error in law occurring at the trial and excepted to at the time by the plaintiffs; 3. Newly discovered evidence material for the plaintiffs, which they could not with reasonable diligence have discovered and produced at the trial. In

support of the third ground of their motion the plaintiffs filed affidavits. Answering affidavits were also filed by the defendant. The motion was denied as to the first ground, but was granted on the second and third grounds therein mentioned. ³⁴⁴ From the order setting aside the verdict and granting a new trial this appeal has been taken.

The record shows, and the parties concede, that the jury reached its verdict because it concluded that, under the facts proven, the action was barred by the three year statute of limitations. The respondents, by their pleadings and evidence, contended that the improvement and grading was not completed prior to January 20, 1902, while the appellant contended that it was completed on or before November 30, 1901, more than three years prior to December 24, 1904, the date of the commencement of this action. The evidence on this issue was in sharp conflict, and the jury evidently determined the same in favor of the appellant. The appellant, by its motions, demurrers and answers, has at all times contended, and now contends, that the action was barred under the two year statute, Ballinger's Code, section 4805 (P. C., sec. 289a). The respondent concedes that the three year statute, Ballinger's Code, section 4800, subdivision 1 (P. C., sec. 285), if justified by the facts, would apply, but strenuously insists that section 4805 has no application whatever. On this question the trial court held with the respondents, and instructed the jury that, if they found the work of regrading had been completed more than three years prior to the commencement of the action, the plaintiffs' right of action would be barred. It being conceded that the work had been completed for two years, and there being a conflict of evidence as to the three year period, the appellant, by its assignments of error, now contends, (1) that the two year statute of limitations applies, and (2) that the court erred in setting aside the verdict and granting a new trial.

It being undisputed that the work of regrading had been fully completed more than two years prior to the commencement of this action, the respondents in their brief concede that the action is barred if the two year statute of limitations, section 4805, *supra*, applies, and that they cannot recover. We think it does apply, and that the act complained of does not ³⁴⁵ constitute a trespass within the meaning of subdivision 1 of section 4800, *supra*. Trespass upon real property, as used in said section, only contemplates and comprehends a

direct physical invasion of the real estate itself. It has no reference to consequential injuries resulting from any act which does not amount to a physical invasion of the property itself: *Suter v. Wenatchee Water Power Co.*, 35 Wash. 1, 102 Am. St. Rep. 881, 76 Pac. 298.

As we hold the action was barred under the two year statute, it will be impossible for the respondents to recover upon a new trial, which should not have been granted, the verdict of the jury being right under the law and the evidence. It is apparent that no error was committed by the court during the trial, prejudicial to the respondents. It therefore erred in granting the motion for a new trial. The judgment is reversed and the cause remanded, with instructions to deny the motion for a new trial.

Hadley, C. J., Rudkin, Mount, and Fullerton, JJ., concur.

An Injury is Immediate and Therefore a Trespass only when it is directly occasioned by, and is not merely consequence resulting from, the act complained of: *Holly v. Boston Gaslight Co.*, 8 Gray, 123, 69 Am. Dec. 233.

HEINTZ v. BROWN.

[46 Wash. 387, '90 Pac. 211.]

APPEAL AND ERROR—Interest Sufficient to Entitle a Party to Appeal—A sheriff who is restrained from selling property under execution has such an interest adverse to the judgment as entitles him to prosecute an appeal therefrom. (p. 939.)

HUSBAND AND WIFE—Community Property.—Moneys Borrowed by a Wife, though their payment is secured by a mortgage on her separate estate, are community property. (p. 939.)

HUSBAND AND WIFE—Property Partly Community and Partly Separate Estate.—Where property is purchased partly with the separate funds of a wife and partly with community funds, it belongs to the separate and community property in the proportion in which the moneys came from each. (pp. 939, 940.)

Tolman & Kimball, for the appellants.

Zent & Lovell, for the respondent.

387 RUDKIN, J. In the month of December, 1900, the plaintiff, Alice Heintz, entered into a contract with the Northern Pacific Railway Company for the purchase of fractional section 5, township 20 north, range 38 east, Willamette meridian, containing two hundred and eight and a fraction acres.

Under the terms of this contract, the purchase price was to be paid in five annual installments of about sixty-two dollars each. Three of these installments were paid by the plaintiff out of her separate funds, acquired by bequest from her deceased father. On the twenty-fifth day of January, 1904, she borrowed money on this land from the Holland Bank to pay the deferred payments, or balance due, and on that date ³⁸⁸ received from the railway company a warranty deed reciting a consideration of three hundred and sixty-one dollars. In the year 1901 the plaintiff entered into a further contract with the Oregon Mortgage Company for the purchase of the southwest quarter of northwest quarter, the northeast quarter of the northwest quarter, the northwest quarter of the northeast quarter, and lot 1 of section 8, in the same township and range. At the time of the execution of this contract she paid three hundred dollars on the purchase price from her separate funds, acquired as above stated. On the twenty-fifth day of January, 1904, she borrowed money from the Holland Bank on this land to make the deferred payments, and received a warranty deed from the mortgage company of that date, reciting a consideration of six hundred and fifty dollars.

In the year 1902 the plaintiff entered into a further contract with one Kohl for the purchase of fractional section 7 in the same township and range. No payments have been made on the last-mentioned contract, except interest paid out of separate funds. On the twenty-fourth day of July, 1905, the defendant Gilson, as sheriff of Adams county, levied on all the above-described lands under and by virtue of an execution issued out of the superior court of Lincoln county on a certain judgment therein entered in an action wherein Charles R. Brown was plaintiff, and the plaintiff herein and John T. Heintz, her husband, were defendants, and gave notice that he would sell the same at public auction to satisfy the above-mentioned judgment and execution. John T. Heintz and the plaintiff, Alice Heintz, were husband and wife during all the times herein mentioned. The judgment sought to be enforced against the plaintiff was for a community debt, and the character of the land in controversy, whether community property or the separate property of the wife, is the only question presented on this appeal. The plaintiff had judgment below enjoining the execution sale, and from that judgment the defendants appeal.

The respondent has moved to dismiss the appeal for the reason that the appellant sheriff has no interest in the controversy, ³⁸⁹ and cannot appeal from the judgment against him. Counsel has suggested no reason why an officer, who has been restrained from the performance of a duty enjoined upon him by law, cannot appeal from the adverse judgment, and we perceive none. The motion to dismiss is therefore denied.

From the foregoing statement it will be seen that the property acquired from the railway company and the mortgage company was paid for in part by the separate funds of the wife, and in part by money borrowed on the property in which she had invested her separate funds. Under the rule announced by this court in *Yesler v. Hochstettler*, 4 Wash. 349, 30 Pac. 398, and reaffirmed on rehearing in *Main v. Scholl*, 20 Wash. 201, 54 Pac. 1125, the funds borrowed by the wife, even though borrowed on her separate property, or on property in which she had invested her separate funds, was community property, and to that extent at least the property in controversy was paid for with community funds and became community property: See, also, *Schuyler v. Broughton*, 70 Cal. 282, 11 Pac. 719; *Heidenheimer Bros. v. McKeen*, 63 Tex. 229.

In the states where community property laws prevail, the rule seems to be established that property purchased in part with community funds and in part with separate funds is community property to the extent and in the proportion that the consideration is furnished by the community, the spouse supplying the separate funds having a separate interest in the property in proportion to the amount of his or her investment: 21 Cyc. 1644; *Schuyler v. Broughton*, 70 Cal. 282, 11 Pac. 719; *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695; *Northwestern etc. Bank v. Rauch*, 7 Idaho, 152, 61 Pac. 516; *Love v. Robertson*, 7 Tex. 6, 56 Am. Dec. 41; *Braden v. Gose*, 57 Tex. 37; *Parker v. Coop*, 60 Tex. 111; *Goddard v. Reagan*, 8 Tex. Civ. App. 272, 28 S. W. 352; *Clardy v. Wilson*, 24 Tex. Civ. App. 196, 58 S. W. 52.

A rule which permits married persons to commingle separate and community funds in the acquisition of property ³⁹⁰ after marriage, and to assert their separate property rights as against creditors of the community, is by no means free from objection, but such a rule is established by the authorities, and we feel constrained to adopt it. It follows that

the judgment must be reversed, with directions to ascertain the proportion that the separate funds of the respondent, entering into the purchase price of the property bore to the entire consideration paid, and to enjoin the execution sale to that extent. It is so ordered.

Hadley, C. J., Mount, Dunbar, Crow, and Root, JJ., concur.

The Question of Who is Entitled to Appeal is discussed in the note to *In re Switzer*, 119 Am. St. Rep. 740.

The Presumption that Property Purchased During Marriage is Community Property is very cogent, and can be repelled only by clear and conclusive proof; but where it is established clearly and conclusively that the property was purchased with the separate money of one of the parties, it remains the separate property of the party with whose money it was purchased: *Love v. Robertson*, 7 Tex. 6, 56 Am. Dec. 41. See, also, *People v. Swalm*, 80 Cal. 46, 13 Am. St. Rep. 96; *Svetinich v. Sheean*, 124 Cal. 216, 71 Am. St. Rep. 50; *Crochet v. McCamant*, 116 La. 1, 114 Am. St. Rep. 538.

KLINE v. STEIN.

[46 Wash. 546, 90 Pac. 1041.]

EJECTMENT, Splitting Causes of Action in.—If by the same act of trespass adverse possession is taken of land, but one action can be maintained to recover such possession, and if an action is brought and judgment rendered for part only of the tract, no subsequent action can be maintained for the balance, though it is claimed that the bringing of the action for a part only was due to accident and mistake. (pp. 942, 943.)

JUDGMENT FOR PART Only of a Tract, Remedy for, How Must be Sought.—If persons entitled to recover in ejectment a tract of land commence an action for a part only through accident and mistake, and recover judgment therefor, their only remedy is to seek relief in such action by opening the judgment, amending the pleadings, and trying anew the rights to the property, and not by an action to recover the part omitted from the first action. (p. 943.)

Thomas Carroll, John Arthur and C. D. Sutton, for the appellants.

Charles E. Patterson and Frank T. Reid, for the respondents.

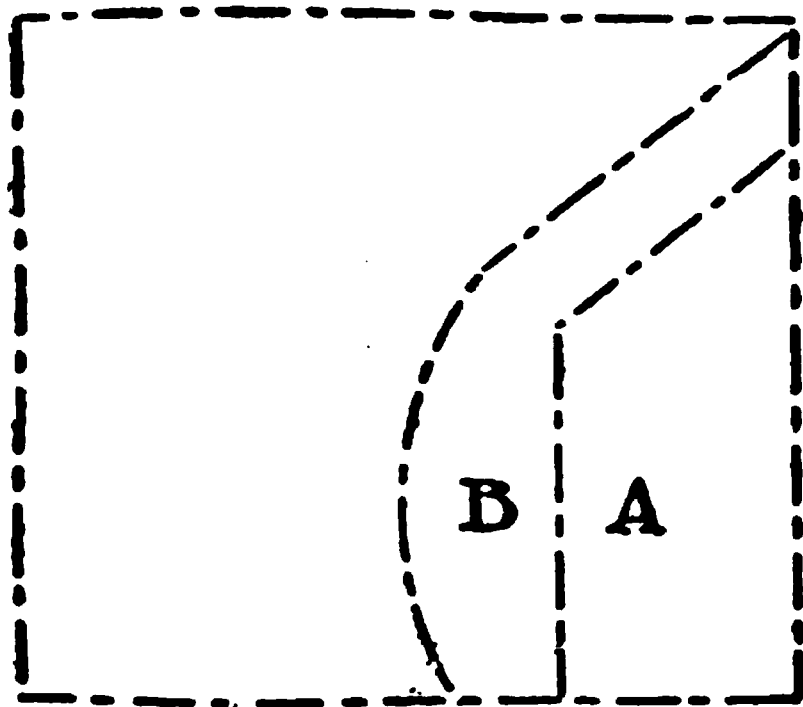
546 FULLERTON, J. This is an action of ejectment, brought by the appellants against the respondents to recover some three acres of land. To the complaint in ejectment, an answer was filed, pleading former adjudication, and to this

answer the appellants filed a reply. On the filing of the reply, the respondents moved for a judgment on the pleadings, which motion the trial court granted, entering a judgment of dismissal. This appeal is from the judgment so entered.

The facts shown by the pleadings upon which the judgment of dismissal was based are in substance these: In 1884 the appellants entered, under the homestead laws of the United States, with other lands, the east half of the northwest quarter ⁵⁴⁷ of section 12, in township 22 north, of range 1, east of the Willamette meridian, which lands were afterward conveyed to them by patent from the United States. The predecessors in interest of the respondents acquired, at about the same time, in the same manner, the west half of the quarter section described. In making their settlement upon the land entered by them, the appellants included in their improvements a part of the west half of the quarter section patented to the predecessors in interest of the respondents. After the respondents acquired their rights in the property they caused the line dividing the tracts to be surveyed, and finding that the appellants had encroached upon the lands described in their patent, entered with force and moved the fences erected by the appellants back to a place which they conceived to be the true line. The appellants thereupon began an action to recover possession of the tract from which they were thus forcibly dispossessed, claiming title thereto by virtue of the statutes relating to adverse possession. The action was prosecuted to judgment and the appellants recovered therein all of the land of which they alleged they were dispossessed by the acts of the respondents. The cause was appealed to this court, where the judgment was affirmed and remanded for execution. The respondents thereupon paid the costs and damages adjudged against them, and performed the mandatory part of the judgment by moving the fence on to the line the judgment determined marked the boundary between the two several tracts.

Thereafter the present action was instituted. In it the appellants seek to recover an irregular shaped tract bordering on the west side of the tract recovered in the first action, which they claim they were deprived of by the same acts of forcible trespass committed by the respondents that deprived them of the land recovered in the former action, and which was not recovered in that action owing to the fact that by accident and mistake on their part it was not included in the complaint

filed in that action. The tract recovered in the former action, and the tract sought to be recovered in this action, are roughly ⁵⁴⁸ shown on the following diagram, the tract recovered being the tract marked A, and the tract sought to be recovered being the tract marked B. (The square representing the southwest quarter of the northwest quarter of section 12, in township 22 north, of range 1 east of Willamette meridian.)



The trial judge sustained the motion for judgment on the principle of *res judicata*, and we are clearly of the opinion that he was right in so doing. The trespass gave rise to but one right of recovery, and since the appellants have exercised that right, they are estopped from maintaining a second recovery. The appellants, however, seek to distinguish this action from the earlier one by saying that the tract of land they are now seeking to recover is a separate and distinct tract from that first recovered. But manifestly this is a mistaken contention. If they ever were in possession of this tract at all they were deprived of such possession by the same trespass that deprived them of the tract already recovered, and they must resort to the same evidence to maintain their claim to this property that they resorted to in order to maintain their claim to the other, the only possible difference being that they must now contend that their possession covered a larger area than they contended for in the other action. But this difference does not allow the claim that the two suits represent different causes of action. On the contrary, there has ⁵⁴⁹ been a splitting of a single cause of action. If this action can be maintained, there is no end to the number of actions that may be maintained for this trespass. The appellants

can, as soon as judgment is finally entered in this action, maintain another action to recover another parcel of the same tract, and so on indefinitely. It is the policy of the law that there be an end to litigation; and as a means to this end, the law requires causes of action to be prosecuted as a whole, and forbids dividing them into parts and prosecuting each part severally.

But the appellants assert that the allegation to the effect that this tract was left out of their original complaint through accident and mistake was made advisedly, and inasmuch as the respondents' motion for judgment on the pleadings concedes it to be true, this fact alone is sufficient to show the inconclusiveness of the original judgment. This contention, also, mistakes the rule. If the appellants have, by accident or mistake on their part, failed to recover all of the land that they were entitled to recover, their remedy is not to sue for the omitted portion, but is rather to seek relief in the original action by opening up the judgment, amending their pleadings, and trying anew their rights to the property.

The judgment of the trial court is right and must be affirmed. It is so ordered.

Hadley, C. J., Mount, Root, and Crow, JJ., concur.

A Judgment on the Merits Constitutes a Bar to a subsequent action founded upon the same claim or demand, concluding the parties and their privies, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for that purpose. But where a second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those issues upon the determination of which the judgment was rendered, and does not extend to matters which might have been, but were not, litigated and determined in the former action: *Brack v. Boyd*, 211 Ill. 290, 103 Am. St. Rep. 200, and cases cited in the cross-reference thereto.

A Judgment for the Plaintiff in Ejectment is conclusive against the defendant on the question of title, from whatever source derived, and forever estops him from asserting a claim of title which existed at the time of the rendition of the judgment: *Hentig v. Redden*, 46 Kan. 231, 26 Am. St. Rep. 91; *Sanford v. Herron*, 161 Mo. 176, 84 Am. St. Rep. 703.

BROOKMAN v. DURKEE.

[46 Wash. 578, 90 Pac. 914.]

HUSBAND AND WIFE—Conflict of Laws as to Property Rights of.—Personal property acquired by either husband or wife in a foreign jurisdiction which is by the law of the place where acquired the separate property of either, continues to be such property when brought within this state, and if invested in or exchanged for real property, such property becomes separate estate also. (pp. 945, 947.)

Walker & Munn, for the appellants.

Frank Allyn, for the respondents.

⁵⁸¹ FULLERTON, J. In 1849 Eugene R. Durkee, then domiciled and having his residence in the state of New York, intermarried with one Cynthia H. Durkee, and thereafter lived with her as his wife in that state until 1889. In the year last named Mrs. Durkee died intestate, leaving as her sole heirs at law the respondents in this action. During the time the marriage existed, Eugene R. Durkee conducted a manufacturing business in the state of New York, and accumulated as the profits of such business a considerable fortune. In 1888, a year prior to the death of his wife, he used a portion of the fortune so accumulated in the purchase of certain real property situated in Pierce county in this state, and in 1902 died in the state of New York, leaving a will by which he devised the property to the appellants. Neither the husband or wife ever resided or had a domicile in this state. The respondents claim that the real property mentioned was the community property of Eugene and Cynthia Durkee, and that they have an undivided half-interest therein as heirs of their mother. The appellants claim that the property was the separate property of Eugene R. Durkee, and that they are the owners of the whole thereof by virtue of the will. At the trial it was conceded that the rules of the common law governed the ownership of personal property acquired by a husband in the course of trade or business in the state of New York, and that money and other personal property accumulated by him in that state became his sole and separate property, subject ⁵⁸² to his absolute dominion, and that the wife had no interest therein which would descend to her heirs on her death during the lifetime of her husband. The court held, nevertheless, that the real property purchased in this

state during the lifetime of the wife with the funds so accumulated became the community property of the husband and wife, and that the wife's heirs inherited an undivided one-half interest in the property on her death. The correctness of this holding presents the sole question to be determined on this appeal.

The statutes of this state defining separate and community property read as follows:

“Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterward by gift, bequest, devise or descent, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber, or devise, by will, such property without the wife joining in such management, alienation, or encumbrance, as fully and to the same effect as though he were unmarried.”

“The property and pecuniary rights of every married woman at the time of her marriage, or afterward acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him.”

“Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof”: Bal. Code, secs. 4488, 4489, 4490 (P. C., secs. 3875, 3867, 3876).

These statutes, the respondents assert, make no distinction between property acquired within this state and property acquired in another state and brought into this state; but that under these statutes all property acquired after marriage ~~583~~ by either husband or wife, not acquired by gift, devise or inheritance, or from the rents, issues or profits of property so acquired, whether the same be acquired wholly within this state or in some other state and brought into this state, is community property.

But while the statute, broadly construed, gives countenance to the contention of the respondents, we cannot think it was the intention of the legislature that no distinction should be made between property acquired wholly within this state by the joint efforts of husband and wife, and property acquired by them elsewhere and brought within this state. If it were the intent of the statute that property acquired in another jurisdiction and brought within the state should become community property, its legality might be seriously questioned. It would destroy vested rights. It would take from one of the spouses property over which he or she had sole and absolute dominion and ownership, and vest an interest therein in the other, and if the spouse should be the wife it would not only take away her absolute title, but would take away from her her right to control and manage the property, and make it subject to the separate debts of the husband whether or not she derived any benefit from their contracting, or had any legal or moral obligation to pay them. Therefore, without entering further into the reasons for the rule, we are clear that personal property acquired by either husband or wife in a foreign jurisdiction, which is by law of the place where acquired the separate property of one or the other of the spouses, continues to be the separate property of that spouse when brought within this state; and it being the separate property of that spouse owning and bringing it here, property in this state, whether real or personal, received in exchange for it, or purchased by it if it be money, is also the separate property of such spouse.

While this question has not been directly before this court, analogous cases sustaining the rule can be found. In *Freeburger v. Gazzam*, 5 Wash. 772, 32 Pac. 732, certain personal ⁵⁸⁴ property had been seized on an execution against the husband for which the community was liable. The wife sought to recover the property seized, on the ground that it was her separate property, having been acquired by her by purchase with money which she acquired in the state of Kansas and brought into this state. The court held the property to be her separate property, saying that the property was her separate property in the state of Kansas and did not change its status by being brought across our state border. In *Elliott v. Hawley*, 34 Wash. 585, 101 Am. St. Rep. 1016, 76 Pac. 93, it was held that real property purchased in this state by a married woman living with her husband, with

money earned by her in Alaska, was her separate property, since the money itself was by the laws of that territory her separate property, and its status in that respect was not changed by being brought into this state. This case is precisely in point and would be controlling were it not for the fact that the decision of the question was not necessary to a decision of the case, as the result must have been the same had the property been determined to be community property. But the case, taken with the case first cited, shows that it has been the uniform opinion of this court since its organization that property acquired in the manner the property in question here was acquired is separate property: See, also, *Dormitzer v. German Sav. etc. Soc.*, 23 Wash. 132, 62 Pac. 862.

The rule that property acquired in a foreign jurisdiction, which is there the separate property of one of the spouses, maintains its separate character when brought into a state having community property laws, prevails also in California, Texas, and Louisiana: *Kraemer v. Kraemer*, 52 Cal. 302; *In re Burrows' Estate*, 136 Cal. 113, 68 Pac. 488; *Oliver v. Robertson*, 41 Tex. 422; *Blethen v. Bonner*, 30 Tex. Civ. App. 585, 71 S. W. 290; *Thayer v. Clarke* (Tex. Civ. App.), 77 S. W. 1050; *Tanner v. Robert*, 5 Mart. (N. S.) 255; *Young v. Templeton*, 4 La. Ann. 254, 50 Am. Dec. 563.

⁵⁸⁵ We conclude, therefore, that the property in question was the separate property of Eugene R. Durkee, and passed to the appellants on his death by virtue of the terms of his will.

The judgment is reversed and the cause remanded, with instructions to enter a judgment in accordance with this conclusion.

Hadley, C. J., Mount, and Crow, JJ., concur.

If Money Acquired by a Married Woman in One State is a member of a partnership there becomes her separate property, and is brought into another state and deposited as the funds of such partnership, her share thereof remains her separate property, and real estate there purchased by her and paid for by a check of such partnership, in a sum less than her share of such deposit, is not subject to her husband's separate debt: Elliott v. Hawley, 34 Wash. 585, 101 Am. St. Rep. 1016.

STATE v. SUPERIOR COURT FOR KITSAP COUNTY.

[46 Wash. 616, 91 Pac. 4.]

CERTIORARI may be Maintained Though There is a Right of Appeal, if, before the question can be determined on appeal, the judgment must become fruitless, as where a public office being involved, the right of the relator thereto will expire before relief can be obtained by an appeal. (p. 949.)

PUBLIC OFFICER, Resignation of, Necessity for Acceptance of.—The acceptance of his resignation is necessary to relieve a public officer from responsibility and to create a vacancy in the office. This remains true notwithstanding a statute declaring that every office shall become vacant on the death of the incumbent, his resignation or removal. (p. 954.)

James W. Bryan, for the plaintiff.

Thomas Stevenson, for the respondents.

616 HADLEY, C. J. This cause is before this court on writ of review. The relator here was the plaintiff in the court below. The cause was determined by sustaining a demurrer to the complaint and by the dismissal of the action, the plaintiff declining to plead further. The complaint in effect alleges that the city of Bremerton is a city of the third class, and that on December 5, 1905, one Gruwell was elected as councilman for the third ward of said city, to serve a term of two years from and after the first Monday in January, 1906; that thereafter, **617** on November 2, 1906, said Gruwell resigned as councilman, the resignation being in writing; that the resignation was read in open council on November 5, 1906, at the first regular meeting after the date of the resignation, and that said Gruwell has never since said November 2, 1906, exercised or attempted to exercise any of the duties of said office; that at a regular annual election held in said city on December 4, 1906, the plaintiff was elected as councilman to fill the unexpired term of said Gruwell, resigned; that thereafter, on March 22, 1907, the said city council, acting as a board of canvassers, under and in obedience to a writ of mandate issued out of the superior court, canvassed the returns of said election, and issued to the plaintiff a certificate of election; that thereafter, on March 25, 1907, the plaintiff filed his oath of office with the city council and demanded recognition in his said official capacity; whereupon he found his seat occupied by Robert Stewart, the defendant,

said Stewart claiming to hold by virtue of his appointment by said city council to said office on December 10, 1906, six days after the election of the plaintiff to the office; that said Stewart is a usurper of the office, and that he wrongfully withholds the same from the plaintiff. Judgment is prayed that the defendant Stewart be ousted from the office, and that the plaintiff be put in possession of the same. The defendant's demurrer to the foregoing allegations having been sustained and judgment of dismissal entered, the plaintiff applied to this court for a writ of review, which was granted.

The relator had the right of appeal from the judgment, but it was believed that such remedy would be inadequate, as the appeal could probably not have been determined before the time for which the relator claims the office in question expires, thus rendering the appeal fruitless. For said reason the writ of review was granted in pursuance of the rule heretofore followed in similar cases: *State v. Tallman*, 24 Wash. 426, 64 Pac. 759; *State v. Superior Court*, 26 Wash. 278, 66 Pac. 385.

⁶¹⁸ The question involved in the ruling upon the demurrer to the complaint is, Was there a vacancy in the office of councilman of the third ward of Bremerton at the time the relator claims to have been elected thereto? If Gruwell's resignation was not complete at the time of the election, there was no vacancy, and the effort to elect the relator was fruitless without a vacancy to fill. It will be observed that the complaint does not allege that the resignation had been accepted by the council prior to the election, either by the appointment of a successor or by any other action taken. The complaint merely shows that the communication tendering the resignation was read before the council. It is the contention of the relator that no acceptance of the proposed resignation was necessary, and that the office became vacant upon the mere presentation of the tendered resignation to the council. Upon the other hand, the respondent contends that an acceptance was necessary, and that in its absence there was no vacancy. The authorities cited in the respective briefs are in conflict. We have also made further investigation with the same result. The relator cites *United States v. Wright*, 1 McLean (U. S.), 509, Fed. Cas. No. 16,775. In the opinion in that case the following expression is found: "There can be no doubt that a civil officer has a right to resign his office at pleasure, and it is not in the power of the executive to

compel him to remain in office. It is only necessary that the resignation should be received, to take effect, and this does not depend upon the acceptance or rejection of the resignation by the president.”

The above expression has been criticised in subsequent decisions, for the reason that it was not necessary to the decisions, inasmuch as the letter of resignation expressed a willingness to serve until a successor could be appointed, and the officer did so serve. The decision was an early one, it having been rendered by the circuit court of the United States in 1839, and by reason of the said quoted expression frequent reference has been made to it. We are directed by relator to a ⁶¹⁹ partial quotation from section 352 of McCrary on Elections, which is to the effect that, when a written resignation has been sent to the governor, it is not necessary that the governor shall signify his acceptance of the resignation to make it valid, the tenure of office not depending upon the will of the executive, but of the incumbent. In support of the text-writer's statement, *United States v. Wright*, 1 McLean, 509, Fed. Cas. No. 16,775, is cited, together with other cases to which we shall now refer. The case of *People v. Porter*, 6 Cal. 26, is quite similar to the case at bar. The written resignation of a county judge was received by the governor on the 24th of August, to take effect September 1st. No action was taken by the governor until the eighth day of September following, when he appointed a successor. Meanwhile the fact of the tendered resignation having become known through the newspapers, the board of supervisors of the county ordered an election to fill the vacancy supposed to exist. The election was held September 5th, and the elected person then sought possession of the office from the governor's appointee, who was appointed three days after the election. The appointee resisted the claim, on the ground that there was no vacancy at the time the election occurred, and that the vacancy did not occur until September 8th, when the governor accepted the resignation and appointed the successor. It was said in the opinion that the resignation became effective September 1st, without any action on the part of the governor. The statement appears to have been made upon the sole authority of what was said in *United States v. Wright*, 1 McLean, 509, Fed. Cas. No. 16,775. The case was, however, determined in favor of the appointee in possession of the office, on the ground that the election was a nullity for want

of sufficient notice. Under the theory of the decision it therefore seems to have been unnecessary to say what was said about the necessity of accepting a resignation, and under all these circumstances we are not disposed to give the opinion much weight as bearing upon the subject now before us.

⁶²⁰ The next case cited is *Gates v. Delaware County*, 12 Iowa, 405. The opinion in that case declares, without referring to any authority, that an officer has a right to lay down his office whether the officer to whom the resignation must be presented consents or not; yet in the opinion it was stated that the county judge, who was such officer in that instance, had actually accepted the resignation of the county superintendent. As a decision the opinion is therefore entitled to no weight upon the subject in hand. In *State v. Clarke*, 3 Nev. 566, it was held that one holding a civil office under the United States may resign without the consent of the appointing power, and the holding was on the authority of *United States v. Wright*, 1 McLean, 509, Fed. Cas. No. 16,775, and *People v. Porter*, 6 Cal. 26. A similar holding was made in *State v. Fitts*, 49 Ala. 402, and the decision was apparently made upon the authority of *State v. Clarke*, 3 Nev. 566, and *People v. Porter*, 6 Cal. 26. The case of *Bunting v. Willis*, 27 Gratt. 144, 21 Am. Rep. 338, is also cited, but in that case it was said that a prospective resignation may be withdrawn at any time before it is accepted, thus recognizing that a resignation is not complete so as to create a vacancy until it has been accepted. The several decisions above noticed are all that are cited in support of the statement in *McCrory on Elections*, to which reference was above made. Through the relator and also through our own investigation, the following further decisions have been called to our attention:

State v. Mayor, 4 Neb. 260, holds that the acceptance by the mayor of the resignation of a city engineer is not necessary to create a vacancy. The decision is on the authority of *United States v. Wright*, 1 McLean, 509, Fed. Cas. No. 16,775, and *People v. Porter*, 6 Cal. 26. In the case of *Olmsted v. Dennis*, 77 N. Y. 378, it was held that the resignation of a drainage commissioner was complete when it was received by the county judge, and that no formal acceptance was needed to give it effect. In the case of *Reiter v. State*, 51 Ohio ⁶²¹ St. 74, 36 N. E. 943, 23 L. R. A. 681, the holding was similar, chiefly on the authority of the cases above cited.

The relator began his argument on the authority of *United States v. Wright*, 1 McLean, 509, Fed Cas. No. 16,775, and we have seen that his quotation from the text of McCrary on Elections was based upon that case and others which approved what was said in that case upon a subject which was not decisive of the case. The same section 352 of McCrary on Elections, fourth edition, concludes as follows: "This, however, was not the rule at the common law, by which an office was regarded as a burden which the appointee was bound in the interest of good government to bear, and which he was not allowed to lay down without the consent of the appointing power. The supreme court of the United States has recently said that 'In this country, where offices of honor and emolument are commonly more eagerly sought after than shunned, a contrary doctrine with regard to such offices, and in some states with regard to offices in general, may have obtained; but we must assume that the common-law rule prevails unless the contrary be shown.' "

The quotation which the above text-writer makes from the supreme court of the United States was taken from the opinion in *Edwards v. United States*, 103 U. S. 471, 26 L. ed. 314. That decision was rendered in the year 1880, after most of the decisions to which reference has heretofore been made were rendered. The opinion is an able and exhaustive one upon the subject now before us, in which it was held that the common-law rule which requires the acceptance of a resignation in order to create a vacancy is in force unless the rule has been discarded by statute. The reasons for the rule, as being founded in sound public policy, are well stated. Some of the decisions we have noticed above, including what seems to have been the pioneer case of the *United States v. Wright*, are criticised in the opinion. Among other things the court said:

"As civil officers are appointed for the purpose of exercising the functions and carrying on the operations of government, and maintaining public order, a political organization ⁶²² would seem to be imperfect which should allow the depositaries of its power to throw off their responsibilities at their own pleasure. This certainly was not the doctrine of the common law. In England a person elected to a municipal office was obliged to accept it and perform its duties, and he subjected himself to a penalty by refusal. An office was regarded as a burden which the appointee was bound, in the

interest of the community and of good government, to bear. And from this it followed of course that, after an office was conferred and assumed, it could not be laid down without the consent of the appointing power. This was required in order that the public interests might suffer no inconvenience for the want of public servants to execute the laws. . . . This acceptance may be manifested either by a formal declaration, or by the appointment of a successor. 'To complete a resignation,' says Mr. Willcock, 'it is necessary that the corporation manifest their acceptance of the offer to resign, which may be done by an entry in the public books, or electing another person to fill the place, treating it as vacant.' . . . And in view of the manifest spirit and intent of the laws above cited, it seems to us apparent that the common-law requirement—namely, that a resignation must be accepted before it can be regarded as complete—was not intended to be abrogated. To hold it to be abrogated would enable every officeholder to throw off his official character at will, and leave the community unprotected. We do not think that this was the intent of the law."

The decision in the Edwards case (103 U. S. 471, 26 L. ed. 314) was cited and followed in the following cases: *People v. Williams*, 145 Ill. 573, 36 Am. St. Rep. 514, 33 N. E. 849, *State v. Clayton*, 27 Kan. 442, 41 Am. Rep. 418; *Clark v. Board of Education*, 112 Mich. 656, 71 N. W. 177; *Coleman v. Sands*, 87 Va. 689, 13 S. E. 148. The following further authorities also support the rule that a resignation must be accepted in order to complete it and effect the vacancy: *State v. Ferguson*, 31 N. J. L. 107; *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677; *Steel v. Commonwealth*, 18 Pa. 451.

We believe the decided weight of authority supports the rule that an acceptance of a resignation is necessary in order ⁶²³ to relieve an officer of responsibility and to create a vacancy. Under the decision in the Edwards case (103 U. S. 471, 26 L. ed. 314) such must be the rule where the common law in that regard has not been changed by a statute. We regard that decision as an authority we should follow, unless the common-law rule has been clearly changed by statute in this state. The relator calls our attention to Ballinger's Code, section 567 (P. C., sec. 2871), in which the following appears:

"If any justice of the peace shall die, resign, or remove out of the precinct for which he may be elected, or his term of office be in any other manner terminated, the docket, books,

records, and papers appertaining to his office, or relating to any suit, matter, or controversy committed to him in his official capacity, shall be delivered to the nearest justice in the precinct. . . ."

It is argued that the right of a justice of the peace to resign without an acceptance of his resignation is recognized by the above statute. We are not able to so read it. It simply directs what shall be done with his books and papers after the resignation of a justice has become effective. We are also referred to Ballinger's Code, section 1548 (P. C., sec. 4787), which provides, among other things, as follows:

"Every office shall become vacant on the happening of either of the following events before the expiration of the term of such officers: 1. The death of the incumbent; 2. His resignation; 3. His removal. . . ."

We see nothing in the above which changes the common-law rule. It is true, it is declared that an office shall become vacant upon the resignation of the incumbent; but nothing is said about the method of effecting a resignation. The silence of the statute in that regard should be construed to mean that the established common-law method still obtains, and that a resignation is not complete until it has been accepted by the appointing power. Our attention has not been called to any other statutes which the relator claims have effected a change in the common-law rule. In the absence of ⁶²⁴ a clear statutory declaration of a purpose to change the rule, it should not be held that it has been changed. The long-standing rule is wholesome. It insures a continuous responsible incumbent in an office. One may not lightly throw aside responsibilities which he has assumed and leave the public without an official, when some possible emergency might make the existence of a qualified officer of great importance.

We think the court did not err in sustaining the demurrer, and the judgment is affirmed.

Fullerton, Crow, Mount, and Root, JJ., concur.

The Scope of Certiorari is the subject of a note to *Wulzen v. Board of Supervisors*, 40 Am. St. Rep. 29.

Resignation.—*A Person Holding a Public Office* has no power of his own motion to resign it, and his resignation does not become effective to discharge him from the performance of the duties of such office until accepted by lawful and competent authority: *People v. Williams*, 145 Ill. 573, 36 Am. St. Rep. 514. But a resignation of a

public office need not be in any particular form. It is sufficient that the incumbent evince, by parol or in writing, a purpose to relinquish the office; that this purpose be communicated to the proper authority, and that the resignation be accepted, either in terms or by something tantamount to an acceptance, such as the appointment of a successor: *State v. Augustine*, 113 Mo. 21, 35 Am. St. Rep. 696.

NORTHERN PACIFIC RAILWAY COMPANY v. CITY OF SEATTLE.

[46 Wash. 674, 91 Pac. 244.]

ASSESSMENTS AND ASSESSMENT DISTRICTS, Conclusiveness of Determination Concerning.—A municipal ordinance creating a district and directing an assessment upon all abutting property, according to frontage, is a legislative determination by the city council that all such property will be benefited, which, in the absence of fraud or arbitrary action, is not subject to review by the courts, but is final. (pp. 956, 964.)

ASSESSMENTS, Use of Property, When cannot Affect.—Abutting property cannot be relieved from the burdens of an assessment simply because its owner has seen fit to devote it to a use which may not be benefited by the local improvement. (p. 958.)

ASSESSMENTS Against Property Used as the Right of Way for a Railroad.—Property abutting on a public street and used by a railroad company as its right of way is subject to an assessment for local improvement, and the company cannot successfully claim exemption of the property from such assessment on the ground that it cannot be benefited by the proposed improvement. (pp. 958, 961.)

ASSESSMENTS for Local Improvements Against Abutting Property in proportion to frontage are valid and constitutional. (p. 959.)

ASSESSMENT—Want of Lien.—The right and power to levy an assessment upon the right of way of a railroad is not dependent on the question whether a valid and enforceable lien can be created against the property. (p. 964.)

Carroll B. Graves, for the appellant.

Scott Calhoun and O. B. Thorgrimson, for the respondent.

675 CROW, J. The city of Seattle, by ordinance 12,185, created local district 1059 for the improvement of Wallingford avenue and other streets, by constructing sidewalks, and directed that a special assessment be levied against the property therein to pay the cost thereof. The district consisted of all real estate to the depth of one hundred and twenty feet abutting on each side of the streets improved. An assessment-roll was prepared, filed and notice given, in due form. Written objections made by the Northern Pacific Railway,

Company were overruled by the city council, and upon appeal were again overruled by the superior court of King county. ⁶⁷⁶ From the order of the superior court confirming the assessment, the Northern Pacific Railway Company has appealed.

The assessment was made upon all abutting property according to frontage. The trial court found that the appellant has an abutting right of way, varying from sixty to one hundred feet in width, which has been assessed; that it was acquired as a right of way, and is not used for any other purpose; that with the exception of a single track located thereon, it is vacant and unimproved; that the assessment levied is in proportion to the assessments on other lands in the district; that the appellant's land is within the limits of the city of Seattle, close to the north shore of Lake Union in a district now being used for the operation of mills and manufacturing plants; that said land is suitable for the purpose of building sidetracks and spurs to reach the different mills and manufacturing plants which are now, or may hereafter be, built in such locality; that only a small portion of such right of way is used and occupied by the railroad track, and that the land will be benefited and its market value increased by the improvement. These findings are sustained by the record. The ordinance creating the district and directing an assessment upon all abutting property according to frontage was a legislative determination by the city council that all abutting property within such district will be benefited. With perhaps occasional exceptions involving fraudulent or arbitrary action, such legislative determination does not become the subject of review by the courts, but is final: *Smith v. Worcester*, 182 Mass. 232, 65 N. E. 40, 59 L. R. A. 728; *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661; *Chicago etc. R. Co. v. Joliet*, 153 Ill. 649, 39 N. E. 1077; *Chicago etc. R. Co. v. Elmhurst*, 165 Ill. 148, 46 N. E. 437; *People v. Pitt*, 169 N. Y. 521, 62 N. E. 662, 58 L. R. A. 372; *Illinois Cent. R. Co. v. People*, 170 Ill. 224, 48 N. E. 215. In *Prior v. Buchler & Cooney Const. Co.*, 170 Mo. 439, 71 S. W. 205, the court said: "The question of whether the plaintiffs' lots would or would not be benefited by the construction of this sewer is ⁶⁷⁷ a legislative and not a judicial question, and the municipal legislature adjudged that they would be benefited and fixed the ratio of such benefit, when it established the joint sewer district, and as there is no question of fraud or oppression of

the municipal assembly in so passing such ordinance (even if such allegation would convert the question into a judicial one, as to which it is not necessary now to decide), such judgment of the assembly is conclusive."

In *Lightner v. Peoria*, 150 Ill. 80, 37 N. E. 69, it is said: "As already seen, the imposition of the tax is, of itself, a determination by the legislative authority of the city that the benefits to the contiguous property will be as great as the burden imposed. There is necessarily vested in the city council a large discretion in determining the extent of the improvement, what shall be included within it, and the nature and character of it. By the statute they are expressly authorized to determine that the improvement shall be made and paid for by special taxation of contiguous property, and unless there has been a clear abuse of the power and discretion conferred upon the city council, courts are powerless to interfere."

Judge Cooley, in his work on *Taxation*, third edition, volume 2, at page 1208, says: "It has been repeatedly decided that the legislative act of assigning districts for special taxation on the basis of benefits cannot be attacked on the ground of error in judgment regarding the special benefits, and defeated by satisfying a court that no special and peculiar benefits are received. If the legislation has fixed the district, and laid the tax for the reason that, in the opinion of the legislative body, such district is peculiarly benefited, its action must in general be deemed conclusive."

In his work on *Constitutional Limitations*, seventh edition, at page 729 et seq., Judge Cooley says: "On the other hand, and on the like reasoning, it has been held equally competent to make the street a taxing district, and assess the expense of the improvement upon the lots in proportion to the frontage. Here also is apportionment by ⁶⁷⁸ a rule which approximates to what is just, but which, like any other rule that can be applied, is only an approximation to absolute equality. But if, in the opinion of the legislature, it is the proper rule to apply to any particular case, the courts must enforce it."

The appellant contends that the land held and used by it as a right of way cannot be assessed for local street improvements; that a special assessment can only be levied when a special benefit produced by the improvement inures to the property assessed; that unless it can be affirmatively shown

that some special benefit does result, no assessment can be imposed; that the strip of land used solely as right of way for railway trains is not benefited by the improvement of an abutting street; that the public use to which the land is exclusively devoted is not thereby rendered more valuable; that trains can pass and repass as well without as with the improvement; that appellant only occupies its land as a right of way, not owning the fee, and that its easement is not subject to special assessment. Although the appellant may not hold the fee simple title, there is no reasonable or immediate probability that it will abandon the land. Its use will doubtless be perpetual. Appellant is, therefore, for all practical purposes, the substantial owner. The fee subject to its use and easement is of but little value, if any. Except for appellant's occupancy, no suggestion would be made that the land was not benefited by the improvement, or that it would not be subject to the assessment. The particular use of the land cannot affect its liability to assessment. Abutting property cannot be relieved from the burden of a street assessment simply because its owner has seen fit to devote it to a use which may not be specially benefited by the local improvement. The benefit is presumed to inure, not to such present use, but to the property itself, affecting its value. Appellant cites the following authorities to show that its right of way cannot be subjected to special local assessments: *River Forest v. Chicago etc. R. Co.*, 197 Ill. 344, 64 N. E. 364; *New York etc. R. Co. v. New Haven*, 42 ⁶⁷⁹ Conn. 279, 19 Am. Rep. 534; *Philadelphia v. Philadelphia etc. R. Co.*, 33 Pa. 41; *Junction R. Co. v. Philadelphia*, 88 Pa. 424; *Boston v. Boston etc. R. Co.*, 170 Mass. 95, 49 N. E. 95; *Detroit etc. R. Co. v. Grand Rapids*, 106 Mich. 13, 58 Am. St. Rep. 466, 63 N. W. 1007, 28 L. R. A. 793; *Chicago etc. R. Co. v. Milwaukee*, 89 Wis. 506, 62 N. W. 417, 28 L. R. A. 249; *Mt. Pleasant v. Baltimore etc. R. Co.*, 138 Pa. 365, 20 Atl. 1052, 11 L. R. A. 520; *Allegheny v. Western Pennsylvania R. Co.*, 138 Pa. 375, 21 Atl. 763; *Naugatuck R. Co. v. Waterbury*, 78 Conn. 193, 61 Atl. 474.

While these cases seem to be in point, there is a sharp conflict of authority on this question. We think the best considered cases and the weight of modern authority, from which citations are hereinafter made, are opposed to appellant's contention. No citation of authority is necessary in support of the fundamental principle that the weight of a municipality to

levy special assessments depends on statutory enactment, and that it has no existence unless there be a valid statute conferring it. It is also elementary that the whole theory of special assessment is based on the doctrine that the property against which it is levied derives some special benefit from the local improvement. The appellant makes no contention that the assessment was not levied by regular statutory procedure; that it was not made proportionately on all lands in the district, or that any statute expressly exempts its right of way. Its position seems to be that, having shown the exclusive use of the land for a right of way, it must be conclusively presumed that it has not been benefited by the improvement, and therefore cannot be assessed at all. In other words, it does not question the amount of the assessment levied, but the validity of any assessment. This position cannot be sustained. After the proper legislative authority (in this case the city council) has by ordinance established a local improvement district, which includes all abutting property, and has directed an assessment according to frontage, the presumption is that all abutting property within such district is benefited by the ~~ess~~ improvement without regard to the use to which it may be applied.

Subdivisions 10 and 13 of section 739, Ballinger's Code (P. C., sec. 3732), expressly grant to councils of cities of the first class legislative authority to provide for local improvements, to determine that they may be made at the expense of abutting property, and to levy assessments therefor on benefited property. The same powers are granted by subdivisions 10 and 13 of section 18 of article 4 of the charter of the city of Seattle. Subdivision 3, section 11, article 8 of the city charter authorizes the establishment by ordinance of a local improvement district which shall embrace all property benefited by the improvement, and further provides that: "Unless otherwise provided in such ordinance such district shall include all the property between the termini of said improvement abutting upon, adjacent or proximate to the street, lane, alley, place or square proposed to be improved, to a distance back from the marginal line thereof one hundred twenty (120) feet, and all property included within said limits of such local improvement district shall be considered and held to have a frontage upon such improvement, and shall be the property specially benefited by such local improvement, and shall be the property assessed to pay the cost

and expense thereof, or such proportion thereof as may be chargeable against the property specially benefited by such improvement, which cost and expense shall be assessed upon all of said property so benefited, in proportion to the frontage thereof upon such improvement."

This provision confers on the council legislative authority to determine what property will be benefited. In this case the council have by ordinance determined that all property abutting on the improvement to a distance of one hundred and twenty feet from the line thereof, which includes the appellant's right of way, has been benefited, and has directed that the assessment be made thereon in proportion to frontage. This method of making assessments according to frontage has been held valid and constitutional by the great weight of modern authority: Elliott on Roads and Streets, 2d ed., sec. 559; ⁶⁸¹ 2 Cooley on Taxation, 3d ed., pp. 1217, 1218, and cases cited; French v. Barber Asphalt Paving Co., 181 U. S. 324, 21 Sup. Ct. Rep. 625, 45 L. ed. 879; Webster v. Fargo, 181 U. S. 394, 21 Sup. Ct. Rep. 623, 645, 45 L. ed. 912; Sheley v. Detroit, 45 Mich. 431, 8 N. W. 52; Hackworth v. Ottumwa, 114 Iowa, 467, 87 N. W. 424; Harrisburg v. McPherran, 200 Pa. 343, 49 Atl. 988; Parsons v. District of Columbia, 170 U. S. 45, 18 Sup. Ct. Rep. 521, 42 L. ed. 943; King v. Portland, 38 Or. 402, 63 Pac. 2, 55 L. R. A. 812; King v. Portland, 184 U. S. 61, 22 Sup. Ct. Rep. 290, 46 L. ed. 431.

This court, in the case of *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791, where a reassessment had been made on the front-foot basis, held such a method of assessment to be proper, and having distinguished *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. Rep. 187, 43 L. ed. 443, substantially as it was afterward distinguished in *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 21 Sup. Ct. Rep. 625, 45 L. ed. 879, and later cases by the supreme court of the United States, reversed the judgment of the superior court which had held the statute allowing an assessment according to frontage to be unconstitutional.

In *Sheley v. Detroit*, 45 Mich. 431, 8 N. W. 52, Mr. Justice Cooley said: "We might fill pages with the names of cases decided in other states which have sustained assessments for improving streets, though the apportionment of the cost was made on the same basis as the one before us. If anything can be regarded as settled in municipal law in this country,

the power of the legislature to permit such assessments and to direct an apportionment of the cost of frontage should by this time be considered as no longer open to controversy. Writers on constitutional law, on municipal law, and on the law of taxation have collected the cases, and have recognized the principle as settled."

As above stated, however, the theory of the appellant is that the judgment of the superior court confirming the assessment is erroneous, for the reason that, according to its contention, neither the statute nor the city charter contemplates ⁶⁸² that its lands, which are at present used exclusively as a right of way, shall be assessed; that an assessment can be upheld only on the theory of benefits conferred equal to the assessment imposed, and that in its very nature its right of way cannot receive any such benefit. We have heretofore mentioned the cases cited by appellant in support of this contention. There are, however, numerous authorities announcing the contrary doctrine which we now approve, holding that the right of way of a railroad is liable to special assessments for local improvements. This rule should certainly be adopted in this case, as our statutes and the charter of the city of Seattle confer such broad legislative authority upon the city council to determine what lands shall be included in the district as benefited by the improvement: 2 Cooley on Taxation, 3d ed., p. 1234; Louisville etc. R. Co. v. Barber Asphalt Paving Co., 116 Ky. 856, 76 S. W. 1097; Ludlow v. Trustees, 78 Ky. 357; Northern Indiana R. Co. v. Connelly, 10 Ohio St. 159, 36 Am. Dec. 82; Louisville etc. R. Co. v. Barber Asphalt Paving Co., 197 U. S. 430, 25 Sup. Ct. Rep. 466; Chicago etc. R. Co. v. Joliet, 153 Ill. 649, 39 N. E. 1077; Chicago etc. R. Co. v. Elmhurst, 165 Ill. 148, 46 N. E. 437; Illinois Cent. R. Co. v. People, 170 Ill. 224, 48 N. E. 215; Pittsburg etc. R. Co. v. Hays, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597; Peru etc. R. Co. v. Hanna, 68 Ind. 562; Rich v. Chicago, 152 Ill. 18, 38 N. E. 255; Indianapolis etc. R. Co. v. Capital Paving etc. Co., 24 Ind. App. 414, 54 N. E. 1076; State v. Passaic, 54 N. J. L. 340, 23 Atl. 945; State v. Lewis Co., 82 Minn. 390, 85 N. W. 207, 86 N. W. 611, 53 L. R. A. 421 (on rehearing).

In *New Whatcom v. Bellingham Bay etc. R. Co.*, 16 Wash. 137, 47 Pac. 237, we held that it was not within our province to say that a railroad right of way could, under no circum-

stances, be benefited by a street improvement, and sustained a special assessment on such right of way. We cannot express our views more clearly on this question than by quoting at ⁶⁸³ length from the language of Mr. Justice Peck, in *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159, 36 Am. Dec. 82.

“If railroad tracks are taxable for general purposes, it is difficult to perceive why they should not be subject also to special taxes or assessments. The company, to advance its own interests, has seen fit to appropriate to its use, ground within the corporate limits of the city of Toledo, and over which that city had the power of making assessments to defray the expense of local improvements, and why should not the company be held to have taken it cum onere? A citizen would scarcely claim exemption, because he had devoted his lot to uses which the improvement could not in any way advance, and we see no good reason why a railroad company should be permitted to do so. The company have the exclusive right to the possession, so long as it is used for the road, and if the roadbed was exempt from taxation for general purposes, it would by no means follow that it was not liable for such special assessments. See 11 Johns. 77, where church sites, which by the laws of New York, were exempt from taxation, were held to be liable for such assessments. But it is said that assessments, as distinguished from general taxation, rest solely upon the idea of equivalents, a compensation proportioned to the special benefits derived from the improvement, and that in the case at bar, the railroad company is not, and in the nature of things cannot be, in any degree, benefited by the improvement. It is quite true that the right to impose such special taxes is based upon a presumed equivalent; but it by no means follows that there must be in fact such full equivalent in every instance, or that its absence will render the assessment invalid. The rule of apportionment, whether by the front foot or a percentage upon the assessed valuation, must be uniform, affecting all the owners and all the property abutting on the street alike.”

In *Louisville etc. R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 25 Sup. Ct. Rep. 466, the first syllabus reads as follows:

“In determining whether an improvement does, or does not, benefit property within the assessment district, the land should be considered simply in its general relations and apart from

its particular use at the time; and an assessment, otherwise legal, for grading, paving and curbing an adjoining street is not void under the fourteenth amendment because the lot is ⁶⁸⁴ not benefited by the improvement owing to its present particular use."

In *Ludlow v. Trustees*, 78 Ky. 357, the court of appeals of Kentucky said:

"While assessments of this character, as distinguished from general taxation, rest upon the basis of benefits or presumable benefits to the property assessed, it is not essential to their validity that actual enhancement in value, or other benefit to the owner, shall be shown. The passage of the ordinance by the city council, under the power granted in the charter, is conclusive of the propriety of the improvement, and of the question of benefit to the owners of abutting property (*Northern Indiana R. R. Co. v. Connelly*, 10 Ohio St. 164). Absolute equality in the distribution of such burdens cannot be attained. An approximation to equality is all that is possible, but in reaching this point the present or prospective use of the property cannot enter into the calculation."

It might possibly be suggested that, in many of the cases here cited, the attacks made on the validity of special assessments were collateral, while in this instance the attack is direct. It is true that this hearing is on written objections to the proposed assessment. The objections which may be presented and adjudicated in a proceeding of this character do not extend to or question the right of the city council, in the exercise of its legislative authority, to determine that appellant's land is benefited and shall be included in the assessment district, but the appellant has the right to question by such objections all matters of procedure and the equality of the assessments made.

In *People v. Pitt*, 169 N. Y. 521, 62 N. E. 662, 58 L. R. A. 372, the court of appeals of New York, in passing on a statute of that state quite similar to the statutory and charter provisions here involved, said:

"The provisions of the charter did not deny to the relator the right to a judicial hearing before the assessment became conclusive upon him, and so far as that right is secured to the citizen by the constitution or any principle of law in proceedings for imposing a tax or assessment, it was not disregarded or violated by the statute in question. The relator ⁶⁸⁵ was, by the terms of the act, entitled to a hearing, and

had a hearing before the local authorities upon every question to which the right applied. He had the right to show that the proceedings for the construction of the sewer were not initiated or conducted as required by the statute. He had the right to show that his property was so situated that he could not use the sewer for drainage purposes. He had the right to show that he owned no property on the line of the street, or if he did that the width was erroneously estimated. He had the right to a hearing upon every question relating to the validity or amount of the assessment except the principle or rule of apportionment and that was prescribed by the legislature in the exercise of its discretion, and he had no more right to a hearing upon that question after the statute was enacted than he had to a hearing upon the question whether his property should be assessed at all."

The determination of the city council that the appellant's land is benefited and should be included in the local improvement district and assessed is final under any showing made in this case.

The appellant further contends that, even if it should be held that its right of way will receive some special benefit from the improvement, the assessment should not be made, as no lien can be enforced therefor. It insists there is no law in this state, nor any provision in the statute, for special assessments, which permits the road and right of way of a public service corporation to be broken up or sold in fragments, and the exercise of its franchise to be destroyed by piecemeal foreclosure and sales. The right and power to levy a special assessment upon the appellant's right of way is not in any way dependent upon the question as to whether a valid and enforceable lien can be created against its property: *Troy etc. R. Co. v. Kane*, 9 Hun, 506.

We do not understand that either the collection of the assessment or the enforcement of any lien is now before us for consideration. In this proceeding we cannot be called upon to anticipate and determine the validity of any method the city of Seattle may adopt for the collection of the assessment. It ⁶⁸⁶will be ample time for us to pass upon that question when it is directly presented.

The judgment is affirmed.

Hadley, C. J., Dunbar, and Root, JJ., concur.

Mount and Rudkin, JJ., took no part.

An Assessment for Street Improvements against the track and right of way of a railway corporation cannot, according to some decisions, be sustained: Detroit etc. Ry. Co. v. Grand Rapids, 106 Mich. 13, 58 Am. St. Rep. 466; New York etc. R. R. Co. v. City of New Haven, 42 Conn. 279, 19 Am. Rep. 534; City of Bridgeport v. New York etc. R. R. Co., 36 Conn. 255, 4 Am. Rep. 63. But according to some authorities, the rights, franchises and interests of a street railway company, chartered by the legislature and occupying a city street, by contract with the city, are liable to assessment for benefits in the widening of the street in which the track lies: Chicago etc. Ry. Co. v. City of Chicago, 90 Ill. 573, 32 Am. Rep. 54.

Public Property is Subject to Assessment for the improvement of streets abutting thereon: Edwards etc. Co. v. Jasper County, 117 Iowa, 365, 94 Am. St. Rep. 301; City of Clinton v. Henry County, 115 Mo. 557, 37 Am. St. Rep. 415.

CASES
IN THE
SUPREME COURT
OF
WEST VIRGINIA.

BARE v. CRANE CREEK COAL AND COKE COMPANY.

[61 W. Va. 28, 55 S. E. 907.]

NEGLIGENCE—Burden of Proof.—In an action for the death of a child alleged to have been due to the defendant's negligence, the burden of proving that such negligence was the proximate cause of such death must be assumed by the plaintiff. (p. 969.)

NEGLIGENCE Consists of a Breach of Duty Either of Omission or Commission. (p. 969.)

MASTER AND SERVANT—Minor Employés, Duty to—Capacity of Minor.—The duty of an employer in engaging and placing a minor at a dangerous employment is largely measured by the capacity of the minor to comprehend the dangers of the employment, when the employer has, or should have, notice of the minor's capacity. (p. 969.)

MASTER AND SERVANT—Minor Employés—Capacity.—The questions of the assumption of risk, of the benefit of instruction by the employer, and of contributory negligence hinge upon the question of the capacity of the minor employé for the particular work in which he is engaged. (p. 969.)

MASTER AND SERVANT—Notice of Lack of Capacity of Minor Employé.—The employer of a minor is charged with notice of such lack of capacity as is usual among minors of the same age, so far as his age is or should be known to the employer. (p. 969.)

EVIDENCE—Burden of Proof of Capacity of Minor Employé.—The burden of proving that a minor employé had greater than the usual capacity of minors of the same age rests upon the employer, and the burden of proving that the minor had less than the usual capacity rests upon him or the person seeking to recover damages on account of his death. (p. 969.)

MASTER AND SERVANT—Negligence in Engaging a Minor in a Dangerous Employment.—It is actionable negligence for an employer to engage and place at a dangerous employment a minor who, although instructed, lacks sufficient age and capacity to understand and avoid the dangers of the employment, if the employer has, or should have, notice of the minor's age and lack of capacity. (pp. 969, 970.)

MASTER AND SERVANT—Minor Employés, Risks Assumed by.—A minor assumes the risks of all such apparent dangers as he is capable of comprehending and avoiding. The apparent dangers are those which he has capacity to comprehend and avoid. (p. 970.)

MASTER AND SERVANT—Minor Employé, Test of Capacity of.—In determining the capacity of a minor to perform the work and avoid the dangers of the employment, the character of the work, the circumstances under which it is performed, and his previous experience should be considered. (p. 970.)

MASTER AND SERVANT—Minor Employés, Negligence, When will not be Imputed to.—The capacity of a minor employé is the measure of his responsibility. If he has not capacity to comprehend and avoid the dangers to which he may be exposed, negligence will not be imputed to him from the fact that he unwittingly exposed himself to such dangers. (p. 970.)

MASTER AND SERVANT—Minor Employés, Duty of Employer to is not Affected by the Statute Permitting Such Employment.—The fact that a statute permits the employment of minors more than twelve years of age does not have any bearing on the duties of the employer to such minors. (p. 971.)

MASTER AND SERVANT—Minor Employés—Questions of Fact for the Jury.—Age, capacity and discretion of a minor employé to observe and avoid dangers are questions of fact for the jury. (p. 971.)

MASTER AND SERVANT—Minor Employés, Negligence of, When a Question for the Court.—The court should take from the jury the question of the contributory negligence of a minor employé when the clear weight of evidence shows that he had capacity for self-protection which he culpably omitted to use in the face of a danger which he knew and sufficiently apprehended, but otherwise not. (p. 971.)

G. J. Holbrook and Harold A. Ritz, for the plaintiff in error.

A. W. Reynolds, for the defendant in error.

²⁹ COX, J. This action was instituted in the circuit court of Mercer county by G. L. Bare, administrator of his son Jonas E. Bare, deceased, against Crane Creek Coal and Coke Company, a corporation, to recover damages on account of the death of Jonas E. Bare.

After the plaintiff's evidence had been introduced upon the trial, the defendant, without introducing evidence, moved the court to strike out the plaintiff's evidence and to direct a verdict for defendant, which motion was sustained. A verdict for defendant, and a judgment dismissing plaintiff's action, followed. The plaintiff brings the judgment here by writ of error for review.

The plaintiff offered evidence on the trial tending to prove that the boy, Jonas E. Bare, was employed by the defendant
³⁰ as "trapper" or "doorkeeper" in an entry of the mine of

defendant; that the boy was killed while so engaged; that his duties were to open and shut the door across the entry, where he was stationed, for the passage upon the track of mine cars propelled by an electric motor, and to signal for the passage of cars upon that track, by manipulating an electric light or lights by means of a "cut-out switch," thus indicating when the track was clear and when it was proper for cars to pass; that the light was located inside the door; that there was an opening in the door, through which the signal light was visible from the entry in front of the door; that shortly previous to the death of the boy a train of sixteen cars was passing into the mine, along the main entry leading to the door where the boy was stationed; that, before reaching the door, the brakeman on the train whistled for signals, and saw the signal light indicating that the track was clear and that it was proper for cars to proceed; that the brakeman did not see that the door was closed; that the brakeman then signaled the motorman; that eight of the front cars were cut off, and caused to run on the main straight siding leading to the door where the boy was stationed; that the cars struck the door, knocking it down and wrecking the cars or a number of them; that upon an examination of the wreck the boy was found beneath it under the cars, about twenty-five or thirty feet from the door, with his head injured and his life extinct; that about fifteen or twenty minutes before the wreck a track-layer with another person passed out through the door; that the track-layer then saw the boy lying on his back between the rails of the track; that the person with the track-layer said to the boy, "Don't lay there and let that motor run over you and kill you"; that the boy laughed and said: "He wasn't going to sleep"; that after the track-layer and the person with him passed out the boy shut the door with his foot; that the signal lights were not on when these persons passed out of the mine; that the boy was killed some time after 3 o'clock in the afternoon of February 23, 1904; that the boy had been on duty about seven hours that day; that the boy was past twelve and under thirteen years of age when he was killed; that he was "tolerably small for his age"; that at the time the boy was employed his father told the one employing him that the boy was in his fourteenth ³¹ year. The father afterward ascertained that the boy was in his thirteenth year. The evidence does not show what previous experience the boy had in his employment. His father testified that he saw the boy

while he was working in the mine, and saw the place where the boy was working, before he (the father) "got crippled," but he does not say when he was crippled. As to the capacity of the boy, the father says: "He was just a common child, just like a common child." The evidence does not tend to show whether the boy was instructed in the duties or dangers of his employment or not. There are other features of the evidence unnecessary to detail.

The ground of this action is negligence. The burden is on the plaintiff to prove that the negligence of the defendant was the proximate cause of the injury resulting in the death of the boy: *Butcher v. West Virginia etc. R. R. Co.*, 37 W. Va. 180, 16 S. E. 457, 18 L. R. A. 519. Negligence implies breach of duty, either of omission or commission. The question for our determination is: If the jury had found a verdict for the plaintiff on this evidence, would it have been the duty of the court to set the verdict aside; or, in other words, was the evidence sufficient to support a verdict for the plaintiff? *Dye v. Corbin*, 59 W. Va. 266, 53 S. E. 147. The evidence in this case tended to show that the boy was under thirteen years of age when he was killed. The duty of an employer in engaging and placing a minor at a dangerous employment is largely measured by the capacity of the minor to comprehend and avoid the dangers of such employment, when the employer has or should have notice of the minor's capacity: 20 Am. & Eng. Ency. of Law, 99; *Goff's Admr. v. Norfolk & W. R. R. Co.*, 36 Fed. 299. The questions of the assumption of risks ordinary and extraordinary, of the benefit of instructions (if any) by the employer, and of contributory negligence, hinge upon the question of the capacity of the boy for the particular work in which he was engaged. The employer of a minor, without other notice, is charged with notice of such lack of capacity as is usual among minors of the same age, so far as his age is or should be known to his employer. The burden of proving that a minor employé had greater than the usual capacity of minors of the same age rests upon the employer; and the burden of proving that the minor had less than such usual capacity rests upon the minor, or the one seeking to recover damages on account of his death: ³² 1 *Shearman & Redfield on Negligence*, 5th ed., sec. 218; *Molaske v. Ohio Coal Co.*, 86 Wis. 220, 56 N. W. 475; *Wynne v. Conklin*, 86 Ga. 40, 12 S. E. 183.

It is actionable negligence for an employer to engage and place at a dangerous employment a minor who, although in-

structed, lacks sufficient age and capacity to comprehend and avoid the dangers of the employment, if the employer has or should have notice of the minor's age and lack of capacity; Thompson on Negligence, sec. 4689; 20 Am. & Eng. Ency. of Law, 99; Goff's Admr. v. Norfolk & W. R. R. Co., 36 Fed. 299; 1 Shearman & Redfield on Negligence, 5th ed., sec. 218.

The rule in relation to assumption of risks by minor employes is correctly stated by this court in Williams v. Belmont Coal & Coke Co., 55 W. Va. 84, 46 S. E. 802. It is, that a minor who enters the employ of another assumes the risks of all such apparent dangers as he is capable of comprehending and avoiding. The apparent risks assumed are those which the minor has the capacity to comprehend and avoid: See, also, Turner v. Norfolk & W. R. R. Co., 40 W. Va. 675, 22 S. E. 83; Giebell v. Collins Co., 54 W. Va. 518, 46 S. E. 569; Thompson on Negligence, 4689; 1 Labatt on Master and Servant, 291. In determining the capacity of the minor to perform the work and avoid the dangers of a particular employment, the character of the work, the circumstances under which it is to be performed, and the previous experience of the minor should be considered: 1 Labatt on Master and Servant, 291.

The evidence tends to show that it was the duty of the boy to open and close the door across the mine entry for the passage of electric cars, and to manipulate the signal light or lights, by means of a "cut-out switch," for such passage. This employment was attended with danger. It required care, watchfulness, concentration of mind, and continuity of purpose. A failure to exercise these qualities of mind in the performance of his duties would probably entail great danger of injury or loss of life. Were such duties only consistent with, or were they beyond, the capacity of an ordinary boy under thirteen, or even under fourteen, years of age? The defendant claims that it must be presumed that the boy was instructed as to the dangers of his employment, in the absence of any showing to the contrary. If he was instructed, the question of capacity to comprehend and follow the instructions and avoid the dangers arises.

³³ The question of contributory negligence presents the same question of capacity. The capacity of a minor employe is the measure of his responsibility. If he has not the capacity to comprehend and avoid the dangers to which he may be exposed, negligence will not be imputed to him from the fact that he unwittingly exposes himself to such

dangers: 1 *Minor's Institutes*, 505; *Thompson on Negligence*, 4689; *Shearman & Redfield on Negligence*, 5th ed., 73a.

It is said that the statute, *Annotated Code of 1906*, section 412, permits the employment of a boy over twelve years of age in a coal mine. We do not think that section has any bearing on the duties of an employer toward a minor employé over the age of twelve years.

Considering the fact that the evidence tends to show that the boy was actually under thirteen years of age, and was represented at the time of the employment to be in his fourteenth year, and the other circumstances which the evidence tends to prove, this evidence should have been submitted to the jury to determine the question of the capacity of the boy by its verdict. "The rule may be laid down generally that the age, the capacity and discretion of a child to observe and avoid dangers are questions of fact, to be determined by the jury; and his responsibility is to be measured by the degree of capacity he is thus found to possess": 1 *Minor's Institutes*, 505. "The true rule would seem to be that the court should take the question away from the jury where the clear weight of evidence shows that the child had a capacity for self-protection, which he culpably omitted to use, in force of a danger which it knew and sufficiently apprehended, but not otherwise": See, also, 1 *Shearman & Redfield on Negligence*, 73a, sec. 218; *Buswell on Personal Injuries*, sec. 203; *Thompson on Negligence*, sec. 4687; *Ketterman v. Dry Fork R. R. Co.*, 48 W. Va. 606, 37 S. E. 683; *Williams v. Belmont Coal Co.*, 55 Va. 84, 46 S. E. 802.

For the reasons stated, the judgment is reversed, a new trial awarded, and the case remanded to be further proceeded with according to law.

When Young and Inexperienced Persons are Employed to do work which is attended with danger, they are entitled to a full explanation and warning of the danger and to instructions how to avoid it. If such warning and instructions are not given by the master, or are inadequately given, he is answerable for the consequences: *Siegel-Cooper & Co. v. Treka*, 218 Ill. 559, 109 Am. St. Rep. 302; *O'Connor v. Golden Gate Woolen Mfg. Co.*, 135 Cal. 537, 87 Am. St. Rep. 127; *Omaha Bottling Co. v. Theiler*, 59 Neb. 673, 80 Am. St. Rep. 673; *Addicks v. Christopher*, 62 N. J. L. 755, 72 Am. St. Rep. 685. But if a minor employé is set to perform a duty which is one of the common operations of every-day life, free from complexity or complications, and which universal experience

has stamped as an ordinary and harmless act, as, for instance, using a hatchet as a wedge in opening a box and striking the hatchet with a hammer, there is no duty resting on the employer to warn such employé: *Whalen v. Rosnosky*, 195 Mass. 545, 122 Am. St. Rep. 271.

The Doctrine of Assumption of Risks and Contributory Negligence in the law of master and servant is discussed in the notes to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884; *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 289. The rule in respect to assumption of risks and contributory negligence by employés is modified in the case of young persons of inexperience and immature judgment: *Siegel-Cooper & Co. v. Trecka*, 218 Ill. 559, 109 Am. St. Rep. 302; *Shirley v. Abbeville Furniture Co.*, 76 S. C. 452, 121 Am. St. Rep. 952; *O'Connor v. Golden Gate Woolen Mfg. Co.*, 135 Cal. 537, 87 Am. St. Rep. 127.

WEAVER v. NEAL.

[61 W. Va. 57, 55 S. E. 909.]

APPEAL AND ERROR—Bill of Exceptions, When Sufficient.

The appellate court will not exclude evidence relied on by the appellant on the ground that the bill of exceptions does not sufficiently incorporate the evidence to bring it before such court, when such bill says, "The certificate of evidence certified by J. T. H., official stenographer of the circuit court, etc., is hereby certified, filed herewith, and made a part of this bill of exceptions," and the full oral evidence appears in such bill. (p. 973.)

TRUST DEED to Secure an Indebtedness, When does not Show a Fraudulent or Void Trust.—To establish that a deed of trust is fraudulent and void on its face as to creditors, it is not sufficient to show that such deed does not authorize the trustee to sell until maturity of the note secured where it is only four days from the execution of the deed to such maturity, and the deed does not postpone the right of the trustee to take immediate possession. (p. 973.)

A DEED OF TRUST to Secure any Future Indorsement of the promissory note described therein is not void as containing a badge of fraud. (pp. 973-974.)

EXECUTION, Property Subject to—Goods Conveyed in Trust to Secure a Debt.—Where property is conveyed under a trust deed, it cannot be levied upon. A creditor by execution has a lien upon it subject to the trust, but must enforce his equity in chancery. (pp. 974, 975.)

CONFUSION OF GOODS, Burden of Proof with Respect to by a Claimant Under a Trust Deed.—If a deed of trust to secure indebtedness conveys all of a stock of goods, with which other goods are afterward commingled without the consent or fault of the trustee, and a levy is subsequently made upon the whole and an action commenced by the trustee to recover the property, the burden is not upon him to pick out the property included in the deed. On the contrary, that burden must be assumed by the levying officer, and on his failing to do so, the trustee may recover the possession. (p. 976.)

T. A. Brown, for the plaintiff in error.

Wm. Beard, for the defendants in error.

⁵⁸ BRANNON, J. R. A. Reese made a deed of trust conveying all his personal property including a stock of goods to Weaver, trustee, to secure a negotiable note made by Reese payable to J. A. Wiseman in ninety days at the Wirt County Bank. After this deed of trust had been executed R. L. Neale & Co. caused a writ of fieri facias to be levied on the stock of goods. Then Weaver, trustee, filed before the justice who issued the execution a petition under chapter 50 of the Code, section 152, setting up his title and claim under the deed of trust, and asking that the stock of goods be released from said execution, and asking that the right of property be tried. After trial before a justice the case went by appeal to the circuit court of Wirt county, where a jury was impaneled to try the case; but the court struck out the plaintiff's evidence and directed a verdict for the defendant and rendered judgment thereon.

Counsel for Weaver endeavors to exclude the evidence on the ground that the bill of exceptions does not sufficiently incorporate it to bring it before this court; but we think that the bill is ample to do so. It says that: "The certificate of evidence certified by John T. Harris, official stenographer of the circuit court of Wirt county, is hereby certified, filed herewith, and made a part of this bill of exceptions." We find the full oral evidence with a formal certificate by Harris that it is all the evidence given in the case. This clearly identifies the evidence.

The execution creditor claims that the deed of trust is fraudulent and void as to creditors on its face. It is not ⁵⁹ claimed that oral evidence proves such impeachment, but that its vice is shown by the deed. To establish this we can look only at the face of the deed of trust: *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. 203. We do not find such fraud on the face of the deed. The deed provides that the trustee sell at the maturity of the note. It cannot be said that sale under the trust is unreasonably postponed, as it was only four days from the date of the trust to the maturity of the note. The deed contains no reservation or power to the debtor, none whatever. It does not give him power to sell, or to retain possession, or to consume, or in any wise use the property, so as to enable us,

for such grounds, to stamp the deed with fraud, as in *Livesay's Ex. v. Beard*, 22 W. Va. 585. Nor does the deed postpone the right of the trustee to take possession until maturity of the note, as in that case. He could take possession the moment the deed was executed. We find no provision authorizing the debtor to replenish the stock of goods. The deed does not cover after-acquired goods. If it did so, there might be an inference of an intent to let the debtor still have the benefit of the goods, and to waste them from creditors, as held in *Shattuck v. Knight*, 25 W. Va. 590, and *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. 203. We do not find earmarks of fraud referred to in the many cases in this court of deeds fraudulent on their face: *Bartles & Dillon v. Dodd*, 56 W. Va. 383, 49 S. E. 414, holds that a deed of trust will not be fraudulent per se, unless its provisions plainly show that it was not made in good faith, but only as a colorable security. The only questionable feature of this deed is a provision that it is to secure any future indorsement by Wiseman of the note. The debt is an honest debt, as nobody questions, and we do not think that such a provision is a badge of fraud. This deed was good when made, and this clause does not change its character. It does not put it in the power of the debtor to postpone sale under the trust, nor does it bind Wiseman at all to make a future indorsement. The clause gave the debtor no power whatever to enforce such indorsement.

Another point to sustain the judgment made by counsel is this: Reese purchased a small quantity of new goods and intermingled them with the old goods conveyed by the deed of trust. Wiseman is not shown to have consented to this.⁶⁰ It is claimed that Weaver, the trustee, is to be treated as plaintiff suing for specific goods, and that he cannot recover because there is a confusion of goods; that he must point out the particular articles to which he had legal title under the trust, and failing to do so must fail in his claim, on the ground that where there is a confusion of goods rendering their separation impossible a plaintiff in detinue or other proceeding to recover particular property must pick out his property. Now, the trustee had prior right and legal title over the execution creditor. That execution could not be levied on the property conveyed in the trust because of the well settled rule that where property is conveyed under a deed of trust it cannot be

levied upon. The creditor by execution has a lien upon it subject to the trust, a charge on the surplus, but he cannot levy on the tangible personal property. He must enforce his equity in chancery: *Doheny v. Atlantic D. Co.*, 41 W. Va. 1, 23 S. E. 525; *Coutts v. Walker*, 2 Leigh, 268. It follows that the levy was void, conferring no title. Seeing that the trustee had a perfect legal title, and the execution creditor none, we think that the execution creditor cannot say that the burden is upon the trustee to identify that part of the stock of goods covered by his trust before he can recover; but the burden is rather on the execution creditor to show what articles of the stock of goods his levy operates upon, as he could have no claim to those articles conveyed in the deed of trust. So holds *Kreuzer v. Cooney*, 45 Md. 582. There one Stewart sold type in a printing office to Kreuzer, by bill of sale, and Stewart remaining in possession bought and mingled additional type, and then sold to Cooney. Held, that Stewart's title was superior to Cooney's; that the case was to be treated as between Stewart and Kreuzer, and that Cooney got no title to the type sold to Kreuzer, and Kreuzer could maintain replevin against Cooney. It is the law that when one has charge of another's goods, and mingles them with his own, he forfeits his own, unless he can separate them. So held in that case: *Trapnell v. Conklyn*, 37 W. Va. 242, 38 Am. St. Rep. 30, 16 S. E. 570; *Brakely v. Tuttle*, 3 W. Va. 86, 126; 2 Schouler on Personal Property, sec 47. So, if we test the matter as between Reese and Weaver, Reese must pick out the goods he mingled with the others, and so must Neal & Co., else Weaver gets all under his deed of trust. The case from Maryland above cited says the rule or law of confusion must operate in favor of Weaver, not in favor of the execution creditor. In *Adams v. Wildes*, 107 Mass. 123, a mortgagor in possession of goods failed to keep them separate from his, purposely or through carelessness, and sold all to a third person. Held, the mortgagee may replevy the whole from the purchaser, unless the latter identifies the articles not embraced in the mortgage. The court said: "It was the duty of the defendant, as he only succeeded to Gay's title subject to the mortgage, to identify the specific articles not in the mortgage": See 6 Am. & Eng. Ency. of Law, 2d ed., 598, note 2, citing that case. At this point I met with the case of *Rose v. Sharpless*, 33 Gratt. 153,

where a man had some goods paid for and some not paid for and he mingled them and then claimed to exempt under the exemption law from liability for purchase money of part of the goods, the court held that the burden was on the man who claimed to exempt them to separate them from the goods that had been paid for, "and he failing to do this, they will all be treated as not having been paid for, as far as the homestead deed is concerned, and therefore not exempt under the law." I think that the matter is to be tested as if between Reese and Weaver, the trustee, and that the burden to discriminate the goods is on the execution creditor. I find in 2 Schouler on Personal Property, section 48, the following: "In the analogous case of chattels specifically pledged or mortgaged for a debt, confusion will sometimes effect an extension of the creditor's security, and sometimes impair or take it away all together; for if the debtor, having possession, mingle the pledged or mortgaged goods with other goods of his own. they are all brought under cover of the original security because of his conduct; while the secured creditor in possession, who is guilty of a corresponding intermixture, must bear the consequence of his folly." As is said in *Kreth v. Rogers*, 101 N. C. 263, 7 S. E. 682, one party or the other must suffer, and surely it is not the man having prior claim guilty of no blame.

On these principles we conclude to reverse the judgment and set aside the verdict and remand the case for a new trial. Judge Sanders and I would enter judgment for Weaver as the case involves, and is dependent on, questions of law.

Mortgages to Secure Further Advances are discussed in the note to *Merchants' State Bank v. Tufts*, 116 Am. St. Rep. 690.

The Doctrine of Confusion of Goods is the subject of a note to *Stone v. Marshall Oil Co.*, 101 Am. St. Rep. 913. On pages 922 to 924 of this note will be found a discussion of the rights of a mortgagee where other goods are mingled with those covered by the mortgage.

STUCKEY v. MIDDLE STATES LOAN, BUILDING AND
CONSTRUCTION COMPANY.

[61 W. Va. 74, 55 S. E. 996.]

USURY, Defense of by One Who has Assumed the Payment of a Debt.—One who purchases land, and, as part of the consideration therefor, agrees to pay a debt infected with usury but secured by a trust deed, will not be relieved against such debt or deed. (pp. 978, 979.)

C. O. Strieby, for the appellant.

R. D. Heironimus, for the appellee.

⁷⁴ COX, J. In March, 1893, H. J. Wagoner obtained from the Middle States Loan, Building and Construction Company; a corporation under the laws of Maryland, a loan of six hundred dollars, on stock of said corporation then held by him. For this loan Wagoner executed to the corporation his bond in the penalty of twelve hundred dollars, dated the eleventh day of March, 1893, conditioned for the payment of the loan and interest thereon, together with all dues and premiums, until the maturity of the said stock upon which the loan was obtained in accordance with the by-laws of the corporation. To secure the payment of the loan and the performance of the conditions of the bond, Wagoner and wife executed a deed of trust, also dated the eleventh day of March, 1893, conveying to Alexander Neil and C. O. Strieby, trustees, a lot of land in the town of Davis. By deed dated the first day of April, 1893, Wagoner and wife conveyed the lot to the plaintiff, Benjamin A. Stuckey, the deed reciting that the consideration therefor was one thousand dollars in hand paid. At February rules, 1901, the plaintiff, Stuckey, filed his bill in the circuit court of Tucker county against the corporation, Wagoner and the trustees, alleging that as part of ⁷⁵ the consideration for the purchase of the lot the plaintiff assumed the debt owing by Wagoner to the corporation; that thereafter the corporation looked to him for and collected from him the monthly installments on said debt until the month of March, 1900, when he refused longer to pay; that up to the time of the conveyance of the lot to him, Wagoner had paid the monthly installments on the debt; that the pay-

ments by Wagoner and plaintiff were more than sufficient to pay the debt; and that the contract whereby Wagoner obtained the loan was usurious; and praying an accounting as to the debt, a release of the deed of trust, and for general and special relief. The answer of the corporation admits the allegation of the bill to the effect that the plaintiff assumed the debt owing by Wagoner to the corporation, as a part of the consideration for the purchase of the lot. Wagoner filed an answer in which he did not make the defense of usury or authorize the plaintiff to do so. The case was referred to a commissioner to state the account and for other purposes. On the 26th of November, 1904, counsel for all the parties appeared in court and waived the order of reference and agreed that, if the contract in controversy be held usurious upon calculation by partial payments at six per cent interest, there would be due to the plaintiff from the corporation the sum of two hundred and sixty-nine dollars and seventy-eight cents, with interest from the fifteenth day of November, 1904, and that if the contract be held not usurious, there would be due to the corporation from the plaintiff the sum of four hundred and ninety-eight dollars and fifty-six cents, with interest from said date. Thereupon the court held that the contract was usurious and that the plaintiff was entitled to be relieved from the usury, and entered a final decree in favor of the plaintiff against the corporation for the sum of two hundred and sixty-nine dollars and seventy-eight cents with interest and costs, and directed a release of the deed of trust. From this decree the corporation obtained an appeal.

Assuming that the debt is usurious, which we do not decide, the vital question in this case is, Can the plaintiff, under the circumstances stated, be relieved from the usury? The contract whereby Wagoner obtained the loan from the corporation was a building and loan association contract, providing for the monthly payment of interest, dues and premiums until the maturity of the stock upon which the loan was obtained. Whether the contract was usurious or ⁷⁶ not, the plaintiff assumed the payment of the debt thereby created. It is not claimed that the plaintiff's contract with Wagoner was usurious. If the plaintiff is compelled to pay the usurious debt he does nothing more than he agreed with Wagoner to do in the purchase of the lot. If the plaintiff should be relieved from the payment of

usury, he would pay less for the lot than he agreed to pay. The principles governing this case are well settled in this state. The defense of usury is personal to the debtor. One who purchases land which is charged with an usurious debt, and, as part of the consideration for his purchase, assumes the payment of the debt, cannot be relieved from the usury: *Spengler v. Snapp*, 5 Leigh (Va.), 478; *Crenshaw's Admr. v. Clark*, 5 Leigh (Va.), 65; *Smith v. McMillan*, 46 W. Va. 577, 33 S. E. 283; *Lee v. Feamster*, 21 W. Va. 108, 45 Am. Rep. 549; *Snyder v. Middle States L. B. & C. Co.*, 52 W. Va. 655, 44 S. E. 250; *Harper v. Middle States L. B. & C. Co.*, 55 W. Va. 149, 46 S. E. 817; *Chenoweth v. National Building Assn.*, 59 W. Va. 653, 53 S. E. 559. In *Harper v. Middle States L. B. & C. Co.*, 55 W. Va. 149, 46 S. E. 817, the property on which the usurious debt was charged had been twice conveyed after being so charged. The original debtor, as well as both alienees, made the defense of usury, and that was held sufficient to raise the question of usury. In that case it was also held that a purchaser of real estate charged with a usurious debt cannot defend against the usury, unless the debtor unites with him in the defense, or his acquiescence and consent to such defense appear in the record. In this case the original debtor, Wagoner, neither made the defense of usury himself nor joined with the plaintiff in so doing, nor in any way acquiesced in or consented to such defense by the plaintiff. The principles stated leave the plaintiff without right in this case to be relieved from the usury, if the contract be usurious; and they are conclusive of the case in the absence of novation. In *Chenoweth v. National Building Assn.*, 59 W. Va. 653, 53 S. E. 559, novation is defined to be the substitution of one debtor by mutual agreement for another, whereby the old debt is extinguished. In order to make a novation, there must be an extinguishment of the old debt, which implies the release of the original debtor. This record does not disclose such a state of facts. The plaintiff does allege in the bill that the shares of stock in the corporation were transferred to him by Wagoner; and there is exhibited with the bill a passbook purporting to show payments by "Stuckey" to the corporation. These payments were entered on the passbook in the name, or initials, of H. J. Wagoner as collector for the corporation, except two which were en-

tered in the name of Smith as such collector. In the case of *Chenoweth v. National Building Assn.*, 59 W. Va. 653, 53 S. E. 559, which involved a building and loan association contract, there had been a transfer of the stock and a new account opened by the building and loan association with the purchaser of the property upon which the debt was charged; but, as in this case, there had been no extinguishment of the old debt and no release of the original debtor. The court properly held that there was not a novation, and we so hold in this case.

The Middle States Loan, Building and Construction Company by its answer does not pray affirmative relief either by way of decree against the plaintiff or enforcement of the trust; but the plaintiff, having come into equity for an accounting and for relief against an alleged usurious debt, we think it is proper to adjudicate in this suit the amount of the debt, in accordance with the agreement of record of the parties.

For the reasons stated, the decree complained of is reversed and the amount of the trust debt mentioned in the bill and exhibits and evidenced by the bond of the defendant Wagoner to the corporation, dated the eleventh day of March, 1893, is ascertained to be four hundred and ninety-six dollars and fifty-six cents, with interest from the fifteenth day of November, 1904, until paid; and as to all other relief prayed for in the plaintiff's bill the bill is dismissed. This decision is without prejudice to any right, remedy or proceeding on the part of the defendant corporation for the collection of the debt the amount of which is here ascertained, or for the enforcement of the trust securing the same.

Reversed and bill dismissed in part.

The Principal Case was considered and the rules therein stated, confirmed and applied in the subsequent case of *Aggleson v. Middle States L. B. & C. Co.*, 61 W. Va. 139, 56 S. E. 177.

Where a Grantee of Land Assumes the Payment of the Mortgage thereon, or takes expressly subject to it, the amount of which is deducted from the purchase price, he cannot claim an abatement of the amount of the debt on the ground that it is usurious, or otherwise set up usury as a defense: *Hiner v. Whitlow*, 66 Ark. 121, 74 Am. St. Rep. 74; note to *Klapworth v. Dressler*, 78 Am. Dec. 87. But it is only where the grantee of mortgaged property has purchased it on the basis of a clear title, and agreed, as a part of the consideration, to pay the mortgage debt, that he is estopped from questioning the mortgage for usury: *First Nat. Bank v. Drew*, 226 Ill. 622, 117 Am. St. Rep. 271.

SHEA v. BALLARD.

[61 W. Va. 255, 56 S. E. 472.]

TRUSTEE'S SALE, Notice of, Service of on the Grantee of the Trustor.—Under a statute requiring notice of a sale under a deed of trust to be served on the grantor, if within the county, it is not necessary to make such service on his assignee or grantee, though the grantor is not in the county. (p. 982.)

TRUSTEE'S SALE, When will not be Set Aside.—A grantee of property which is subject to a deed of trust to secure the payment of indebtedness is not entitled to have the sale set aside on the ground that he was not served with notice thereof, when the statute does not require such service. (p. 982.)

PURCHASER OF PROPERTY at a Sale Made by a Trustee under a trust deed to secure the payment of indebtedness is not required, if he is not the person whose debt was so secured, to assume the burden of proving that the notice of sale was given as required by law or the deed of trust. (p. 983.)

A TRUSTEE'S SALE Made Without Giving the Notice Required by Law or by the provisions of the trust deed will be set aside. (p. 983.)

Payne & Payne, for the appellant.

H. O. Middleton, for the appellees.

²⁵⁵ SANDERS, J. E. E. Huddleston and wife, being the owners of three certain lots of land in the city of Charleston, conveyed the same to George E. Price, trustee, to secure a loan of eight hundred dollars, advanced to the grantors therein by the Kanawha Valley Building Association No. 2. On the seventeenth day of November, 1900, Huddleston and wife conveyed the three lots to the plaintiff, A. G. Shea, in consideration of one hundred dollars, and in the further consideration of the assumption by her of the loan secured by said deed of trust. The plaintiff and her grantors having made certain payments ²⁵⁶ upon the loan to the association, and she desiring to pay the remainder, a disagreement arose between her and the association as to the exact amount due, and no agreement being reached, and no settlement being made between them, the trustee, after having advertised the land, sold it to W. L. Ballard for the sum of seven hundred and fifty dollars, and on the day following the sale conveyed the same to him. Shortly thereafter the plaintiff filed a bill in equity in the circuit court of Kanawha county, against Price, trustee, Kanawha Valley Building Association No. 2, and Bal-

lard, the purchaser, for the purpose of canceling the deed and setting aside the sale from Price, trustee, to Ballard, and to enjoin an action of unlawful entry and detainer which had been instituted by Ballard to recover possession of the property in controversy. Upon a final hearing of the cause, the circuit court dismissed the plaintiff's bill, and it is from this decree that she has appealed.

One reason assigned by the plaintiff, for setting aside the sale and canceling the deed is that she, having purchased the property from Huddleston and wife, the grantors in the trust deed, and having continued to make payments upon the loan to the association, which sums were accepted by it, under the true construction of section 7, chapter 72, Code 1899, section 3056, Annotated Code of 1906, a copy of the notice of sale should have been served upon her at least twenty days prior to the day of sale. This section only requires a copy of the notice to be served upon the grantor of the deed, or his agent or personal representative, if he or they be within the county, at least twenty days prior to the day of sale. It is not claimed that the grantors in this instance were within the county; on the other hand, it is conceded that they were not. We cannot, by construction, extend the provisions of this statute so as to apply it to the assignee or alienee of a grantor. In the absence of this statute, no such notice would be required. Therefore, a literal compliance with its provisions is all that is necessary. The plaintiff bought subject to the trust deed; in fact, she assumed the payment of the loan secured by it, and she knew that under the statute personal service was only required to be given to her grantor. Therefore, the failure to give her such notice is no ground for setting aside the deed and sale.

257 The plaintiff also insists that the sale and deed should be set aside and annulled, because the trustee failed to post a notice of sale at the front door of the courthouse of Kanawha county. The same section of the Code above referred to provides that where property is sold under a deed of trust, unless it be otherwise provided in the deed of trust, a copy of such notice shall be posted at the front door of the courthouse of the county wherein the land lies, for a certain time therein specified. A trustee is only authorized to make sale of the property conveyed in such manner as is provided by the trust deed, and where there is no provision as to no-

tice, then as is required by the statute. The trust deed here made no provision for the advertisement; hence the trustee, in making the sale, should have given the notice required by the Code. As to whether or not such notice was posted, calls for a consideration of the evidence. The appellant contends that the burden is upon the purchaser to show that the property was properly advertised, but we cannot subscribe to this view, in the light of the former decisions of this court. *Burke v. Adair*, 23 W. Va. 139, and *Atkinson v. Washington & Jefferson College*, 54 W. Va. 32, 46 S. E. 253, plainly hold that the burden of proof, in such case, is upon the plaintiff. A purchaser at a trustee's sale, after acquiring a deed for the property, does not assume the burden of showing that the sale was regularly made and the property properly advertised, where he is not the trust creditor, and where there is no duty or responsibility whatever charging him with the regularity of the proceedings under which the sale is made. The trustee does not claim to have personally posted the notice, but in his answer he states that he had the notice of sale published in the "Charleston Daily Gazette," a newspaper published in Charleston, Kanawha county, West Virginia, for four successive weeks, and that, as he was accustomed to do, he requested the manager of the newspaper to post the notice at the front door of the courthouse. The trustee does not testify, and from a careful consideration of all the evidence, we conclude that the notice was not so posted. Entertaining these views, it follows that the decree of the circuit court must be reversed, and the sale and deed of the trustee to Ballard must be set aside and canceled.

Sales Under Powers in Mortgages and Trust Deeds are discussed in the notes to *Houston v. Nat. etc. Loan Assn.*, 92 Am. St. Rep. 573; *Tyler v. Herring*, 19 Am. St. Rep. 266. A sale of land by a mortgagee, made after the death of the mortgagor, under a power given by the mortgage, though without notice to the heir, is valid: *Carter v. Slocomb*, 122 N. C. 475, 65 Am. St. Rep. 714.

ATKINSON v. CAIN.

[61 W. Va. 355, 56 S. E. 519.]

AN INJUNCTION will Issue to Prevent the Transfer of Negotiable Notes against which the maker has a good defense where the payee is insolvent. (pp. 984, 985.)

J. W. Vandervort, for the appellant.

³⁵⁵ BRANNON, J. Isaac Cain conveyed to Mathew Atkinson, with general warranty, a tract of land, taking for deferred purchase money two negotiable notes. Before this conveyance there had been an attachment levied on the land with notice of lis pendens, and Cain later had a judgment entered for its sale. Under this judgment a sale of the land was advertised, and to save his land Atkinson paid the judgment. The bill states that Cain personally represented to Atkinson that no lien existed on said land, except an item of taxes, which Cain paid. The notes were committed to the custody of the Parkersburg Banking and Trust Company for collection, at which bank they were payable, but were still owned by Cain. Before either of the notes became matured Atkinson filed his bill in equity to enjoin the banking and trust company from disposing of the notes or from delivering them to Cain, and to enjoin Cain from selling them to any person, and to apply the sum paid by Atkinson in payment of said attachment debt in full discharge of the notes. The bill alleged that Cain was insolvent and would transfer said notes to some purchaser without notice. Upon demurrer to the bill the court dismissed it.

Why the court sustained the demurrer does not occur to us. There is no brief for the defendant to tell us. The sole consideration for the notes was the land conveyed with general ³⁵⁶ warranty, and so far as we know on demurrer there was a valid lien antedating the conveyance to Atkinson, and if valid, Atkinson had right to pay it and right to set it off against the unpaid purchase money, and Cain might, and it was charged would, sell the notes, which in the hands of a purchaser for value, without notice of the facts, would compel payment by Atkinson. We understand that equity will enjoin the sale and transfer of negotiable instruments on good grounds. How otherwise could their makers be protected? The common law affords no remedy in such case: *Dickenson v. Bankers' L. & T. Co.*, 93 Va. 498, 25 S. E. 548; *Moomaw*

v. Fairview, 2 Va. Dec. 509; Pomeroy's Equity, sec. 1240. 10 American and English Decisions in Equity, 55, has a large citation of cases for this position. We need not summon cases holding that where the law remedy is doubtful or partial equity comes in, because the law would give no relief at all to Atkinson against a purchaser for value without notice of the truth affecting these notes. It seems not necessary to say that chancery will enjoin collection of purchase money where title fails: Kinports v. Rawson, 29 W. Va. 487, 2 S. E. 85.

Therefore, we reverse the decree, overrule the demurrer, and remand the case for further proceedings.

If a Negotiable Instrument is About to be Transferred before due, so as to cut off defenses of the maker, he may enjoin its transfer and have it delivered up for cancellation, but it is otherwise if the instrument is non-negotiable: Erickson v. First Nat. Bank, 44 Neb. 622, 48 Am. St. Rep. 753.

HARMAN v. CARETTA RAILWAY COMPANY.

[61 W. Va. 356, 56 S. E. 520.]

AN INJUNCTION will Issue to Prevent a Corporation from Taking Possession of Property for a Public Use, as for railway purposes, without first making compensation therefor, although the bill does not allege that the injury which would be sustained by the complainant is irreparable or that the trespassing corporation is insolvent. (p. 989.)

PLEADING.—In a Suit to Enjoin a Corporation from Taking Land for a Public Use it is sufficient to allege the taking or occupying of the land, seeking to exercise the right of eminent domain, without complying with the provisions of the statute. (p. 989.)

Chapman & Gillespie and S. M. B. Coulling, for the appellant.

Rucker, Anderson, Strother & Hughes, Stokes & Sale, and W. B. Kegley, for the appellees.

357 McWHORTER, J. W. F. Harman, claiming to be the owner in fee of a tract of fifty-seven and sixty one-hundredths acres of land in McDowell county, and the owner of one undivided one-half of another tract adjoining the same containing one hundred and eleven and forty-nine one-hundredths acres, filed his bill in the circuit court of McDowell county

against the Caretta Railway Company, a corporation, Virginia-Pocahontas Coal Company, a corporation, George L. Carter and A. Collier, joining with him as coplaintiff in said bill the state of West Virginia as being interested in a part of the land involved by reason of alleged forfeiture to the state for the nonpayment of taxes and omission from the commissioner's books of said county; alleging that plaintiff Harman's title to the fifty-seven and sixty one-hundredths acres was conveyed to him by J. W. Hicks and A. B. Buchanon, who also conveyed their interest in the said one hundred and eleven and forty-nine one-hundredths acres adjoining the said fifty-seven and sixty one-hundredths acres, describing the same by metes and bounds, a copy of which description was filed as an exhibit with the bill; that said two tracts of land were front lands as to the Iaeger Southern Railway Company, then constructed and being constructed up the Dry Fork of Tug Fork of Sandy River; that back of said two tracts of land as to said Iaeger Southern Railway Company lies the holdings—several thousand acres—of the Virginia-Pocahontas Coal Company; that to ship on the Iaeger Southern Railway Company timber, lumber, or coal from the land of the Virginia-Pocahontas Coal ³⁵⁸ Company it was necessary to pass over the said two tracts of land of said plaintiff; that the Caretta Railway Company filed in the circuit court of McDowell county two applications to condemn a strip of land for the right of way for a railroad through both of said tracts of land as well as through the lands of other parties mentioned in said applications, the applications being similar so far as the interest of plaintiff was concerned; that plaintiff was made a party defendant and appeared to said applications; that commissioners were appointed in one case to ascertain just compensation for the land proposed to be taken, subject, however, to plaintiff's right subsequently to test the right of applicant to have said land condemned; that plaintiff filed his answer to said applications; that issue was joined between him and the Caretta Railway Company, and upon the hearing of the case the court held that said railway company was not entitled to condemn said strip of land because it sought to take same for private and not for public use, and the judgment of the court was entered accordingly. Plaintiff's defense to said applications was that the Caretta Railway Company would not be, and was not intended to be, a public railway, but a private road for the exclusive benefit of the Virginia-Pocahontas Coal Com-

pany, which was made a party to said applications; that the managers and directors of the latter company were the managers and directors of the Caretta Railway Company; that it was owned and controlled by said Virginia-Pocahontas Coal Company; that with one application pending and the other dismissed, work of grading a railroad along the right of way mentioned in the applications and sought therein to be condemned, beyond the boundary lines of said tracts, had steadily continued under the supervision of A. Collier, agent of the Virginia-Pocahontas Coal Company and the Caretta Railway Company, and the agents and employés of said company had graded said railroad up to the lines of said two tracts of plaintiff's land, and on June 12, 1906, commenced grading on said two tracts; that plaintiff notified the foreman in charge of the work on said date and requested him to stop work on said two tracts, but was told by said foreman that his instructions were to grade through said tracts and he would have to continue the work until he was stopped by the law; and alleging that unless they were ³⁵⁹ stopped the Caretta Railway Company and the Virginia-Pocahontas Coal Company would have the road graded as soon as possible through said two tracts and have in operation a railway over the same before the plaintiff could assert his rights thereto and prevent them from so doing; that George L. Carter owned all the stock, except four shares, of the Caretta Railway Company and was the largest stockholder of the Virginia-Pocahontas Coal Company; that he controlled and directed the policies of the two said companies; that A. Collier was general superintendent of both of said companies and well knew of the proceedings had on said applications and plaintiff's rights in the premises; that plaintiff had a tenant living in a house on the fifty-seven and sixty one-hundredths acres and also a sawmill and lumber-yard on the one hundred and eleven and forty-nine one-hundredths acres, and a house occupied by his hands; that no one else had possession of the fifty-seven and sixty one-hundredths acres, but that the Virginia-Pocahontas Coal Company also had a tenant on the one hundred and eleven and forty-nine one-hundredths acres; that plaintiff's title to the fifty-seven and sixty one-hundredths acres and one undivided half of the one hundred and eleven and forty-nine one-hundredths acres was superior to any other claimant's thereof, and that he was ready and willing to pay off and discharge all the unpaid taxes, dues and demands of the state thereon; and

prayed that the defendants, the Caretta Railway Company and the other defendants, their agents, servants and other employes be enjoined and restrained from constructing said railroad through said two tracts of land, and if before notice of injunction they had constructed said railroad, then they be enjoined from operating any cars upon said road or from in any way using the same, and from trespassing on same, and for general relief. Upon the filing of the bill, on the fifteenth day of June, 1906, the judge of the court in vacation granted a restraining order according to the prayer of the bill.

On the 28th of June, 1906, the defendants gave the plaintiffs written notice that on the 5th of July, 1906, the defendants would move the judge of the circuit court of McDowell county, in vacation of said court, to dissolve the temporary restraining order awarded in this case on the 15th of June, 1906. In pursuance of such notice, the plaintiff Harman appeared to resist said motion, the plaintiff state of West Virginia failing to appear, and thereupon the defendants by counsel filed their demurrer in writing, in which the plaintiff Harman joined, and the judge, being of the opinion ^{see} that said demurrer was well taken, decreed that the temporary restraining order be dissolved; and it was certified that upon the hearing of the motion all the exhibits with the bill not having been filed, plaintiff then filed the same. From which decree dissolving the injunction or restraining order the plaintiff Harman appealed.

The only question arising in the case is whether the judge erred in dissolving the restraining order. No action was taken, or could have been taken, in vacation concerning the demurrer further than the expression of the opinion of the judge that the demurrer was well taken. The constitution and statutes of this state are very jealous of the rights of its citizens and all others in property, and while it provides for the taking of private property for public use, it is very careful that the corporation desiring to take the property shall not enter upon or take and use the same for the purpose specified in the application for the taking thereof until a report of commissioners appointed for the purpose shall have been made and the compensation therein reported, paid to the party or into court. "Equity has jurisdiction to restrain the taking or damaging of private property for public use without just compensation, even though an action at law will

lie for the recovery of damages in such cases after the property has been so taken or damaged": *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396, syl. pt. 3. In *Wenger v. Fisher*, 55 W. Va. 13, 46 S. E. 695, syl. pt. 1, it is held: "An injunction is the proper remedy to prevent the location and establishment of a public road through private property, without prior compliance with the requirements of law." And in *Spencer v. Point Pleasant & O. R. R. Co.*, 23 W. Va. 406, syl. pt. 1, it is held: "If a railroad company take the land of any person without having first paid a just compensation to the owner or having secured it to be paid in the manner prescribed by law, the owner, as a matter of right, in any such case may enjoin said company from using said land for its purposes till the company have so paid or secured to be paid such just compensation as by section 9, article 3 of our constitution, companies are required to pay or secure to be paid before taking such land; and the observance of this provision of our constitution can be enforced in no other manner than by the granting of such injunction by a court of chancery." In ³⁶¹ the light of these authorities and many others which might be cited it is not necessary that a bill praying an injunction to prevent the location, construction and use of a railroad over the lands of the plaintiff should allege that irreparable injury will be sustained by the lands in question by reason of the acts complained of, neither is it necessary to allege the insolvency of the trespasser as it is insisted upon in the demurrer of the defendants. It is enough to allege the taking and occupation of the land by the corporation seeking to exercise the right of eminent domain in respect to such land without a compliance with the provisions of the statute under which only it can exercise such right, and appropriate to its own use the property of another.

The judge erred in dissolving the injunction, and the order dissolving it must be reversed and the cause remanded for further proceedings to be had therein according to law and the rules governing courts of equity.

Where a Change in the Grade of a City Street is being made in pursuance of valid legislative and municipal authority, a citizen, whether or not his land abuts on the street, whose property is not taken, but merely subjected to consequential damages, cannot have the work enjoined until his damages are ascertained and paid, under a constitutional provision that private property shall not be taken or damaged for public use without just compensation: Clemens v. Connecticut Mut. Life Ins. Co., 184 Mo. 46, 105 Am. St. Rep. 526.

Compare *Town of New Decatur v. Scharfenberg*, 147 Ala. 367, 119 Am. St. Rep. 81. But though a court of equity will not entertain jurisdiction at the suit of a person whose property is not actually taken, to enjoin the making of a public improvement, yet it has been affirmed that if the threatened act involves an actual taking, expropriation will be enjoined until the damages are ascertained and paid: *Elser v. Gross Point*, 223 Ill. 230, 114 Am. St. Rep. 326.

STARCHER BROS. v. DUTY.

[61 W. Va. 373, 56 S. E. 524.]

SPECIFIC PERFORMANCE of a Contract will not be Refused on the ground of misrepresentation and fraud, if the persons against whom the relief is sought accepted, a year after entering into the contract, a sum agreed to be paid for extending the time for its performance. (p. 993.)

SPECIFIC PERFORMANCE will not be Decreed if to decree it will create inequality resulting from old age, mental weakness, poverty, inexperience, ignorance, sex, etc., or where the terms of the contract are so indefinite or assented to with such lack of caution that the enforcement will produce an inequality not foreseen by the defendant, although the complainant was free from any intention to take an unfair advantage. (p. 993.)

PERPETUITIES, Definition of.—A perpetuity is “a future limitation, whether executory or by way of remainder, and either of real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future interests, and which is not destructible by the persons for the time being entitled to the property subject to the future limitation.” (pp. 994, 995.)

PERPETUITIES, Equitable Interest Subject to.—Whenever a contract raises an equitable right to property which the obligee can enforce in chancery by a decree for specific performance, such equitable right is subject to the rule against perpetuities. (p. 995.)

PERPETUITIES, What will not Take the Case Out of the Rule Against.—The mere fact that a contingent interest may be released by the persons in being and that a good title may thus be made is not enough to take the case out of the rule against perpetuities. (p. 995.)

PERPETUITIES, Options to Purchase Land with Provisions for Annual Renewals.—A contract which gives the right to purchase land within a specified time, and also contains an agreement that it may be extended yearly on the payment of a sum designated and that its terms and stipulations shall extend and apply to the heirs, assignees, executors and administrators of the parties, attempts to create an interest which is within the rule against perpetuities, and is therefore void. (p. 996.)

PERPETUITIES, Contracts Which are Void Because of cannot be Made Valid by Estoppel or Partial Performance.—A contract which attempts to create an interest forbidden by the rule against perpetuities does not become enforceable upon one of the contracting parties accepting a payment thereunder according to its provisions, nor can he be estopped from urging that it is void. (p. 996.)

Charles E. Hogg and Walter Pendleton, for the appellant.

Wyatt & Graham, for the appellees.

374 MILLER, J. The plaintiffs below have appealed from the decree of the circuit court of Lincoln county, denying them the specific execution of an option contract for the sale and purchase of a tract of one hundred and seventy acres of land. The court below, by its decree of December 8, 1905, denied the relief prayed for, dissolved the injunction awarded, and dismissed the plaintiffs' bill.

The contract, dated April 5, 1902, was signed by Jeff Duty and Elizabeth, his wife, by their marks, and was acknowledged before Philip Hager, Jr., a notary public, April **375** 7, 1902. The contract acknowledges a consideration of eleven dollars paid down, and was conditioned on the optionees electing to take and accept the land on or before April 5, 1903, and in that event that they should thereupon pay the optioners at the rate of six dollars per acre for all the land, to be ascertained by a survey made in the usual way at the expense of the purchasers, to whom the sellers were to execute an apt and proper deed of general warranty, clear of all encumbrances. The contract also contained the proviso that Starcher Brothers might, prior to April 5, 1903, pay to the first parties, or deposit "to their credit in the Huntington National Bank, their heirs, assigns or personal representatives, the sum of ten dollars, which shall constitute and be in full consideration for the extension of this option and agreement for the period of one year from said last mentioned date, and upon payment thereof this contract and option shall be so extended." There is then superadded this further provision, and the one upon which this litigation mainly depends: "*And said Starcher Brothers may have this option and agreement so extended from year to year upon the payment of said sum annually as aforesaid.*" By the last clause of the contract also, "*it is understood that the terms and stipulations of this agreement shall extend and apply to the heirs, assigns, executors and administrators of both parties hereto.*"

This record shows that this contract and other contracts for lands taken from other persons residing in the same locality, including the one taken from J. F. Duty, a brother of Jeff Duty, were prepared on printed forms provided by the optioners. At the time the contracts with Jeff Duty and J. F. Duty were procured C. W. Starcher, a member of the firm of

Starcher Brothers, and one Bee, employed by the firm to assist in taking these contracts, met Jeff Duty and his brother, J. F. Duty, on Broad Branch in Lincoln county, where they agreed to give an option on their lands for the period of two years, upon terms substantially as set forth in the written contract, but declined to make them run for a longer period. And they both say that the contracts as executed were explained to them by Starcher and Bee to be limited to two years. There is, however, some conflict of evidence on this subject—not important, in our view of the ³⁷⁶ case, to be considered upon this appeal. There is no denying the fact that Jeff Duty and his wife Elizabeth, and his brother J. F. Duty, were all ignorant and illiterate persons. Neither Jeff Duty nor his wife could read or write. Philip Hager, Jr., the notary public who was employed by Bee, the agent of Starcher Brothers, to procure the acknowledgments to these contracts, testifies that he was instructed by Bee not to read the option contracts to these people.

As soon as these contracts were taken and acknowledged, they were promptly recorded in Lincoln county. The optionees did not elect to take the land the first year, but instead, and prior to April 5, 1903, they deposited ten dollars in the bank as stipulated in the contract, carrying the option over to April 5, 1904—the period of two years which, according to the professed understanding of the optioners, was the extreme limit of time to which it would go. But these prospective purchasers did not elect to take the land during the second year; but, depending upon the provision of the contract for extending it from year to year, they again and prior to April 5, 1904, made a second deposit of ten dollars in the bank to the credit of optioners, which they received from and receipted for to the bank—thereby, according to the terms of the contract, extending it to April 5, 1905. It is also shown that Starcher Brothers made a third deposit in the bank to the credit of Duty prior to April 5, 1905, but which was never accepted by Duty; and in their bill the plaintiffs charge, and it is proven, that prior to April 5, 1905, they gave notice to Duty of their election to take the land and proposed to make the survey and demanded a deed, which Duty refused to execute. But in the meantime and in March, 1905, after notifying the plaintiffs that his contract with them had expired, Duty and wife undertook to sell the timber on the land to the defendants, the Williams Lumber Company, a

copartnership, for seven hundred and fifty dollars, Duty depositing the deed and the lumber company the cash payment and the notes for the deferred payments in a bank at Huntington until all encumbrances should be removed. Besides their defense that the contract did not give the plaintiffs an option to purchase beyond April 5, 1904, and reciting their inability to read the contract and their dependence ³⁷⁷ upon and trust in the plaintiffs to give them proper information and instructions in regard to the meaning of the contract, they further say that, if they executed a writing containing any provision for annual renewals, "they were induced to extend the same by misrepresentation and fraud." They also plead illegality of the provision of the contract for annual extensions of the option.

The record, therefore, presents two questions for our consideration: First, and conceding it to be valid, should a court of equity, under all the circumstances, specifically enforce the contract; and, second, is the contract a valid one which the court, with judicial discretion, and if so disposed, can enforce? It seems quite clear, although conceding that Duty and wife may have been overreached and induced by misrepresentation and fraud to execute a contract to run for more than two years, nevertheless, having accepted the ten dollars deposited to their credit in March, 1904, to extend the contract for a year beyond the two years, they ought to be concluded thereby and required to execute the same, and they will be unless there is something inherent in the contract itself and so fatal to its life and validity as to forbid its enforcement. If Duty and wife had stood upon their contract, as a contract for two years, and had declined to accept the money deposited to extend it for a longer period, and considering the very unusual and unreasonable proviso for annual extensions, and their disadvantages of ignorance and inexperience, we would have been disposed upon this ground alone, regardless of the question of the validity of the contract presented by the record, to withhold the remedy of specific performance. This remedy will be denied, even though the plaintiff was free from any intention to take an unfair advantage, if the actual result is an inequality, resulting from old age, mental weakness, poverty, ignorance, inexperience, sex, etc., or where the terms of the contract are so indefinite, or assented to with such lack of caution, that the enforcement of the con-

tract would produce an inequality not foreseen by the defendant: 6 Pomeroy's Equity Jurisprudence, ed. 1905, 785.

This brings us to the consideration of the pivotal question in this case, viz., the validity or invalidity of the contract. It is claimed by the defendants that the provision of the contract, ³⁷⁸ "and said Starcher Brothers may have this option and agreement so extended from year to year upon the payment of said sum annually as aforesaid," and which provision by the terms of the contract is made to "extend and apply to the heirs, assigns, executors and administrators of both of the parties hereto," creates such a present right to an interest in the land which may arise at a period beyond the legal limit as to bring the contract within the rule against perpetuities, and that the contract is therefore absolutely void and unenforceable, at law or in equity, at any period of its existence. On the other hand the plaintiffs insist, in the first place, that Duty and wife, by accepting the second payment of ten dollars paid into bank to their credit prior to April 5, 1904, thereby estopped themselves from asserting that the contract was to run only for two years; second, that it is permitted to the owner by contract to suspend his right of disposition of his property only so it shall not offend against the law of perpetuities, and that to bring the contract within this rule the alienation must be restrained for the entire period of the life of the owner and twenty-one years and a fraction thereafter, and which they claim is not the legal effect of the contract. The authorities relied on in support of this theory are *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101; *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150; *Brush v. Beecher*, 110 Mich. 597, 64 Am. St. Rep. 373, 68 N. W. 420, and other like cases relating to contracts for the perpetual renewal of leases. It is claimed that this contract partakes of the nature of such lease contracts. The answer to this argument, however, is that leases of land like those considered in the authorities cited create vested estates in the lessees, and the covenant for perpetual renewal is one which runs with the land, without any restraint upon the right of alienation by the lessor of his property subject to the lease, and hence the authorities relied on are inapplicable: *Gray's Rule Against Perpetuities*, sec. 230.

The best definition of a perpetuity and the one most generally adopted by the courts and text-writers is that of Mr. Lewis (*Lewis on Perpetuities*, 164), which is as follows: "A

future limitation, whether executory or by way of remainder, and either of real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within ³⁷⁹ the period fixed and prescribed by the law for the creation of future interests, and which is not destructible by the persons for the time being entitled to the property subject to the future limitation": Hogg's Equity Practice, sec. 554. Chief Justice Gibson in *Hillyard v. Miller*, 10 Pa. 326, says that "a perfect definition of a perpetuity has not been given, and the nearest approach to it is found in Lewis on Perpetuities." Mr. Gray (Gray's Rule Against Perpetuities, secs. 329, 330), on the authority of the leading case of *London & S. W. R. Co. v. Gomm*, 20 Ch. D. 562, says: "Whenever a contract raises an equitable right in property which the obligee can enforce in chancery by a decree for specific performance, such equitable right is subject to the rule against perpetuities." The English case cited by Gray is particularly applicable, for in the deed from a railroad company the grantee covenanted with the grantor that he, his heirs and assigns, would at any time, on receipt of one hundred pounds, reconvey the land to the company. The grantee subsequently sold and conveyed the property, and the railroad company subsequently sued the then owner for a specific execution of this contract. Kay, J., who decided the case below, while regarding the rule against perpetuities, did not think it applicable to that case, because in his opinion the contract did not create any estate or interest, properly so called, in the property, nor contain any covenant running with the land or binding on the purchaser. On appeal, however, Jessell, M. R., with whom Sir James Hannon and Lindley, L. J., concurred, and reversing the decree below, held that the option to purchase gave an equitable interest which was within the rule against perpetuities, and that, judged by that rule, it was void. The court, said Justice Kay, was in error in thinking that the contract did not create any interest in land: See Gray's Rule Against Perpetuities, sec. 485.

The mere fact that a contingent interest may be released by the persons in being, and that a good title may thus be made, is not enough to take the case out of the rule: *Winson v. Mills*, 157 Mass. 362, 32 N. E. 352.

This rule against perpetuities is aimed not only against restraints on the alienation of present interests, but is also directed against the creation of future interests in property:

380 21 Eng. Rul. Cas. 159, note; Gray's Rule Against Perpetuities, c. 7. Unless, therefore, we can read into this contract some terms of limitation requiring the optionees to exercise the right to take the property within some reasonable time, not too remote, it is clearly within the rule and must be declared void. To attempt this would be to make a new contract for the parties, for they have provided that the option may be extended annually to an indefinite period, and may be to a time beyond which the rule against perpetuities will not allow. The contract, therefore, is illegal, and was void from its very inception, and everything done by either of the parties designed to carry the contract into effect which is auxiliary thereto must be considered as unauthorized and inoperative: *Fosdick v. Fosdick*, 6 Allen, 41.

Such being the law of the contract, we hold that it was void and unenforceable from the beginning, and that it was given no vitality by payments made and received for annually extending it.

We therefore affirm the decree of the court below, with costs to the appellees.

The Rule Against Perpetuities is the subject of a note to *In re Walkerly*, 49 Am. St. Rep. 117. The perpetual renewal of leases is discussed in the recent note to *Duke v. Board of Education*, ante, p. 448.

REED v. BACHMAN.

[61 W. Va. 452, 57 S. E. 769.]

TENANT IN COMMON, Ouster of.—The actual ouster of one tenant in common by another cannot be presumed where the possession has become tortious and wrongful by the disloyal acts of the cotenant, which must be open, continuous and notorious, so as to prevent all doubt of the character of his holding or the want of knowledge thereof by a cotenant. This conduct must amount to a clear, positive and continued disclaimer and disavowal of his cotenant's title and an assertion of an adverse right; and knowledge must be brought home to his cotenant. (p. 1000.)

TENANT IN COMMON—Ouster.—The Taking of All the Rents and Profits by one cotenant will not amount to an ouster of another. (p. 1002.)

A TRUSTEE cannot Deny the Trust and Plead the Statute of Limitations without a disavowal of the trust, with notice to the beneficiary. (p. 1002.)

TENANT IN COMMON—Ouster.—Mere Silent Possession by One Cotenant, however long continued, will not work an ouster and cause the statute to bar another cotenant. (p. 1003.)

TENANT IN COMMON—Ouster.—Knowledge by a Cotenant of an Adverse Claim made by another cotenant is essential to an ouster. The cotenant not in actual possession is not bound to inquire respecting the possession held by his cotenant, because each can repose confidence in the other's good faith. (p. 1003.)

TENANT IN COMMON—Ouster.—Neither Taking a Deed for Real Property nor the exclusive receipt of rents and profits by one of the cotenants amounts to an ouster of the other. (p. 1003.)

TENANT IN COMMON.—The Purchase of an Outstanding Title to the Common Property by one of the cotenants is by law deemed to be for the benefit of all. Hence, such purchase cannot be set up by one tenant against another. (p. 1003.)

COTENANTS, Heirs of cannot Set up an Adverse Title.—Where one of the cotenants purchases an outstanding title and is incapacitated by law from setting it up against his fellow-tenants, his heirs, on his death, are subject to the same incapacity. (p. 1004.)

A TENANT IN COMMON Purchasing the Property of the Cotenants at a Sale Under a Deed of Trust given to secure the payment of an indebtedness from all the cotenants cannot hold the title against the others, especially when they have paid their share of the indebtedness and he has not paid his. (p. 1005.)

TENANT IN COMMON—Adverse Possession.—A conveyance to a cotenant without possession taken under it can never amount to an ouster, as where he is in possession before such purchase. (p. 1005.)

TENANTS IN COMMON, Purchasers from One of Several, Notice to.—Purchasers or lessees from a cotenant are bound by the rules of law respecting the acquisition of an adverse title by him, where the original deed showed that he once held the property as a cotenant, for they are chargeable with notice of his title and of the law. (pp. 1006, 1008.)

TENANTS IN COMMON—Laches.—The title of a tenant in common cannot be lost by laches when it is not barred by the statute of limitations. (p. 1007.)

TENANT IN COMMON—Jurisdiction in Equity to Compel an Accounting.—Equity has jurisdiction to entertain a suit for partition by a tenant in common and also for an accounting of rents and profits. This rule applies against one who has, without lawful right, under one cotenant, taken oil from the property of the cotenancy. (p. 1007.)

H. P. Camden, R. E. Bills, G. D. Smith and Edward A. Brannon, for the appellant.

Van Winkle & Ambler, Clyde B. Johnson, J. H. W. Simpson and John F. Barron, for the appellees.

⁴⁵² BRANNON, J. In November, 1903, Joseph S. Reed began a suit in equity against the administratrix and heirs of Bachman, the Vespertine Oil Company and others. Numerous demurrers were ⁴⁵³ filed by Bachman's representatives, and other defendants, relying upon want of equity in the bill,

laches, staleness of demand and the statute of limitation. The bill was dismissed on demurrer, and Reed appeals.

As appears from the bill in 1870, Paterson, Douth and Bradford conveyed a tract of fifteen hundred acres of land in Pleasants county to Reed, Reno, Reeves and Bachman for the consideration of five thousand five hundred dollars, of which three thousand five hundred dollars was paid cash, and for the residue Ree, Reno, Reeves, Bachman and Swope united in a deed of trust conveying the land to Hall, trustee. Swope was not included in the deed, but intended to take a fifth interest. Reed advanced for Swope his share of the down payment, but Swope never repaid Reed in money. Soon after said parties acquired said land Reed, Reno, Reeves, Bachman and Swope entered upon the manufacture of lumber from the timber on the land. Bachman was placed by the parties in exclusive management and control to carry on the work as trustee and agent of his cotenants. In the panic of 1873 the business failed and was abandoned. In July, 1874, Reeves conveyed his interest to Reed and Bachman, and they made a deed of trust on the Reeves interest to secure payment of the purchase money going to Reeves. Reno transferred his fifth to Reed, but made him no deed for it. Reed claimed also the Swope interest, having paid for it. Reed claimed seven-tenths. Bachman is conceded to own his original fifth interest and half the Reeves fifth, making a three-tenths interest in the tract. In 1877 the Reeves fifth was sold under the deed of trust made by Reed and Bachman to secure Reeves its purchase money, and Cain and Douth became purchasers, and took a deed from the trustee for said fifth, and a few days thereafter Cain and Douth conveyed the said Reeves fifth to Bachman. Bachman never paid any part of the purchase money on the original purchase. Reed paid more than his fifth. He paid fully his share of the deferred purchase money. A few days after Bachman had so acquired the Reeves fifth, Douth, one of the creditors of the Reeves interest, and also a creditor in the original deed of trust given to Hall in 1870 by Reed and others, on the fifteen hundred acres to secure its purchase money, executed a release to Bachman releasing the lien as to two undivided fifths of the tract of fifteen hundred acres. A few ⁴⁵⁴ days after this release sale was made by the said trustee under the trust deed given in 1870 on the fifteen hundred acres to secure its purchase money, the sale being the three-fifths of the said tract and Douth became the pur-

chaser, and took from the trustee a deed for the three-fifths, and a few days later Doult conveyed said three-fifths to Bachman. Bachman has been in the sole exclusive possession of the land since about 1870, when the joint lumber business began. He went upon the land into a house built on it by the joint owners about 1870, and after the abandonment of the lumber business by the joint owners in 1873 Bachman remained in sole possession. From 1870 to 1885, when he died, Bachman was in sole possession, cutting timber from the land, using the land, taking all its rents and profits, and rendering no account thereof. Since Bachman's death his widow and heirs have continued such possession, taking the rents and profits, leasing to various ones for oil, and they developing oil, and paying shares of it to the Bachmans, and the Bachmans rendering no account thereof. No demand was ever made by Reed on Bachman or his heirs for an account of rents and profits. Reed resided in Pennsylvania, and as the bill states, still trusting Bachman as his cotenant, agent and trustee in possession of the land and ignorant of the sales under the trust deeds until 1884. Reed had not seen Bachman from 1874 to 1884, and had had no communication with him. The bill says that in 1884 Reed met Bachman in Pittsburgh, and Bachman told Reed that in order to protect their joint interests he had certain interests in the land sold under the deeds of trust, and had bought them in for the joint benefit of Reed and himself, and that Bachman, by agreement with Reed then made, was to remain in possession of the whole tract as Reed's cotenant and trustee and use and occupy the dwelling-house in consideration of payment of all taxes. The bill says that Reed knew nothing of Bachman's death until the year 1900 or 1901. The bill states that when the lumber business failed Reed was without means of support from insolvency, and at the age of sixty years was beginning life over again, and paid no attention to the land, because he regarded it valueless to him so long as he was without money to improve and cultivate it, and for the further reason that he had placed Bachman in full charge and ⁴⁵⁵ control of the land as his agent and cotenant, and trusted implicitly to him to protect Reed's interest. The bill charges that Bachman derived from the land much money, amply sufficient to discharge the said deeds of trust, and more; the bill charges that Bachman had plenty of money in his hands belonging to himself and Reed to pay off the trusts, but that he refused to pay them in order to

have sales made under them, so that he might buy in the land and hold it in sole ownership; that to that end he fraudulently and wrongfully colluded and conspired with the trustees under said deeds of trust, and with Douth and Cain, purchasers under the sales under said trusts, to accomplish the end aforesaid. The bill states that Reed became embarrassed in 1873 and in 1876 made an assignment to Dicken of his property, including his interest in this land, for the payment of his creditors; but that his other property discharged his debts, and that Dicken reconveyed his interest in this land to him by deed, 25th of September, 1903. The bill further states that Bachman's heirs had by certain oil companies as lessees caused large quantities of petroleum oil to be taken from the land, and that large amounts of money had been received therefrom by said heirs in the way of rentals and royalties, and by the lessees under the Bachman right, without any account therefor to Reed. The nature or character of the estates conferred by these leases is not specified in the bill. The bill set up the title claim of Bachman, and claimed that the said purchases by Bachman derivatively from said trust deeds were for the common benefit of Reed and Bachman as cotenants, and that Bachman could not claim under them for his sole ownership, and prayed that Bachman's heirs and their lessees who had taken oil from the land be required to account for Reed's interest therein, and that the land be partitioned between him and Bachman's heirs according to their respective rights.

In our conception of this case the question is, Is Reed barred by adverse possession under the statute of limitations? "An actual ouster of one tenant in common cannot be presumed, except where the possession has become tortious and wrongful by the disloyal acts of the cotenant, which must be open, continuous and notorious, so as to ⁴⁵⁶ preclude all doubt of the character of his holding or the want of knowledge thereof by his cotenant. This conduct must amount to a clear, positive and continued disclaimer and disavowal of his cotenant's title, and an assertion of an adverse right; and a knowledge of this must be brought home to his cotenant": *Bogges v. Meredith*, 16 W. Va. 1. "The possession of one parcener is ordinarily regarded as the possession of all his coparceners, and such possession being subordinate and not adverse cannot, however long continued, operate as a bar to his coparceners. A parcener in possession may disseise

his coparcener; and from the time of such disseisin his possession will be adverse. Where one parcener occupies the common property notoriously as the sole owner, using it exclusively, improving it and taking to his own use the rents and profits, or otherwise exercising over it such acts of ownership as manifest unequivocally an intention to ignore and repudiate any right in his coparceners, such occupation or acts and claim of sole ownership will amount to a disseisin of his coparceners, and his possession will be regarded as adverse from the time they have knowledge of such acts or occupation and claim of exclusive ownership. It is the intention of the tenant or parcener in possession to hold the common property in severalty and exclusively as his own, with knowledge or notice to his cotenants of such intention, that constitutes the disseisin. The notice or knowledge required must be actual, as in the case of a disavowal or disclaimer of any right in his cotenants; or the acts relied on, as in the case of expulsion, making costly improvements and exercising exclusive ownership, must be of such an open, notorious character as to be notice of themselves": *Cooey v. Porter*, 22 W. Va. 120. These old-time doctrines have been uniformly held by this court in many decisions, among them *Justice v. Lawson*, 46 W. Va. 163, 33 S. C. 102, and *Cochran v. Cochran*, 55 W. Va. 178, 46 S. E. 924. *Parker v. Brast*, 45 W. Va. 399, 32 S. E. 269, says: "As the possession of one cotenant is the possession of all, laches, acquiescence, or lapse of time cannot bar the right of entry of a cotenant until the actual disseisin has been effected by some notorious act of ouster brought home to his knowledge." Upon these principles, and under the facts stated in this bill, it is impossible to say that Reed's right has become barred by adverse possession. ⁴⁵⁷ There has been no adverse possession. The parties were cotenants and there has been no legal ouster. They started out as joint tenants in the year 1870. After several years of joint ownership, with Bachman in exclusive possession, Bachman acknowledged a continued joint tenancy with Reed, because in 1874 Bachman joined with Reed in acquiring the Reeves fifth interest. Thus he acknowledge the continued joint right in a most decisive manner. The two joint tenants, Reed and Bachman, united in acquiring the interest of a third joint tenant. Three years later Bachman acquired interests sold under the deeds of trust. Seven years after he had acquired such interests he met Reed and told

him that he had caused the sales under the deeds of trust; admitted that he had caused such sales to be made; but stated to Reed that he had done so to save the interests of Reed and himself jointly, and had purchased for their joint benefit. Thus, a year before his death, Bachman, in good faith to his brother tenant, admitted that brother's continued right, and Reed and he made the further agreement that Bachman should remain in possession of the land as he had done for years, and use it and keep the taxes paid. The law required Bachman, if he intended to claim to his exclusive ownership, to say so to Reed. Instead of doing that he expressly told him that he made no hostile claim acquired under the said deeds of trust sale. A year before Bachman's death by this interview and contract for continued friendly possession Bachman lulled Reed into sleep and a feeling of security, and it would be a gross wrong and against law to allow Bachman or his heirs to have prevailed under the theory of ouster when there was no ouster, and when Bachman recognized Reed's right. Can it be said that Bachman's taking the rents and profits can operate as ouster? Such taking will not alone amount to ouster of one joint tenant by another; but the facts stated in the bill show that Bachman did not intend that his taking the rents and profits should so operate, because in 1884, by the conversation and contract stated, he conceded that his taking rents and profits prior to that date had been without intent to set up adverse claim to the land; and by it also he agreed that his taking the rents and profits in future should not so operate, because such taking of rents and profits was ⁴⁵⁸ but in pursuance of the agreement that their estate was one of joint ownership, and that Bachman should continue in possession and take the rents and profits and pay the taxes. And, moreover, by this agreement between Reed and Bachman in 1884, as well as in 1870, Bachman agreed to hold in trust, made himself a trustee, if it were necessary to say so, as it is not, because he was a cotenant in joint tenancy, which is enough. A trustee cannot deny the trust and plead the statute without a disavowal of the trust with notice to the beneficiary: *Nease v. Capehart*, 8 W. Va. 95. It will be seen from the law above quoted from West Virginia decisions that mere silent possession by one joint tenant, however long continued, will not work an ouster and cause the statute to bar another joint tenant. There must be some overt, open

notorious act of a character to indicate an intention of adverse claim, so as to preclude all doubt of the character of his adverse holding, whereas taking profits by one cotenant in possession is but the exercise of a legal right, subject to an accounting to another for his share. There must be clear, positive, continued disclaimer of his cotenant's right and an assertion of his own adverse right. And that is not enough. His cotenant must know of such adverse claim and tortious acts. He is not bound to inquire, because he can repose in confidence of his cotenant's good faith. That cotenant must notify him of his adverse claim, or, at any rate, he must know of it. The burden is on Bachman to show that Reed knew of both the purchase and adverse claim under it: *Buchanan v. King's Heirs*, 22 Gratt. 414. No matter what the acts of one cotenant may be, whether by taking deed for the whole or by taking rents and profits, or what not. That will not do; for our decisions say with emphasis that such knowledge or notice of hostile claim on the part of the cotenant must be shown. There is not a particle of appearance on the face of this bill, which we must take to be true on demurrer, that Reed, living in a distant place, had notice or knowledge of any adverse claim. The bill distinctly states that Reed had no such notice of any adverse claim by Bachman. That would be enough to repel the idea of ouster. But, more than that, the bill states that in 1884 Bachman told Reed that he had purchased the interests sold under the deeds of trust for their joint benefit, ⁴⁵⁹ and would continue in possession as cotenant and trustee and take rents and pay taxes, holding thus for the benefit of both. Thus, an indispensable element to constitute ouster of one joint tenant by another is absent in this case, namely, notice or knowledge of adverse claim; on the contrary, the bill states acts showing an assurance by Bachman to Reed of continued joint ownership. There was in fact no adverse claim to call for notice.

In view of what has been said, there being no adverse claim under the deeds, taken by Bachman from the purchasers under the deeds of trust, and no notice of adverse claim, but, on the contrary, a disavowal of adverse claim under them by Bachman, it is hardly necessary to advert to the principle that when one joint tenant purchases an outstanding title to the common property, he cannot set it up against his cotenant, because the law makes the purchase

for the benefit of the common title. This is spoken by many decisions. In *Parker v. Brast*, 45 W. Va. 399, 32 S. E. 269, it is held that where a cotenant permits the common property to be sold for taxes, and directly or indirectly secures the title in his own name, his deed will be avoided at the instance of his cotenant, or he will be held to be a trustee holding the title for their mutual benefit. The late case of *Clark v. Beard*, 59 W. Va. 669, 53 S. E. 597, so holds. For that additional reason Bachman cannot set up a claim under those deeds, nor can his heirs. His heirs hold as he held; they hold under his contract of 1884, bound by it: *Gilchrist v. Beswick*, 33 W. Va. 168, 10 S. E. 371; *Bowers v. Dickinson*, 30 W. Va. 709, 6 S. E. 335; *Forer v. Forer's Exrs.*, 29 Gratt. 134; 17 Am. & Eng. Ency. of Law, 2d ed., 676.

But it is said that the creditor under one of those deeds of trust for purchase money made in 1870 released the lien of such deed as to Bachman's interest, and that would justify Bachman's acquirement of the title sold under the deed of trust. Plainly, this is not so. The debt was common to all the joint tenants; they all owed it; the land was the common property of all. What part of the land did that release refer to? What two-fifths? Not simply Bachman's. It only released the lien as to two-fifths of the entire tract, not any particular two-fifths. Why so? Because they were joint tenants. One of the unities of joint tenants is unity of title. Both Bachman and Reed held title. Another unity ⁴⁰⁰ is that of possession. "Joint tenants are said to be seised per my et per tout, by the half or moiety, and by all; that is, they each of them have the entire possession, as well of every parcel as of the whole. They have not, one of them a seisin of one-half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety": 2 Blackstone's Commentaries, 182. Reed had in law possession of every inch and every acre, and Bachman had possession of the selfsame inch and acre. The release did not break the unities. It did not cease the joint tenancy. After it that joint tenancy remained the same as before. Hence, Bachman could not so purchase, as a stranger could, and get rid of the rule that purchase by one joint tenant of an adverse claim affecting the common property inures to the benefit of all. And that release was for the

benefit of all. It was only a release, not a deed conveying title to Bachman. Reed's interest yet continues in the interests released.

It cannot be said that Reed, to get the benefit of Bachman's purchase, must contribute to its cost. Bachman made no such demand in his interview with Reed in 1884. Besides, Bachman had money in his pocket, derived from the land, belonging to Reed to reimburse his outlay. Furthermore, before Reed could be said to have abandoned the benefit of the purchase it must appear, not only that he knew of it, but knew of "an adverse claim set up by his cotenant. He may reasonably presume that the purchase was to support, not defeat, the common title": *Cecil v. Clark*, 44 W. Va. 660, 30 S. E. 516. He may be in debt for contribution, but the purchase does not constitute ouster and hostile possession. And for whose debt were the deed of trust sales made? Bachman's. Reed had paid his share of the debts, Bachman none. The idea is not to be tolerated that Bachman could hold against Reed under a sale made for Bachman's debt. He caused the sale by his nonpayment of his own debt. Could he in a court of equity take advantage of his own wrong? Reed could say, "I did not cause the sale; you did." *Freeman on Cotenancy*, section 158, says that where the cotenant purchasing at a sale is himself in default for not ⁴⁶¹ making payment there is no doubt that his purchase cannot be enforced against his companion, except for fair contribution. Purchase at a tax sale by one under duty to pay the taxes is only payment. The purchaser gets no estate against the owner: *Williamson v. Russell*, 18 W. Va. 612.

And then there is another consideration repelling adverse claim to Bachman on the title acquired under the deed of trust sales. It has been a question whether a purchase by one joint tenant of the entire property and entry into possession under it is an ouster; but all admit that "a conveyance alone, without possession taken under it, can never amount to an ouster": *Freeman on Cotenancy*, sec. 226. So holds *Hannon v. Hannah*, 9 Gratt. 146. Now, Bachman never made any fresh entry under these deeds, but simply continued on as before. And moreover, he did not purchase the whole, but only an undivided interest, and being owner of other interests he would be presumed in law, if he had for the first time entered after his purchases, to have entered under his own former interests: *Martin v. Thomas*, 56

W. Va. 220, 49 S. W. 118; Prescott v. Nevers, 4 Mason C. C. 326, Fed. Cas. No. 11,390; Culler v. Motzer, 13 Serg. & R. 359, 15 Am. Dec. 604. But why speak of this when Bachman was already in possession and took no new possession after his deeds? It is like the doctrine of part performance under oral contract. The purchaser's possession must be clearly under and in execution of the contract. No prior possession will do. Putting a tax deed for the whole tract on record is no ouster of a cotenant unless he knows of the adverse claim: Cocks v. Simmons, 55 Ark. 104, 29 Am. St. Rep. 28, 17 S. W. 594. In this connection I will remark that any purchasers or lessees under Bachman or his heirs would likewise be bound by the rule that when Bachman purchased from the purchasers under the trust deeds he purchased for the benefit of the common title. Everyone must look back and notice things in the chain of title under which he acquires: Williamson v. Jones, 43 W. Va. 562, 64 Am. St. Rep. 891, 27 S. E. 411, 38 L. R. A. 694. The original deed showed that it was a joint tenancy and the deeds of trust were made by joint tenants, and Bachman's title under purchases under the deeds of trust came from that source, and persons acquiring rights under Bachman must know the law, and it would constitute notice of the rights of a ⁴⁶² cotenant. For these reasons, there can be nothing in the claim that Reed is barred by the statute of limitation. And it does not appear from the bill that they were complete purchasers or how they became such purchasers, whether by oral or written executory contracts, or by deed of conveyance.

Laches and staleness of demand. Manifestly, this defense does not apply to the case. If Reed's right is not lost by the statute, it is not lost by laches: Waldron v. Harvey, 54 W. Va. 608, 102 Am. St. Rep. 959, 46 S. E. 603. But I have said that laches has no application in this case. Why? Because Reed was a joint tenant with Bachman. We have seen from law quoted above that the possession of one joint tenant is the possession of another, and that no mere silent possession by one for any length of time will alone divest the right of a brother tenant; that brother tenant may be in any part of this earth distant from the land, and he may repose in silence and confidence that his fellow's occupation will not destroy his right. He may assume this and sleep in composure. It is for the occupying tenant to let him know

that he claims in hostility. The burden of showing this rests on him. Diligence is not required of the absent brother. Where there is a deed procured by fraud and mistake, for instance, diligence after notice is required, and suit must soon be brought; but not so as to joint tenants. That brother is put by the law under no duty of inquiry or diligence. If he chooses to let a cotenant retain possession and take the profits, he can do so. He is guilty of no negligence if he does not inquire. He may sleep in restful confidence of the good faith of his cotenant under the law of cotenancy. A cotenant cannot lose his right by mere silence. That does not show acquiescence in loss of his estate: *Justice v. Lawson*, 46 W. Va. 163, 33 S. E. 102.

It is suggested that there is no jurisdiction in equity; but I do not think it is seriously suggested. This is a suit for partition. Secondly, it is a suit by one joint tenant against another and those acting under him for an account of rents and profits, and it is very well settled that one cotenant can go into equity to make another cotenant liable for taking more than his share of the profits while occupying the whole of the common property: *Rust v. Rust*, 17 W. Va. 901. And ⁴⁶⁸ a person who has without lawful right, under one cotenant, taken oil may be held accountable therefor in equity: *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891, 27 S. E. 411, 38 L. R. A. 694. There is no question of equity jurisdiction.

Our decision is to reverse the decree, overrule the demurrers to the bill, and remand the case with leave to answer, and for further proceedings.

ON REHEARING.

A petition for rehearing, while admitting the correctness of the above opinion as between Reed and Bachman, complains of it as between Reed and the oil lessees under Bachman. I answer at once that this concession logically yields the case. But let us go to the petition. It complains of that passage in the opinion that purchasers or lessees under Bachman or his heirs would be bound by the rule that when Bachman purchased from the purchasers under the trust deeds he purchased for the common title. First, the petition says it was not necessary to the decision. Did not these oil lessees demur? Thereby they said that the bill contained no call for relief against them. The counsel say

in argument that no relief can be given because their clients are innocent purchasers. They thus demand decision of this point. The facts as to this question appear in the bill and exhibits. This plainly called for decision of their cases. We had to say whether the bill showed in its facts and exhibits notice to them of Reed's right; for if it did, they had not that defense, but if it did not, their defense would be good. So, I cannot see why this matter was not involved in the decision.

Then, is the proposition of law above stated sound? The petition suggests that authority does not support it. The record shows that the land was conveyed originally to four joint tenants; they made a deed of trust for its purchase price to Hall, trustee, on the whole tract. Two of them, Bachman and Reed, made a deed of trust on the share they bought from Reeves for its purchase price. Sales were made under those deeds of trust to Cain and Douth, and those purchasers conveyed their purchases to Bachman. He thus bought in shares under encumbrances created by Bachman ⁴⁶⁴ and Reed, a common joint encumbrance; that is, Bachman simply removed an encumbrance on the joint estate. The deeds from the trustee declared that the land was the same originally conveyed to the four joint tenants. So did the deeds of trust. Now, a purchaser or lessee must look back through the title papers by which land comes, and is held to have notice of all facts appearing in them. Whether he reads them or not, he is affected with such notice—actual, if he reads them; constructive, if he does not read them: Hogg's Equity Principles, 488; *Morris v. Terrell*, 2 Rand. 6; *Graff v. Castleman*, 5 Rand. 195, 16 Am. Dec. 741; *Burwell v. Fauber*, 21 Gratt. 463; 23 Am. & Eng. Ency. of Law, 2d ed., 508. And such constructive notice is just as effective in law as actual notice: 21 Am. & Eng. Ency. of Law, 2d ed., 582; *Cain v. Cox*, 23 W. Va. 594. In addition, the law charges the purchaser with notice; not merely of facts on the face of the title papers, but also with notice of those facts which they suggest for prudent inquiry. As the opinion in *French v. Loyal Co.*, 5 Leigh, 627, says, "they [the cases] show that wherever ordinary prudence would suggest an inquiry, notice is imputed by law, and the party is charged with everything of which the strictest inquiry would have put him in possession." The court said in *Cain v. Cox*, 23 W. Va. 594: "It

is now considered everywhere that the settled doctrine in equity is, that what is considered as sufficient to put a person on inquiry is considered as conveying notice; for the law imputes to a person knowledge of a fact, of which the exercise of common prudence and ordinary diligence must have apprised him": 21 Am. & Eng. Ency. of Law, 2d ed., 584. See *Lamar's Exr. v. Hale*, 79 Va. 147. "A purchaser of the common property from such cotenant, with notice of the character of his title, will be limited in his holding to the actual interest of his grantor in such property": *Parker v. Brast*, 45 W. Va. 399, 32 S. E. 269. See *Hogg's Equity Principles*, 487, 488. The purchaser "is bound not only by actual, but also by constructive, notice, which is the same in effect as actual notice. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or ears to the inlet of information, ⁴⁶⁵ and then say he is a bona fide purchaser without notice": *Wood v. Krebs*, 30 Gratt. 708. "Means of knowledge with the duty of using them are, in equity, equivalent to knowledge itself: *Cordova v. Hood*, 17 Wall. 1, 21 L. ed. 587; *Price v. McDonald*, 1 Md. 403, 54 Am. Dec. 657, strongly supports this position. Now, under these principles, what is the right of which the title papers would impute knowledge to those purchasing or leasing from Bachman's heirs? The right of Reed to treat Bachman's title acquired from Cain and Douth by their purchases under the trust sales as acquired for their joint benefit, not as an adverse claim; the right of Reed to regard it as a mere removal of the encumbrance created by the deeds of trust on the joint property; an encumbrance made by both on a joint estate, both responsible for it. The law gave Reed right to so regard Bachman's purchase, and those acquiring from Bachman or his heirs were bound to know this law: *Yock v. Mann*, 57 W. Va. 187, 49 S. E. 1019; *Haymond v. Camden*, 48 W. Va. 463, 37 S. E. 642. The title papers told them that the land was joint estate. The original deed so declared. The deeds of trust said so. The trustee's deed said so. Such purchasers were warned of the fact, and it was their duty to inquire of Reed whether he still claimed or had renounced his

right, because there was the proper source of information. They were bound to take notice of the law giving Reed this right, and to inquire whether he yet claimed it. They purchased at their hazard. The title papers told them of his right, and in the strongest way called on the purchasers to see whether it had been extinguished. Reed was not bound to notify them of his right. They must inquire as to that right. This right of Reed's was not required by law to be recorded. He had nothing which any statute required to be recorded, in addition to the recorded deeds. Except where a statute requires a deed or notice or other thing to be recorded, there is no obligation to record. It is questioned by the rehearing petition whether this right of Reed to treat Bachman's purchase as one for the joint benefit was such an one called for inquiry, or was notified, as it was dehors the papers. The general principles stated above answer that question; but the case of *Gibson v. Winslow*, 46 Pa. 380, 84 Am. Dec. 552, distinctly meets the precise point, holding that 'Where land owned jointly by three persons is ⁴⁰⁶ purchased at a sheriff's sale by one of them, on an execution against all, the buyer cannot set up his purchase adversely to them; he can, at most, only hold the former interests of his cotenants as their trustee.' Whatever will put a purchaser upon inquiry, and lead to knowledge, is notice. He is bound to make inquiry where there is anything that would lead to a prudent man to make it, and he is therefore presumed to have known all that inquiry would have revealed to him. Where land owned jointly by three persons is sold on execution against them, and is purchased by one of the joint owners, the deed of the sheriff carries with it notice that the land has been sold on execution, as the property of three joint owners, and purchased by one of them, and that the title of the other joint owners remained in them. Therefore, no subsequent vendee can be treated as a purchaser without notice." *Parker v. Brast*, 45 W. Va. 399, 32 S. E. 269, is pointed authority to show that purchasers under Bachman must know that his purchase was for all. It makes no difference that Bachman did not himself buy at the trust sales. He got in the title sold, and the moment he got it, it was the same title, and affected by the same cast of joint tenancy and trust as before: 17 Am. & Eng. Ency. of Law, 2d ed., 676. In *Parker v. Brast*, cited, one joint tenant

permitted the joint property to be sold for taxes, as Bachman in this case permitted, indeed, as the bill charges, caused the joint property to be sold for a joint debt, and a stranger purchased at the tax sale, as in this case, and then conveyed to the joint tenant failing to pay taxes, as in this case the purchasers conveyed to Bachman, who failed to pay the debt. The court said that the purchase by the joint tenant, though from a stranger to the title, was a purchase for the common benefit of all the joint owners. Point 1 in that case reads thus: "Where a cotenant permits the common property to be sold for taxes, and directly or indirectly secures the title in his own name, his deed will be avoided at the instance of his cotenant, or he will be held to be a trustee holding the legal title for their mutual benefit." In that case, too, it was distinctly held that when Brast purchased from Lanck, a joint tenant, who bought from the tax purchaser, Brast was affected with notice that Lanck was a joint tenant, and that his purchase was only a redemption from the tax sale for the ⁴⁶⁷ benefit of all the owners. The case of Parker v. Brast, 45 W. Va. 399, 32 S. E. 269, is almost identical with and rules this case. I assert that it supports the reasoning above, and is itself supported by authorities above cited.

It cannot be said as Douth, a stranger, purchased at the trust sale and conveyed three-fifths to Bachman, the case is different from what would be the case if Bachman had himself purchased under the trust sale. Did not Douth, by such purchase, himself become only a tenant in common with Reed and Bachman?

Douth purchased an undivided, I say undivided, interest, and thus was a tenant in common, and being such, Bachman acquiring the three-fifths from Douth has the same character as Douth—that is, a tenant in common.

I do not question the law proposition that when once a joint tenancy or in common has ceased and ended—when the parties are no longer cotenants—one of them may purchase an outstanding title; but in this case that doctrine does not apply, because the cotenancy never ceased for a moment, and exists to-day. Why? When Bachman obtained the release of two-fifths, he released an undivided two-fifths and simply lifted the deed of trust from the two-fifths in which Bachman and Reed were cotenants. The release could not inure to Bachman's sole interest. It simply left them cotenants in

such fifths; it did not convey the fifths to Bachman alone. When Bachman acquired the Reeves interest, Reed and he were cotenants, because the tracts had never been divided, and when Doult released the two-fifths, Reed and Bachman still owned the two-fifths together. So Bachman's acquiring the Reeves interest was for joint benefit. So with Bachman's acquirement of the three-fifths under the second trust sale. The joint ownership was not severed by the sale of the Reeves fifth, nor by the sale of three-fifths under the second trust sale. Furthermore, note that the original conveyance of the whole tract was to Bachman, Reed, Reno and Reeves—each taking one-fourth, undivided. When the sales under the deeds of trust were made the sales were of fifths, not fourths, it being supposed that Swope had an interest. But Swope had no interest. The legal title was in four, and the sales under the trusts being of fifths, not fourths, there remained in the four cotenants an undivided ⁴⁶⁸ interest represented by the difference between fourths and fifths—that is, one-twentieth, not touched by the sales under the deeds of trust, that is, one-twentieth in each cotenant. This is another reason why the cotenancy still existed after the sales under the deeds of trusts, and, therefore, when Bachman acquired interests sold under the deeds of trust he acquired them for the benefit of his cotenant, Reed, because the cotenancy had never for a moment ceased.

It is hardly necessary to say that this decision does not touch the rights of purchasers or lessees of Bachman's heirs arising from any adverse possession by them after the beginning of their rights. When their rights began, just how, or under what circumstances does not appear in the bill, so as to enable us to pass on that statute as to them.

The bill states facts from which the question arises whether the lessees were affected with notice, and to raise the question of laches; but it does not give the date of the lessees' possession, or whether they had deeds or not for color of title. Another reason why the claim of innocent purchasers cannot prevail is, that it does not appear from the bill that the parties are purchasers for valuable consideration paid and complete title.

Reversed.

The Ouster by One Tenant in Common of his cotenants and his acquisition of title by prescription are discussed in the note to Joyce v. Dyer, 109 Am. St. Rep. 609. A tenant in common cannot acquire

title by adverse possession against his cotenant except by showing a definite and continuous assertion of an adverse right by overt acts of unequivocal character clearly indicating the assertion of ownership of the premises to the exclusion of the right of the cotenant; and such as must put him upon notice of the adverse claim: *Gill v. Fletcher*, 74 Ohio St. 295, 113 Am. St. Rep. 963. To constitute ouster by a cotenant there must be some open, notorious assertion of an exclusive claim, and a direct interference with, or denial of, the right of another cotenant: *Moragne v. Doe*, 143 Ala. 459, 111 Am. St. Rep. 53.

The Right of a Cotenant to Acquire and enforce tax titles is the subject of a note to *Hoyt v. Lightbody*, 116 Am. St. Rep. 367.

CASES
IN THE
SUPREME COURT
OF
WYOMING.

WYOMING COAL MINING COMPANY v. STATE.

[15 Wyo. 97, 87 Pac. 337, 984.]

CORPORATIONS—Right to Inspect Books.—If a by-law of a corporation gives a stockholder an unconditional right to inspect its books, he is entitled to enforce such right without alleging or proving fraud or mismanagement, or the purpose for which inspection is sought. (p. 1017.)

MANDAMUS—Corporations—Inspection of Books to Enforce Right.—If an unconditional right to inspect the books of a corporation is given to a stockholder by one of its by-laws, such right, when denied, may be enforced by mandamus. (p. 1018.)

STATUTES Adopted from Other States—Construction.—A decision by the courts of one state construing a provision of a statute, rendered subsequently to the adoption of such statute by another state, is not binding upon the courts of the latter. (pp. 1019, 1020.)

CORPORATIONS—Inspection of Books—Mandamus.—In a statute defining mandamus as a writ issued to an inferior tribunal, corporation, board or person commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station, the word "corporation" is a generic term, including public, quasi-public and private corporations. Therefore, mandamus lies to compel an officer of a private corporation to permit an inspection of its books by a stockholder, when the right of inspection, given him by by-law of the corporation, is denied, and in such case the remedy by injunction is inadequate. (p. 1021.)

Lonabaugh & Wenzell, for the plaintiff in error.

E. E. Enterline and W. E. Mullen, for the defendant in error.

100 SCOTT, J. This is a proceeding in mandamus which was commenced in the district court of Sheridan county by the relator, Stewart Kennedy, against the respondents, plaintiffs in error, to compel the said company and Birkhaeuser, its vice-president and acting secretary, to permit the relator to inspect the books and records of the company. A demurrer to the petition was interposed by the respondents on the

ground that the facts stated therein were insufficient to constitute a cause of action against them. Upon a hearing the trial court overruled the demurrer and the respondents elected to stand upon the demurrer and the ruling thereon. Judgment was rendered as prayed in the petition, and respondents bring the case here on error.

It appears from the petition that the coal company is a corporation duly created and organized under the laws of Wyoming, engaged in mining coal and doing business at all times mentioned, at Monarch, in Sheridan county, Wyoming, where its principal office is located; that its capital stock is composed of one million shares, of the par value of one dollar each; that relator was during all times mentioned and is now a stockholder in said company, being the ¹⁰¹ owner of sixty thousand and one shares of the capital stock; that the company has, during the time it has been so engaged in mining, marketing and selling coal, done so at large profit, but has never declared any dividend, and that relator is unable to state the amount of the profits, owing to the fact that he was refused permission to examine the books, papers and effects of the company, and that no financial statement has ever been made or furnished him by the company or by any of its officers; that in and by the laws duly adopted by the company it is provided that the books and papers in the offices or custody of the secretary and treasurer shall be open at all times during business hours to the inspection of any stockholder; that in and by the by-laws the secretary is required to record the proceedings of the board of trustees, make out stock certificates, keep a ledger containing full data as to the stock of the company, have charge of the corporate seal, and perform such other duties as from time to time may be imposed or required of him by the board of trustees. It is further provided that the treasurer shall have custody of the company's funds, pay out the same on order of the board of trustees, keep accurate accounts of the financial business and dealings of the company, make and render reports at the annual meetings of the financial business and dealings of the company. The fiscal year shall end on June 30th of each year, and the annual stockholders' meetings shall be held on the fourth Monday in July each year at 3 o'clock P. M. That the treasurer of said company failed to make any report at the last annual stockholders' meeting, or at any time; that respondent Birkhaeuser, under the provisions of the by-laws,

holds the office of acting secretary and treasurer of the company; that relator has made frequent demands in writing upon said Birkhaeuser, the acting secretary and treasurer, for a financial statement of the business affairs and transactions of the company, which demands were refused; that on or about the thirteenth or fourteenth day of February, 1906, relator, during business hours, went to the principal office of the company at Monarch and demanded of ¹⁰² said Birkhaeuser, the then acting secretary and treasurer, permission to inspect the books, papers and effects of the company in relation to its business affairs and transactions, and such permission was by the said Birkhaeuser refused, and is still refused, although the said Birkhaeuser, as acting secretary and treasurer, then and there had such books, papers and effects in the said office in his possession and under his control; that relator's object and purpose was and is to secure the honest and economical administration of the affairs of the company, and to take such measures as may be deemed necessary to accomplish that end and thereby protect his own interests. Then follows the prayer in the usual form.

Taking everything alleged in the petition as true, it does not appear that the officers in charge of the business of the company have been guilty of fraud or mismanagement. It is earnestly contended that the absence of such an allegation renders the petition fatally defective. It does appear by allegation which must be deemed and taken as true upon the demurrer that the company was organized and a going concern in February, 1906; that its last annual meeting was held in July preceding, at which time a dividend was passed, and there was no financial statement as required by the by-laws made, and that during all that period the relator was a stockholder, and that as such stockholder he has been denied a financial statement of the business affairs of the company, although he has made written request therefor, and that he has also been denied access to or an inspection of the books and records of the company when application so to do was made at a reasonable time; and further, that such inspection was sought, not for mere idle curiosity, or to in any wise injure the corporation.

The right of the relator as a stockholder, upon proper showing, to inspect the records and books of the corporation is well recognized at common law. Indeed, that right is so well established that it needs no discussion. There is no statutory

enactment in this state declaratory of nor in any ¹⁰³ wise changing or modifying that rule, but we may deem the by-law as plead and which was adopted by and in pursuance of the delegated power to the corporation as declaratory and an enlargement of such common-law right. "When such right, under the common-law rule, is denied, the writ of mandamus will not issue to enforce the mere naked right or to gratify mere idle curiosity. It is necessary and incumbent upon the relator to show some specific interest at stake rendering the inspection necessary or some beneficial purpose for which the examination is desired": High on Extraordinary Legal Remedies, sec. 310; 2 Spelling on Extraordinary Relief, sec. 1612. Treating the by-law as having full force and effect, enacted pursuant to statutory authority, and not being in conflict with any statutory provision relating to and effecting the administrative affairs of the corporation, and granting to the stockholder an unconditional right, it enters into and changes the common-law rule as to the necessity of alleging or proving the purpose for which such examination is sought. Under this by-law, if the object of the examination sought was mere idle curiosity or an illegitimate purpose, that would be a matter of defense. In construing a statutory provision to the same effect, it was said by the supreme court of Alabama, in *Foster v. White*, 86 Ala. 467, 6 South. 88: "The stockholder is not required to show any reason or occasion rendering the examination opportune and proper, or a definite or legitimate purpose. The custodian of the books and papers cannot question or inquire into his motive or purpose. If he has reason to believe that they are improper and illegitimate, and refuses the inspection on that ground, he assumes the burden to prove them such. If it be said this construction of the statute places it in the power of a single stockholder to greatly injure and impede the business, the answer is, the legislature regarded his interests in the successful promotion of the objects of the corporation a sufficient protection against unnecessary or injurious interference. The statute is founded upon the principle that the stockholders ¹⁰⁴ have a right to be fully informed as to the condition of the corporation, the manner in which its affairs are conducted, and how the capital to which they have contributed is employed and managed." If the state can, by legislative enactment, make such a law to govern and regulate the affairs of corporate bodies, then there is no reason why those intrusted with the affairs

of a corporation cannot make by-laws not in conflict with any statute or constitutional provision and in furtherance of conducting the affairs and business for which it was organized, and effecting the relation and establishing the rights of those who have contributed to its capital: Thompson on Corporations, sec. 4417.

It is, however, urged that the remedy is not mandamus, but by injunction. Section 4194, Revised Statutes, is as follows: "Mandamus is a writ issued in the name of the state to an inferior tribunal, a corporation, board or persons, commanding the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station"; and section 4197, Revised Statutes, is as follows: "The writ must not be issued in a case when there is a plain and adequate remedy in the ordinary course of the law." It is not pointed out, nor do we understand, where there is a plain and adequate remedy in the ordinary course of the law upon the facts alleged in the petition. The cases cited where mandamus was denied relate to an attempt to compel the transfer of stock upon the books of a corporation, and it seems to us are inapplicable to the case before us, for in all such cases there is a remedy at law for damages, and the corporation as such is not charged by law with the specific duty to make such transfers. The distinction is clear between that class of cases and those where the duty is specially enjoined by law. As we have already held, the by-law plead and relied upon by relator as the basis of his right to maintain this suit is, so far as it affects the Wyoming Coal Company, its officers and stockholders, as legal and binding as though it were a general law enacted by the legislature. The cases cited in support of the contention ¹⁰⁵ of the plaintiffs in error are all predicated upon the common-law rule in the absence of a statute and where there was no by-law of the corporation from which flowed the right here claimed. They are clearly distinguishable from those cases where the right to an inspection of its books by a stockholder of a corporation is held primarily to be an unconditional one, and which are based upon a statutory provision conferring the right, and in all of which mandamus is held to be the proper remedy when such right is denied: *Swift v. Richardson*, 7 Houst. 338, 40 Am. St. Rep. 127, 32 Atl. 143; *Ellsworth v. Dorwart*, 95 Iowa, 108, 58 Am. St. Rep. 427, 63 N. W. 588; *State v. St. Louis etc. Ry. Co.*, 29 Mo. 301; *State v. Bergenthal*, 72 Wis. 314, 39 N. W. 566. There is

no difference in principle between these cases, where the right is a statutory one, and those in which the writ has been awarded to perform a duty enjoined by the charter or a by-law of a corporation. In *People v. Pacific Mail Steamship Co.*, 34 How. Pr. 193, the right to inspect the list of stockholders was given both by the charter and the statute, and such right upon a refusal to permit such inspection was enforced by mandamus. In *Lyon v. American Screw Co.*, 16 R. I. 472, 17 Atl. 61, it was held that the refusal to perform the duty enjoined or imposed by a by-law was properly the subject of a suit in mandamus. It was so held in *Cockburn v. Union Bank*, 13 La. Ann. 289. The relator has plead the by-law. He, therefore, relies upon a right given, and not upon a showing such as is required by the common law, and which, in the state of the pleadings, is conceded by the respondents, who have refused, and do refuse, to perform their duty which is enjoined by the by-law, and by so doing they have deprived, and do deprive, relator of a primary right to which he and every other stockholder of the company is entitled. We are of the opinion, therefore, that the trial court properly overruled the demurrer, and upon the respondents' refusal to plead further the awarding of the peremptory writ was proper and the judgment will be affirmed.

Potter, C. J., and Beard, J., concur.

106 SCOTT, J. Plaintiffs in error have filed a petition for rehearing upon the ground that the court did not discuss the case of *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 78 Am. St. Rep. 707, 56 N. E. 1033, 48 L. R. A. 732, in the opinion filed. It is urged that that decision is binding on this court as a construction of sections 4194 and 4197, Revised Statutes, and that so construed, mandamus was not the proper remedy. That case was decided long subsequent to the adoption of the provisions of the Ohio Code of Civil Procedure by this state, and while such adoption ordinarily bound the courts of this state to the construction which had been theretofore placed upon the provisions of the code by the supreme court of that state, yet the courts of Wyoming are not so bound by subsequent construction, which construction may be persuasive, though not conclusive. The provisions of those sections were not new in this jurisdiction. Sections 607 and 608 of the Civil Code, found in the Compiled Law of Wyoming of 1876, are practically identical,

and may be deemed to have been re-enacted and continued in force by the enactment in 1886 of sections 4194 and 4197. In *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 78 Am. St. Rep. 707, 56 N. E. 1033, 48 L. R. A. 732, Hoffmeister, a stockholder, brought suit to enjoin the company from refusing to allow him to inspect the books and records of the corporation, a right which was given him by statute, and to fix a reasonable time for such inspection. Upon objection it was held that the suit was properly brought, and that the remedy was by injunction and not by mandamus, on the ground that injunction afforded the plaintiff a plain and adequate remedy at law within the meaning of section 6744, Revised Statutes of Ohio, which section is identical in language with our section 4197. The court says: "The complaint of plaintiff is that he is unlawfully prevented from the enjoyment of a right which is incident to his ownership of stock, and his remedy is that the corporation be compelled to desist from such deprivation. This does not call for the performance of an act which the law specially enjoins. It is, on the other hand, an act which may be compelled by injunction ¹⁰⁷ in the common and ordinary exercise of that power. There is, therefore, a plain and adequate remedy open to him in the ordinary course of the law, for, within the meaning of the statute, an equity proceeding is a proceeding of that character." Strictly speaking, the holding of that court that it was a case for injunctive relief did not amount to a construction of the statute defining the remedy by mandamus. The court determined that there was another and adequate remedy open to the plaintiff, and that being the case he could not resort to mandamus, and in effect the decision goes no further. The statute conferring the right to inspect the books in that case says: "And the books and records of such corporations shall at all reasonable times be open to the inspection of every stockholder." The court proceeds upon the assumption, which is one of law, that the books are so open to inspection at all times, with the limitation that the time shall be reasonable. No affirmative act upon the part of any officer of the company is required or necessary to the enjoyment of such right, and the refusal by anyone to permit the books to be inspected is an interference with such right. They were in the control of the company, and the application to inspect was made to the company and not to the officer charged with their custody,

nor was the suit against anyone other than the corporation. In the case before us the application was made to the respondent Birkhaeuser, who was at the time vice-president and acting secretary and treasurer, for permission to inspect the books, but that he, "Birkhaeuser, as such vice-president, acting secretary and treasurer, although then and there and now in the possession and control of all the books, papers and effects of said company in relation to its business affairs and transactions, wholly failed and refused, and still fails and refuses, to permit the relator to inspect the same or any of them." They were in his actual custody and control by the provisions of the by-law, and they were required to be kept open for inspection during business hours. The duty to keep them open was a duty devolving upon Birkhaeuser by virtue of his official position, he having, as such ¹⁰⁸ officer, assumed their possession and custody. It was his duty, as the actual custodian, to keep them in the place required by the by-laws, open and accessible to any stockholder who desired to inspect them during business hours. This involved a duty to produce the books for that purpose, and in this respect the case is different from the Ohio case (62 Ohio St. 189, 78 Am. St. Rep. 707, 56 N. E. 1033, 48 L. R. A. 732). Injunction is a preventive remedy. In the case before us the relator was denied access to the books of the company when it was the duty of Birkhaeuser, their custodian, to produce them for his inspection. We are aware that the decisions are conflicting as to whether such duty will be compelled by mandamus. It is held by some of the courts that to do so would be to permit the use of the writ to redress private wrongs. Other courts hold that there is no other remedy at law, and that the performance of the duty, though private in character, will be compelled by mandamus: 19 Am. & Eng. Ency. of Law, 2d ed., p. 869, and cases there cited. The word "corporation," as used in section 4194, Revised Statutes, we think, is a generic term, and includes public, quasi-public and private corporations. The ordinary and plain meaning of the section would seem to include these different classes, and we see no reason for interpolating the words "public" or "quasi-public" before the word "corporation," thus giving it a restricted meaning. The remedy by injunction would, in our judgment, be inadequate. The right without interference to inspect the books might be protected by the writ of injunction in a

proper case, but the refusal to permit any inspection imports also a refusal to produce the books of the corporation by the custodian. It requires an affirmative act upon the part of the custodian, in order that the right may be enjoyed, and without which the relator would be powerless. As bearing on the questions presented in the case we cite, without further comment, Angell & Ames on Corporations, p. 710; High on Extraordinary Legal Remedies, sec. 308; Cook on Stock, Stockholders and Corporations, secs. 514-516, 518.

Rehearing denied.

Potter, C. J., and Beard, J., concur.

The Right of a Stockholder to Inspect the Books of his corporation and the remedies for its enforcement are discussed in the note to Harkness v. Guthrie, 107 Am. St. Rep. 674.

COLLINS v. STANLEY.

[15 Wyo. 282, 88 Pac. 620.]

ATTACHMENT—Motion to Dissolve—Burden of Proof.—If the grounds for an attachment are positively denied by the defendant in the affidavit in support of the motion to dissolve, the burden then rests upon the plaintiff to sustain them by additional evidence. (p. 1024.)

ATTACHMENT—Motion to Dissolve—Traverse, Issues Triable on.—The merits of the main action cannot be tried on a traverse filed in support of a motion to discharge the attachment, and denying the grounds thereof. (p. 1025.)

ATTACHMENT—Motion to Dissolve—Inquiry into Facts.—On the trial of a motion to dissolve an attachment on a denial of the existence of the alleged grounds therefor, the circumstances of the transaction out of which plaintiff's cause of action arose may be inquired into, although they may involve some of the facts upon the merits; but such inquiry is for the purpose of determining whether grounds for the attachment exist, and not whether there is or is not a cause of action. (pp. 1025, 1026.)

ATTACHMENT—Motion to Dissolve—Denial—Appeal.—The denial of a motion to dissolve an attachment on a traverse of the alleged ground therefor will not be disturbed on appeal, when the trial judge had evidence before him to support the ruling. (p. 1026.)

ATTACHMENT—Motion to Dissolve—Practice on Appeal.—Objections not raised on the trial of a motion to dissolve an attachment cannot be considered on appeal. (p. 1026.)

ATTACHMENT—Unliquidated Damages.—If a statute authorizes the issuance of a writ of attachment in a civil action for the recovery of money, it may issue in such action for the recovery of unliquidated damages. (p. 1027.)

INJUNCTION—Dissolution.—If the petition for an injunction is sworn to positively, the denials of the answer must be equally positive to warrant a dissolution of the temporary injunction upon the petition and answer alone. (p. 1027.)

INJUNCTIONS—Dissolution—Discretion.—The dissolution of a preliminary injunction, like the granting of one, is a matter resting largely in the discretion of the court, to which the motion to dissolve is addressed, and, except in cases of palpable abuse of discretion, the action of the trial court will not be disturbed on appeal or otherwise restrained or controlled. (pp. 1027, 1028.)

ATTACHMENT—Application for Release—Nonappealable Order.—The refusal of the trial court to entertain an application for the release of a writ of attachment of alleged exempt property on the ground that such matter was not properly before the court at the time is not such a final order as can be reviewed on appeal. (p. 1028.)

N. R. Greenfield, for the plaintiffs in error.

McMicken & Blydenburgh, for the defendants in error.

²⁹⁰ BEARD, J. This action was brought by the plaintiff, the defendant in error, against the defendants, the plaintiffs in error, to recover damages which he alleged he had sustained by reason of the unlawful and forcible entry of the defendants upon a certain ranch belonging to plaintiff, and ejecting his agent therefrom, and by threats and intimidation holding possession of the same, and by tearing down the fences around the haystacks, and by consuming and destroying the hay stacked on said ranch, and by depasturing said lands. That all of said acts of defendants were willful and malicious, and were done with intent to injure and defraud plaintiff out of his right to the possession of said ranch, and out of his property. That defendants hold said premises with force and arms, and threaten to continue to deprive plaintiff of the possession of said property. That if they are allowed to continue so to do the plaintiff will be unable to protect his personal property on said ranch or to clean out the ditches, or to repair the fences thereon, and that he will be irreparably damaged.

The petition was presented to the judge of the district court, and a preliminary injunction issued restraining the defendants from interfering with plaintiff's possession of ²⁹¹ the ranch and restraining them from entering thereon. The plaintiff also filed with his petition his affidavit for a writ of attachment, which, after being entitled in the case, is as follows: "I, J. S. Stanley, being first duly sworn on my oath, depose and say that I am the plaintiff in the above-entitled action; that the defendant is justly indebted to plaintiff in the

full and just sum of two thousand dollars; that the same is due on account of damages for willfully and maliciously taking possession and holding possession of my Cow Creek ranch known as the Albert Walters ranch, and using and destroying the hay thereon and depasturing said ranch; that plaintiff ought to recover of defendants the above sum of money after allowing all just credits, counterclaims or set-offs; and that the defendants fraudulently and criminally contracted the debt and incurred the above obligation. That the defendants are about to convert their property, or a part thereof, into money for the purpose of placing it beyond the reach of their creditors."

A writ of attachment was issued and levied upon personal property of defendants, and they filed a motion to discharge and dissolve the attachment and also a motion to vacate the injunction. Both motions were denied by the court upon hearing, and defendants bring error.

The grounds of the motion to discharge the attachment are "that the defendants did not fraudulently or criminally contract the alleged debt, nor fraudulently or criminally incur the alleged obligation." And "that the defendants were not about to convert their property, or a part thereof, into money for the purpose of placing it beyond the reach of the creditors." This motion was supported by the affidavit of each of the defendants in substantially the same language as that contained in the motion, and was heard upon affidavits and oral testimony offered by the parties. When the grounds for an attachment are positively denied by the defendant in the affidavit in support of the motion to discharge, the burden then rests upon the plaintiff to sustain them by additional evidence; and in this case we do not ²⁰² understand counsel for plaintiff to seriously contend that there is evidence to support the claim that defendants were about to dispose of their property with intent to defraud their creditors. This narrows the issues to the single question, Was the obligation fraudulently or criminally incurred? The argument of counsel for plaintiff in error is that the evidence shows that the defendant, Mrs. Card, was entitled to the possession of the ranch, and that she could not, therefore, commit any trespass thereon, and no obligation was or could be fraudulently or criminally incurred; that she was entitled to possession under a lease or contract entered into between her husband and plaintiff, which lease or contract she claimed had been as-

signed or transferred to her by her husband, and that he had since abandoned her; that she had a homestead right in the premises and that a release of the contract executed by her husband was void, etc. While, on the other hand, it is argued that the contract or lease could not by its terms be assigned without the written consent of plaintiff; that it was a contract for personal services, and could not be assigned; that plaintiff had no notice of the assignment, and that Card released and surrendered possession to plaintiff. But if the contract could be assigned, then Card was the agent of his wife, and she was bound by his acts in releasing and surrendering possession. These matters went to the merits of the case, and involve questions of fact, upon which the parties had the right to a jury trial, as well as questions of law. These questions cannot be tried in this summary manner, but must be disposed of in the regular way on the trial. The traverse of the affidavit for the attachment by the motion to discharge in this case is of the grounds for the attachment, and we think that is the only traverse that is permitted on such motion. Were the rule otherwise, the validity of plaintiff's cause of action might be put in issue, and require a trial on the merits; and thus in every case in which an attachment is issued the defendant could force a trial on the merits and on ex parte affidavits, on a motion to dissolve, ²⁹³ which, as we have already stated, cannot be done. In *Foley v. Virtue*, 8 Abb. Pr., N. S., 407, it is said: "The referee and counsel appear to have acted in this matter upon the assumption that the case was to be tried upon its merits, whereas it would seem that the reference was ordered only for the purpose of taking proofs in respect to the facts going to sustain or defeat the attachment. It may be that the referee is correct, and that no cause of action exists in favor of the plaintiff against the defendant, but that question cannot be tried in this summary mode, but must be disposed of in the regular way on the trial. Were the rule otherwise, the cause would in effect be tried on its merits on a mere motion to vacate the attachment." In *Newell v. Whitwell*, 16 Mont. 243, 40 Pac. 866, it was held that it was not within the scope of the inquiry on a motion to dissolve an attachment to try the merits of the main action. In the opinion in that case a number of cases are cited and discussed: See, also, *Miller v. Chandler*, 29 La. Ann. 88; *Romeo v. Garofalo*, 25 App. Div.

191, 49 N. Y. Supp. 114; Kirby v. Colwell 81 Hun (N. Y.), 385, 30 N. Y. Supp. 880; Chouteau v. Boughton, 100 Mo. 406, 13 S. W. 877.

In the case at bar we think it must be assumed for the purposes of the motion that a cause of action exists in favor of plaintiff against defendants for damages in the sum claimed for trespass and for consuming and destroying his property; and that the only question presented by the motion on this ground is, whether the acts of defendants which caused the alleged damages were in their nature fraudulent or criminal. The circumstances of the transactions out of which plaintiff's cause of action arose may be inquired into, although they may involve some of the facts upon the merits; but such inquiry is for the purpose of determining whether grounds for the attachment exist, and not whether there is or is not a cause of action. The evidence on the charge that defendants were about to dispose of their property or a part thereof with intent to defraud their creditors was probably insufficient to sustain that ²⁹⁴ charge; and, as we have said, we do not understand counsel to rely much thereon; but we think there is sufficient evidence in the record to sustain a finding that the acts were criminal in their nature. There is evidence of the defendants themselves strongly tending to show that they went to the ranch and by threats and intimidation caused plaintiff's agent to leave, and that they intended to use such force as might be necessary for that purpose. The judge of the district court had the witnesses before him, and having passed upon the weight of the evidence, and there being evidence to support the ruling, we ought not to disturb it.

It is also contended by counsel for defendants that the affidavit for attachment is insufficient because, first, that in the printed part of the affidavit it states that the "defendant is" justly indebted, etc., instead of "defendants are," etc.; second, that the facts constituting fraud and criminality are not set out; third, that in the statement of the nature of plaintiff's claim it is not stated that the claim is founded on fraud or criminal conduct, but simply on trespass. A complete answer to these objections is that none of them were raised by the motion, and they cannot, therefore, be considered. The motion contains one other ground, viz.: "That the action of the plaintiff in which the attachment was issued as appears from the petition is for the recovery of

purely unliquidated damages, for which attachment proceedings will not lie." In some of the states an attachment can issue only in actions on contract, express or implied; but our statute does not contain such limitation and it may issue in a civil action for the recovery of money: Rev. Stats. 1899, sec. 3988. It is not contended that this is not such an action. Under the Ohio statute, of which ours is a literal copy, it was held in *Sturdevant v. Tuttle*, 22 Ohio St. 111, that an attachment will lie in a civil action for the recovery of unliquidated damages for assault and battery; and that case was approved and followed in *Kirk v. Whitaker*, 22 Ohio St. 115, and *Creasser v. Young*, 31 Ohio St. 57.

²⁹⁵ The motion to vacate the injunction was based largely upon the alleged insufficiency of the petition and a denial of the facts therein stated as grounds for the injunction. The motion was not supported by affidavits, but refers to all of the pleadings on file in the case, in support of the motion. An examination of the record discloses that these pleadings consist of the petition, which is positively sworn to by plaintiff; the separate answer of defendant Card, the verification of which by her is to the effect that she believes the facts therein stated to be true; and the separate answer of defendant Collins, verified in the same way by his attorney. When the petition is sworn to positively, the denials of the answer must be equally positive to warrant a dissolution of an injunction upon the petition and answer alone. In *Porter v. Jennings*, 89 Cal. 440, 26 Pac. 965, it is said: "Certain allegations of the complaint are denied upon information and belief. While denials in this form are authorized by section 437 of the Code of Civil Procedure as matters of pleading and are sufficient to raise an issue, yet they are not such denials as will serve as a basis of a motion to dissolve an injunction on the ground that the equities of the bill are fully denied by the answer": See, also, 10 Ency. of Pl. & Pr. 1068, and cases cited in notes. However, on the hearing in this case the defendants gave oral testimony, and the plaintiff offered oral testimony and affidavits. The evidence covers about thirty pages of the record and is conflicting. Upon this evidence the district court denied the motion, and we think the rule is well settled that the dissolution of a preliminary injunction, like the granting of one is a matter resting largely in the discretion of the court to which the motion to dissolve is addressed, and except in

cases of palpable abuse of discretion, the action of the court will not be disturbed on appeal or otherwise restrained or controlled: 10 Ency. of Pl. & Pr. 1029. This discretion should be exercised so as to prevent injury, having in mind the situation of the parties. The rights of the defendants are protected by the bond, while there is no such ²⁹⁸ protection afforded plaintiff if the injunction is dissolved, and it should turn out that his action is well founded. We have examined the entire record, and we fail to find any abuse of discretion on the part of the district court in refusing to vacate the injunction.

The only remaining assignment of error is that the court refused to hear evidence in support of a motion filed by the defendant Card for an order requiring the sheriff to release the property attached on the ground that it was exempt from attachment. The order of the court after denying the motion to vacate the injunction and to discharge the attachment recites: "And thereupon the defendants, by counsel, asked that the court should hear the application of defendants for an order on the sheriff to release all the attached property, claiming the same to be exempt; and the court thereupon refused to hear or entertain said application at this time, for the reason that the same was not properly before the court at this time." This is not such a final order as can be brought to this court upon error. The application was neither sustained or denied, and for anything that appears in the record is still pending and undetermined. If the district court without just cause has refused to act in a matter in which it is required by law to act, the remedy is not by error to this court, but by mandamus. We find nothing in the record to warrant us in disturbing the order of the district court and it is therefore affirmed.

Potter, C. J., and Scott J., concur.

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I. Preliminary Observations.

The extraordinary remedy of attachment created by statutes in this country was unknown to the common law. The process of attachment did exist at common law, but it differed so in its nature and object from the provisional remedy in this country under that name that our remedy is really in derogation and violation of every principle of the right of property held sacred under the common law. The original purpose of the writ was to acquire jurisdiction of the defendant by seizure of his property, which he forfeited if he failed to appear in court or furnish sureties for his appearance. In other words, it was in the nature of a service of process in a civil action through a species of distress, in which the goods attached were the pledges. Under the provisional remedy of attachment created by statutes, its purpose is, not to compel the defendant's appearance, but to secure the plaintiff's alleged claim, and it is therefore in the nature of a proceeding in rem, and tantamount to an involuntary dispossession of the defendant prior to any adjudication of the rights of the plaintiff—an execution, so to speak, in advance of trial or judgment. Owing to the harshness of the remedy and its destructive effect upon individual credit, the law justly requires that this remedy be construed strictly in favor of those against whom it may be employed; and the writ should never be granted unless it appears, upon full and satisfactory evidence, that the grounds therefor are well founded. When, however, a creditor has brought himself within the statute authorizing this provisional remedy, he will be protected, and the attachment will not be discharged upon the defendant's motion, unless it clearly appears that the writ was improvidently issued.

II. Grounds for Dissolving.

a. **In General.**—The grounds upon which an attachment may be dissolved are generally fixed by the statutes of each state, but they all involve the question of the regularity of the issuance of the writ; and it may be stated, as a general rule, that, in the absence of fraud in its procurement, a writ of attachment will be dissolved only when it has been irregularly or improvidently issued. The rule and its definition are well stated by Chief Justice Simpson in *Kerchner v. McCormac*, 25 S. C. 461: "An attachment may be vacated or set aside upon one of two grounds, dependent upon the facts: First, when it has been irregularly issued; and second, when it has been improvidently issued. An attachment is irregularly issued where the facts or allegations contained in the affidavit upon which it is founded are insufficient; in other words, when, even admitting them to be true, they do not constitute a legal ground for the warrant. It is improvidently issued where the allegations, if true, would be sufficient, yet it satisfactorily appears that they are not true." So, too, if the statute under which an attachment was issued was unconstitutional, the writ should, upon motion, be abated: *Murphy v. State*,

59 Ala. 639. But a motion to vacate an attachment cannot be sustained because the property levied on was not subject to attachment: *Herman v. Bailey*, 20 Misc. Rep. 94, 45 N. Y. Supp. 88. And in *Lexington Brewing Co. v. Goode & Co.*, 30 Ky. Law Rep. 639, 99 S. W. 338, where a firm was sued to recover for goods sold, and the defendants were proved to be insolvent, and neither the firm nor the individual members had any property subject to execution, except the goods which had been attached on the ground that the defendants had not enough money to satisfy the plaintiff's demand, and its collection would be endangered by delay in obtaining judgment, the attachment was held to have been improperly vacated, when the goods brought less than the amount plaintiffs recovered. In *Taylor v. Kuhuke*, 26 Kan. 132, a motion to vacate an attachment against a defendant who had mortgaged his land with intent to defraud his creditors was held to have been properly denied, although the debtor offered to give the attaching creditor a further mortgage on the land. When the levy of an attachment is obtained by fraud, or the abuse of official power, a motion to discharge should be allowed. Thus, where a trunk had been produced and opened under the pretense of a criminal examination, but in fact for the purpose of levying an attachment, the writ was properly dissolved: *Pomroy v. Parmelee*, 9 Iowa, 140, 74 Am. Dec. 328; and the general principle here announced is strongly upheld in *Spear v. Hubbard*, 4 Pick. 143. So, too, in *Metcalf v. Clark*, 41 Barb. 45, a warrant of attachment was vacated because the defendant in the action, who resided in Canada, had been, by trick, persuaded to come into the state of New York for the purpose of effecting a service of summons upon him.

b. Insufficiency of Alleged Grounds for Attachment.

1. **In General.**—Where it appears, upon the face of the affidavit upon which an attachment is obtained, that the grounds alleged therein are not sufficient in law or fact to justify the writ, it should on motion be dissolved. This general rule is clearly stated in *Bear v. Cohen*, 65 N. C. 511, and the authorities are uniform in upholding the doctrine. Thus, in an action for rent, where the affidavit for attachment shows that the rent is not due, the writ should be vacated: *Clark v. Montfort*, 37 Kan. 756, 15 Pac. 899. And in *Lowenstein v. Salinger*, 17 N. Y. Supp. 70, an attachment, which had been issued against a married woman for a debt contracted by a partnership between her and her husband was dissolved for the reason that, under the laws of New York, a married woman could not have lawfully entered into a partnership with her husband.

2. **Falsity of Alleged Grounds.**—The right of a defendant to have an attachment dissolved on motion if he can show that the grounds upon which it was obtained are false, is almost universally upheld: *Ward v. Carlton*, 26 Ark. 662; *Woods v. Tanquary*, 3 Colo. App. 515, 34 Pac. 737; *Bates v. Jenkins*, Bresse (Ill.), 411; *Daggett v. Bell*, 32

Kan. 298, 4 Pac. 292; Rapp v. Shoemaker, 11 Ky. Law Rep. 401; Hosea v. McClure, 42 Kan. 403, 22 Pac. 317; Brungard v. Anderson, 16 La. 341; Thomas v. Dundas, 31 La. Ann. 184; Clarke v. Meixsell, 29 Md. 221; Genessee S. B. v. Michigan B. Co., 52 Mich. 164, 438, 17 N. W. 790, 18 N. W. 206; Nelson v. Gibbs, 18 Minn. 541; Drought v. Collins, 20 Minn. 374; Roach v. Brannon, 57 Miss. 490; Grimes v. Farrington, 19 Neb. 44, 26 N. W. 618; McCord-Brady Co. v. Bowen, 51 Neb. 247, 70 N. W. 950; Kuntz v. Scott, 52 Neb. 460, 72 N. W. 585; Branson v. Shinn, 13 N. J. L. 250; City Bank v. Merritt, 13 N. J. L. 131; Brisbee v. Bowden, 55 N. J. L. 69, 25 Atl. 855; Houghton v. Ault, 8 Abb. Pr. (N. Y.) 89; New York & E. Bank v. Codd, 11 How. Pr. (N. Y.) 221; Coston v. Baigi, 9 Ohio St. 397; Carnahan v. Gustine, 2 Okl. 399, 37 Pac. 594; Hale v. Richardson, 89 N. C. 62; Bayes v. Cappinger, 2 Yeates (Pa.), 277; Kelly v. Force, 16 R. I. 628, 18 Atl. 1037; Bates v. Killian, 17 S. C. 553; Claussen v. Easterling, 19 S. C. 515; Ivy v. Caston, 21 S. C. 583; Deering v. Warren, 1 S. D. 34, 44 N. W. 1068; Quebec Bank v. Carroll, 1 S. D. 372, 47 N. W. 397; Wilcox v. Smith, 4 S. D. 125, 55 N. W. 1107; Jones v. Meyer, 7 S. D. 152, 63 N. W. 773; Pierie v. Berg, 7 S. D. 578, 64 N. W. 1130; Harris v. Taylor, 35 Tenn. (3 Sneed) 536, 67 Am. Dec. 576; Godhe-Pitts D. Co. v. Allen, 8 Utah, 117, 29 Pac. 881; Desert Nat. Bank v. Little Roundy & Co., 13 Utah, 265, 44 Pac. 930; Claflin v. Steenbock, 18 Gratt. (Va.) 842; Sublett v. Wood, 76 Va. 318; Burrett v. Tranb, 88 Va. 980, 14 S. E. 845; Morrison v. Beam, 1 Pinn. (Wis.) 244. The rule is based upon the manifestly just theory that, the right of a party to have an attachment sustained depends, not upon the fact of his making an affidavit of the existence of certain facts, but upon the actual existence of such facts; and that it is therefore the duty of the court to inquire into the truth of the affidavit if the alleged facts are denied. Practically the only state where a different rule prevails is Iowa, where it is squarely held that the court cannot inquire into the truth of the grounds alleged in an affidavit for attachment on a motion to dissolve, and that the defendant's only remedy against an attachment obtained upon a false affidavit is by suit on the attachment bond: Sackett v. Partridge, 4 Iowa, 416; Berry v. Gravel, 11 Iowa, 135; McLaren v. Hall, 26 Iowa, 297; Sturman v. Stone, 31 Iowa, 115. There are also a few other cases in which it was held that the truth of the matter alleged in the affidavit could not be determined on a motion to dissolve: Smith v. Herring, 10 Smedes & M. (Miss.) 518; Olmstead v. Rivers, 9 Neb. 234, 2 N. W. 366; Bateman v. Ramsey, 74 Tex. 589, 12 S. W. 235, and Gimel v. Gomprecht, 89 Tex. 497, 35 S. W. 470; but in these cases the decisions are based on the fact that an inquiry into the truthfulness of the affidavit would involve an inquiry into the merits of the action. But even the ruling in these cases is opposed to the great weight of authority; for while, as we shall hereafter see, the merits of the action cannot be in-

quired into on a motion to dissolve, still the court may inquire into the truthfulness of the grounds of attachment set forth in the affidavit even if such inquiry incidentally refers to some of the questions involved in the merits. Thus in *Bundrem v. Denn*, 25 Kan. 430, an attachment was issued upon the ground that the defendant had fraudulently incurred the liability upon which the action was brought. On defendant's motion to dissolve for the reason that the ground alleged in the affidavit was false, the plaintiff contended that a disposition of the motion would be a determination in a summary and collateral way of the main issue in the cause, and, therefore, as the court had no right to inquire into the question as to whether the plaintiff had a good cause of action or not, it should have at least refused a decision on the motion until a jury had passed upon the issues in the case. In replying to this contention Chief Justice Horton said: "While the court cannot inquire into the validity or justice of the cause of action, yet it may inquire into the truthfulness of the grounds of attachment set forth in the affidavit, and if this inquiry incidentally refers to some of the allegations of the petition, this circumstance does not compel the court or judge to refuse consideration of the motion or suspend the decision until the final trial of the cause." And a similar ruling will be found in *Carnahan v. Gustine*, 2 Okl. 399, 37 Pac. 594, and in the very recent case of *Collins v. Stanley*, 15 Wyo. 282, ante, p. 1022, 88 Pac. 620, where the court, though distinctly holding that the merits of the case could not be inquired into, recognized the doctrine that the truthfulness of the grounds upon which an attachment is issued may be inquired into, even though such inquiry involves some of the facts upon the merits. To the same effect is *Herman v. Amedee*, 30 La. Ann. 393. In *Hamilton v. Johnson*, 32 Neb. 730, 49 N. W. 703, it is held that the rule forbidding consideration of the merits of an action, on a motion to dissolve an attachment issued therein, does not prevent the defendant on such motion from showing any pertinent fact to explain the transaction out of which the suit arose, even if in so doing he makes it appear that the sum claimed is too large. In this case the action was to recover for meat furnished, and attachment issued on the ground that defendants were about to convert their property into money and place it beyond the reach of their creditors, and that the debt had been fraudulently contracted. Among other affidavits filed by defendants on a motion to dissolve was one alleging that plaintiff had charged exorbitant prices for the meat, and that they did not owe him for the full sum claimed. Said the court: "A defendant, by denying the indebtedness, will not thereby be entitled on that ground to a dissolution of the attachment. The question of indebtedness must be determined by a trial on the issues formed by the pleadings, but the grounds for and against an attachment must be determined from the evidence in support of or opposed thereto. Of course, if, on

the final trial of the case, judgment is rendered in favor of the defendant, and the action is dismissed, the attachment will fail, as it is merely an incident to the cause of action. In the case at bar the affidavits of the defendants allege in substance that the plaintiff had charged them exorbitant prices for meat, more than they could have bought it for from other dealers, and that they did not owe him the full sum claimed. It has no bearing upon the attachment, except to explain the conduct of the defendants in not dealing with him to the full extent of their purchases, and we think the defendants had the right to explain their conduct." In *Standard Stamping Co. v. Hebzal*, 44 Neb. 105, 62 N. W. 247, the petition in attachment averred that the defendants acted conjunctively, the first named buying on credit and turning over the goods to the second to be disposed of by him for the joint benefit of both. The goods attached were claimed by one of the defendants, and it was held proper, in motion to dissolve the attachment, to consider whether there existed the alleged privity between the defendants, because without it no ground existed for the attachment against the individual property of the claimant. But in *Roach v. Brannon*, 57 Miss. 490, it was held that a defendant cannot deny the truthfulness of the grounds alleged in affidavit for attachment, if the averments are made by the plaintiff in reliance upon the defendant's language or conduct.

c. **Insufficiency of Cause of Action.**—Where the complaint in an action, aided by attachment, fails to state a cause of action, a motion to dissolve the attachment should be granted. This rule was announced in 1785, by the supreme court of Pennsylvania (*Vienne v. McCarty*, 1 Dall. 154, 1 L. ed. 179), and has been uniformly followed ever since. It is clearly based on the sensible theory that an attachment is obtained only for the purpose of securing the eventual satisfaction of the plaintiff's demand, and that if he has a demand, the complaint must contain a statement of the facts which constitute it; hence if it appears from the complaint itself, without reference to facts aliunde, that no cause of action exists, then the attachment must be discharged. This must not be understood as implying that a motion to dissolve may operate as a substitute to a demurrer to the complaint, or that the motion will be granted because a demurrer might properly be sustained. On the other hand, the complaint may be treated as already amended, if amendable: *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741; *Hale Brothers v. Milliken*, 142 Cal. 134, 75 Pac. 653; *Jends v. Richardson*, 71 Fed. 365. The rule stated does not require the court, on a motion to discharge an attachment, to give the same elaborate consideration in determining whether a cause of action is stated as it would on the hearing of a demurrer, but it is "undoubtedly the duty of the court," as was said by Mr. Justice O'Brien in *Goldmark v. Magnolia Metal Co.*, 51 N. Y. Supp. 68, 28 App. Div. 264, "to examine the plead-

ing with a view to seeing if it is frivolous, or so barren of substantial averments that no reasonable arguments can be urged in its support." In *Guarantee S. L. & I. Co. v. Moore*, 54 N. Y. Supp. 787, 35 App. Div. 421, Mr. Justice Barrett, in applying this rule, said: "The question then is: Are the plaintiff's papers hopelessly bad?" In *Dolan v. Armstrong*, 35 Neb. 339, 55 N. W. 132, it was held that an attachment should be dissolved which was obtained on the ground that the defendant had fraudulently induced plaintiff to sell him goods when the complaint failed to state a cause of action as to a portion of the attached goods. And in *Knight v. Hatfield*, 129 N. C. 191, 39 S. E. 807, where an attachment was levied against a nonresident in an action for breach of an oral contract to sell a manufacturing plant, consisting of realty and personalty, the writ was held to have been properly vacated, because the contract as shown by the complaint was void. In the recent case of *Pearsons v. Peters*, 19 S. D. 162, 102 N. W. 606, the complaint, in an action for damages for the partial failure of defendant to convey to plaintiff certain land, failed to allege any false pretense on the part of defendant, but the affidavit for attachment set forth that the contract, and the debt and damages were incurred for property of the plaintiff obtained in payment of such land under false pretenses. The attachment was held to have been properly dissolved, because the grounds upon which the claim was based were not properly set out in the complaint. But where a cause of action is stated, the fact that the allegations contained in the complaint are not true, or that the defendant could defeat the plaintiff's demand on the merits, are not questions which can be considered on a motion to dissolve the attachment: *Herrman v. Amedee*, 30 La. Ann. 393. And when there is any doubt as to whether a cause of action is stated or not, the attachment will be upheld and the question left for determination on demurrer or at the trial. An excellent illustration of this is afforded by the case of *Jones v. Hygienic Soap Granulator Co.*, 110 App. Div. 331, 97 N. Y. Supp. 104, which has often been quoted as authority and followed by the later cases. Here an order was granted by the lower court vacating an attachment on the ground that there was no competent or sufficient proof in the papers upon which the attachment was granted to show to the satisfaction of the justice who granted the same that a cause of action existed in favor of the plaintiff against the defendant; and on the further ground that the complaint did not state a cause of action. The contract on which the suit was brought, and which was attached to the complaint, was in the form of a letter addressed to the plaintiff and signed by one R. L. Edwards, as follows: "If you will forthwith deposit 2,000 shares in the treasury of the corporation, I will agree to purchase your entire holdings in the Hygienic Soap Granulator Co. of New York City, say 4,500 shares for the sum of \$15,000.00, upon the following terms

and conditions: The said 4,500 shares of stock of said company, in negotiable form, to be deposited with Post Bros. & Co. of the City of New York, and there remain, subject to the following instructions and conditions. On deposit of the said stock \$6,000.00, is to be paid to you in cash, \$4,000.00 to be paid to you within four months from date of such deposit of stock, and \$5,000.00 to be paid to you within five months from same date for the balance. In case of default of the second payment on account of this purchase, Post Bros. & Co., is authorized and directed to surrender to R. L. Edwards or his order, 1,200 shares of the 4,500 shares deposited, and this agreement shall then become null and void as to the balance of said stock, and the 3,300 shares shall then be returned to the original depositor. In case the second payment shall have been paid and default made on the third and last payment, the said Post Bros. & Co. shall then deliver 1,250 shares additional to said R. L. Edwards or his order, for the \$10,000.00 already paid and the balance of the stock, say 2,050 shares, shall be returned to the original depositor, and this agreement or writing shall be declared null and void in so far as the stock unpaid for is concerned. When all the payments shall have been made within the dates above specified, amounting to \$15,000.00, the said Post Bros. & Co., shall then deliver all the balance of, say 2,050 shares, of said stock to the said R. L. Edwards, thereby completing the transaction and releasing Post Bros. & Co., and all concerned from any further obligation." Upon this letter was an indorsement signed by the plaintiff, "I agree to the aforesaid proposition and accept the same." Plaintiff had also agreed to give an irrevocable proxy to vote for two years, the four thousand five hundred shares deposited as aforesaid and tender his resignation as a director and vice-president of said corporation. The complaint alleged that the defendant was a foreign corporation organized and existing under the laws of New Jersey. That on 25th of June, 1904, plaintiff was the owner and in possession of certificates for one thousand shares each of the capital stock of defendants; that on said day plaintiff entered into a contract with one R. L. Edwards, a copy of which was annexed, that at the time the defendant, through its officers, had knowledge of the contract and its terms, and that on or about 25th of June, 1904, plaintiff deposited with defendant the two certificates mentioned; that the first payment of six thousand dollars was paid to plaintiff as agreed and the second payment of four thousand dollars was made on the 26th of October, 1904, and that no other payments had been made, and that the time to do so under said contract had expired, and that said Edwards had defaulted in the compliance with the terms of said contract, and that plaintiff was entitled to have returned to him the said certificates. The plaintiff claimed that the words in the contract, "if you will forthwith deposit" two thousand shares in the treasury named, were clear, and

that the words must be given their plain, ordinary, and every-day sense, while the defendant contended that the word "deposit" as used in the contract meant "transfer," and that the plaintiff had agreed to and did make an absolute and present gift to the company of the two thousand shares, and had thereby parted with all his right to the same. But the court, while expressing a doubt as to what should be a proper construction of the contract attached to the complaint, or whether a recovery could be had thereon, was of opinion that, as the complaint was good in form and properly alleged an action in conversion, it could not be said "that the defendant has established that 'the plaintiff's papers, are hopelessly bad,' nor that they are 'so barren of substantial averments' that no reasonable arguments can be urged in their support," and the order dissolving the attachment was set aside.

d. **Excessive Claim.**—The weight of authority is to the effect that a motion to vacate an attachment should not be granted merely because the movant is not liable for the entire amount for which the writ was issued, but that the attachment should be allowed to stand for the amount for which it should properly have issued. Thus in *Lewis v. Lehman*, 5 Pa. Dist. Rep. 364, it was held that on a rule to dissolve an attachment on the ground that the whole of the debt sued for was not due, the attachment should be sustained as to the portion of the debt that is due. And the general principle above stated is sustained in *Gross v. Goldsmith*, 4 Mackey (D. C.), 126; *Brewer v. Ainsworth*, 32 Ga. 487; *Finney v. Moore*, 9 Idaho, 284, 74 Pac. 866, *Sackett v. Partridge*, 4 Iowa, 416; *Guarantee S. L. & I. Co. v. Moore*, 54 N. Y. Supp. 787, 35 App. Div. 421; *Mendes v. Frieters*, 16 Nev. 388; *Donnelly v. Elser*, 69 Tex. 282, 6 S. W. 563; *Hereford Cattle Co. v. Powell*, 13 Tex. Civ. App. 496, 36 S. W. 1033; *Woldert v. Nedderhut Packing etc. Co.*, 18 Tex. Civ. App. 602, 46 S. W. 378. But this rule is not universal, for in *Weissinger v. Studebaker Bros. Mfg. Co.*, 73 Miss. 480, 18 South. 915, it was held that where the debt alleged to be due is only in part due, the attachment should be dissolved. And in *Smith v. Swenson*, 26 Misc. Rep. 151, 54 N. Y. Supp. 783, an attachment was held to have been properly vacated where the plaintiff in an action for breach of contract claimed too much by asserting the wrong measure of damages. The general principle involved in the case last mentioned is again asserted in *Thorn v. Alvord*, 32 Misc. Rep. 456, 66 N. Y. Supp. 587, though in this case the refusal to dissolve the attachment on the ground that it had issued upon an excessive claim was upheld, where the note set out in the attachment proceedings was to be paid in a year, with interest at eight per cent till paid, "payable ———, and if not so paid to be compounded," while the warrant for attachment called for the amount of the note with interest compounded from the maturity thereof. In *Kennedy v. California Savings Bank*, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846,

it is said that if an attachment issues for a greater amount than claimed, the writ must be vacated, though in levying the writ, no more of defendant's property was seized than was sufficient to satisfy plaintiffs' demand; and to the same effect is *Moore v. Cooley* (Tex. Civ. App.), 16 S. W. 787. While in *Tucker v. Green*, 27 Kan. 355, the court say: "When the grounds of attachment are not denied, and it is sought to release property from an excessive levy, the only question for the court to determine is, whether too much property has been taken under the attachment to satisfy the claim or damages alleged. The court is not to investigate what amount of recovery the plaintiff is likely to obtain upon a trial, but only whether the property taken is more than sufficient to satisfy the claim of the plaintiff. If property is taken upon attachment in excess of the amount of damages claimed, the court, after an investigation as to the value of such property, must discharge the attachment as to so much of the property attached as is in excess in value of the damages alleged."

e. **Want of Jurisdiction.**—Where a nonresident defendant has done nothing to give the court jurisdiction over his person and no property within the court's jurisdiction has been seized, the whole proceedings should be dismissed: *Beasley v. Lennox-Haddleman Co.*, 116 Ga. 13, 42 S. E. 385. And when an officer levied an attachment upon all the interest of a nonresident defendant in certain land, without any affidavit that he had any interest, the defendant could show that there had been no sufficient service by pleading that he had no interest in the land: *Guild v. Richardson*, 23 Mass. (6 Pick.) 364. But where an action was pending between the same parties in both the city and supreme court on notes, and the actions were consolidated in the supreme court, at the defendant's instance, it was held error to vacate an attachment procured by the plaintiff in the city court, although he had also obtained security in the supreme court: *Goepel v. Robinson Machine Co.*, 103 N. Y. Supp. 5, 118 App. Div. 160.

f. Defects and Irregularities in Proceedings.

1. **In General.**—An attachment being a provisional remedy where particular grounds are necessary to authorize issuance of the writ, it follows that if the proceedings upon which the attachment is obtained are irregular and defective, and do not show affirmatively that the statute has been complied with, the attachment should be dissolved. Thus in *Fisk v. French*, 114 Cal. 400, 46 Pac. 161, plaintiff sued on four notes, set up copies of the notes in his complaint, and alleged an assignment by defendant to plaintiff of certain mining stock as collateral security for one of the notes, with power of sale of said stock in case of default. The affidavit for attachment alleged that the notes were not secured by any mortgage or pledge upon personal property. It was held that the attachment was properly dissolved, even though the plaintiff by an amended complaint

made the requisite facts appear; for the reason that the facts which the statute required to be stated in the affidavit were not so stated. And when the statute required sufficient sureties as a condition to the issuance of an attachment, and the state law required that the officer taking it must require the sureties to accompany it with affidavit that they were householders or freeholders and each worth a specified sum, a bond which failed to show the sureties were householders or freeholders warranted a discharge of the attachment: *Tibbet v. Sue*, 122 Cal. 206, 54 Pac. 741. And in *Sproks v. Bell*, 137 Cal. 415, 70 Pac. 281, an attachment was discharged which had issued on an affidavit that the defendants were nonresidents, and that the indebtedness was on a contract for the direct payment of money, but failed to state that the claim had not been secured, though only two of the defendants, whose property was all to be taken under the writ were proven to be nonresidents. In *Connally v. Atlantic Contracting Co.*, 120 Ga. 213, 47 S. E. 575, an attachment was sued out against four defendants, but the officer's return showed that the property was levied on as the property of one of them only, and a dismissal of the levy as to the other defendants was held to have been proper. As the grounds for an attachment must exist at the time the writ issues, when an affidavit was made twenty-eight days before the commencement of the suit and the issuance of the writ, and the ground alleged was the debt was not secured, the attachment was properly discharged on motion: *Murphy Grant Co. v. Zaspal*, 11 Idaho, 145, 81 Pac. 301. An inconsistency between the claim stated in the affidavit for attachment and the demand set forth in plaintiffs' declaration is fatal to the attachment, and may be reached by motion to quash: *Simmons v. Simmons*, 56 W. Va. 65, 107 Am. St. Rep. 890, and note, p. 894, 48 S. E. 833.

But mere technical defects and unsubstantial departures from the words of the statute in stating the grounds for an order of attachment will not require the writ to be vacated, for the law does not regard mere trifles. Thus an attachment should not be vacated because the Christian names of the parties were not given, without giving ample time and opportunity to supply the names: *Ferguson v. Smith*, 10 Kan. 396. And where an attachment issued on the 13th of August, and the bond and affidavit were certified by the clerk to have been acknowledged on the 18th of August, it was held to have been only a clerical error which did not warrant quashing the writ: *Henderson v. Drace*, 30 Mo. 358. Nor is the improper joinder of a defendant in attachment a ground for abating the writ: *Albers v. Bedell*, 87 Mo. 183. And plaintiff's failure to attach to his complaint a copy of the instrument on which the action is brought does not authorize quashing the attachment, because such defect could be supplied, and could only be taken advantage of by a motion directed against the complaint itself: *Olmstead v. Rivers*, 9 Neb. 234, 2 N. W. 366. Nor could an attachment be dis-

solved because of an abortive attempt to serve summons on a non-resident defendant, against whom a judgment creditor had brought an attachment suit to subject land claimed to have been colorably conveyed to one who was made a codefendant with the nonresident defendant: *Kennard v. Hollenbeck*, 17 Neb. 362, 22 N. W. 771. In *Grotte v. Nagle*, 50 Neb. 363, 69 N. W. 973, the action of the lower court in refusing to quash an attachment was upheld where the affidavit varied from the amended petition in the statement of the kind of account in suit, but the defendant had answered the amended petition. The ruling in this case, however, is based on the fact that by answering the amended petition the defendant had waived his right to object that the affidavit set up a different account from that pleaded in the original petition. In an action for breach of contract, where the complaint alleged that defendant had acted in complete disregard of the contract obligations, the attachment could not be vacated on the ground that the complaint failed to state that the defendants did not give the statutory one month's notice of intention to dissolve the contract: *Farquehar v. Wisconsin Condensed Milk Co.*, 30 Misc. Rep. 270, 62 N. Y. Supp. 305.

2. **Insufficiency of the Affidavit.**—An attachment obtained on a void affidavit should be dissolved. Thus, where the clerk of a circuit court began an action in attachment, and his affidavit in attachment was sworn to before his deputy, the writ was properly dissolved on motion, because the affidavit was a nullity: *Owens v. Johns*, 59 Mo. 89. And in *Manley v. Headley*, 10 Kan. 88, it was held that an attachment should be vacated on motion where, in a suit by a corporation, the writ under which real estate was seized was obtained upon an affidavit by a party who alleged he was one of the plaintiffs, but who was only an agent of the plaintiff. So, also, any substantial defect in the affidavit will defeat the attachment. Thus, where an affidavit for attachment recited that the defendant had disposed of his property "or any part thereof," or is about to do so with intent to defraud, etc., it was held insufficient to support the attachment; for the reason that, if false, perjury could not be assigned thereon: *Goodyear Rubber Co. v. Knapp*, 61 Wis. 103, 20 N. W. 651, following *Miller v. Munson*, 34 Wis. 579, 17 Am. Rep. 461, when an affidavit was held insufficient which charged the defendant with fraudulent disposition of "any of his property." But the same rule applies in regard to defects in the affidavit for attachment, as with reference to defects in other papers in attachment suits, and if the defects in the affidavit are not material and are cured by the evidence upon the hearing, the attachment will not be dissolved. Thus in *Hodson v. Tootle*, 28 Kan. 317, the true title to an action was "Milton Tootle, John Shireman, Jr., Harry M. Tootle, De Forest W. Herrick, and Henry D. Robinson, Partners Under the Name of Tootle Shireman & Co., Plaintiffs, v. Pleasant W. Hudson, Defendants," but in the affidavit for attach-

ment the cause was entitled, "Milton Tootles et al., Plaintiffs, v. Pleasant W. Hodson, Defendant." In sustaining the writ the court said: "The body of the affidavit showed clearly in what case the affidavit was made and filed, and the facts set forth in the affidavit were cleverly proved by competent written and oral evidence on the hearing of the motion to discharge." And in *Maury v. American Motor Co.*, 25 Misc. Rep. 657, 56 N. Y. Supp. 316, the failure of an affidavit for attachment to allege that summons had been issued or action commenced was held not to be sufficient ground for vacating the writ. (As to supplying by amendment defects in attachments and the papers on which they are based, see note to *Barber v. Ham*, 61 Am. Dec. 125.) So, too, if the affidavit alleges a good cause of action, the fact that it is incorrectly described in the warrant affords no basis to quash the attachment: *Fox v. Mays*, 61 N. Y. Supp. 235, 46 App. Div. 1.

g. Ownership of Attached Property.—It is a general rule, amply supported by the cases, that an attachment will not be dissolved on defendants' motion on the ground that the goods attached do not belong to him. This rule is founded upon the theory that such traverse is not within the scope of the issues involved in the provisional remedy of attachment; that it involves matters *dehors* and extrinsic to the proceedings, presents an issue merely collateral and disputes the return of the officer: *Sims v. Jacobson*, 51 Ala. 186; *Exchange Nat. Bank v. Clement*, 109 Ala. 270, 19 South. 814; *Tidrick v. Sulgrove*, 38 Iowa, 339; *Mitchell v. Skinner*, 17 Kan. 563; *McDonald v. Marquhardt*, 52 Neb. 820, 73 N. W. 288; *Kneeland v. Weigley*, 6 Neb. 276, 107 N. W. 574; *Vogelman v. Lewitt*, 48 Misc. Rep. 625, 96 N. Y. Supp. 207; *Langdon v. Conklin*, 10 Ohio St. 439; *First Nat. Bank v. Mullany*, 29 Or. 268, 45 Pac. 796. But where the officer's return to a writ served by attachment of real estate only recited that he had attached "the right, title and interest, and property of the defendant therein," it was held that the defendant could plead in abatement to the writ that at the time of the service he had no property in the land attached, as that would not be a contradiction of the officer's return, there being no allegation therein that defendant had any interest: *Gardner v. James*, 5 R. I. 235.

h. Exemption of Attached Property.—There are many cases holding that an attachment will not be discharged on the ground that the property levied on is not subject to attachment: *Mason v. Lieuallen*, 4 Idaho, 415, 39 Pac. 1117; *Campbell v. Morris*, 3 Har. & McH. 535; *Davidson v. Owens*, 5 Minn. 69; *Quigley v. McEvony*, 41 Neb. 73, 59 N. W. 767; *Herman v. Bailey*, 20 Misc. Rep. 94, 45 N. Y. Supp. 88; *Pech Mfg. Co. v. Groves*, 6 S. D. 504, 62 N. W. 109. But this rule is not universal, for in *Holmes v. Marshall*, 145 Cal. 777, 104 Am. St. Rep. 86, 79 Pac. 534, 69 L. R. A. 67, it is held that a motion to set aside the levy of an attachment on money in bank, realized in a

life insurance policy, was properly granted. Said the court: "Under section 556, Code of Civil Procedure, the writ may be discharged when the same was improperly or irregularly issued. This was not a dissolution of the writ of attachment, but an order setting aside the levy as to the exempt property. It would be strange if a court were so impotent that it could not set aside the erroneous levy of its own writ upon exempt property. Any other rule would compel the injured party to bring a suit for damages, which not only would lead to delay but might in the end prove futile."

And in *Hastings v. Phoenix*, 59 Iowa, 394, 13 N. W. 346, where an attachment was issued on the ground that defendant was about to remove his property from the state without leaving enough thereof to discharge the attachment, it was held proper to grant a motion to discharge, supported by defendant's affidavit showing that the property was exempt. In Iowa, however, the statute allows a motion to discharge an attachment for any cause, "making it apparent of record that the attachment should not have been levied upon the property held."

III. Form of Proceedings to Obtain Dissolution.

a. *In General.*—The usual method of defeating an attachment is by motion to quash, but under some circumstances a rule to show cause or plea in abatement is the proper remedy. Thus, where an attachment is sought to be vacated on the ground that the cause of action is one for which an attachment will not lie, the remedy is by rule to show cause and not by demurrer to the complaint: *Jordan v. Hazzard*, 10 Ala. 221; *Watson v. Auerbach*, 57 Ala. 353; *Rich v. Thornton*, 69 Ala. 473; *Adair v. Stone*, 81 Ala. 113, 1 South. 768, the last case holding that a rule to show is the only remedy, and that the irregularity cannot be reached by motion to quash on plea in abatement. In *House v. Hamilton*, 43 Ill. 185, the question involved in a proceeding to vacate an attachment was one of jurisdiction, depending upon the power of the sheriff to go into another county and execute a writ of attachment upon property removed there from the court when the writ issued. It was held that the proper remedy was by motion to quash and not by plea in abatement, because the latter would put in issue only the question of intention of the defendant in removing his property and not the question of jurisdiction.

It is stated in *Leak v. Morrman*, 68 N. C. (Phil.) 168, that the proper mode of taking advantage of a defect in an affidavit for attachment is by a plea in abatement, but later cases in that state recognize the right to proceed by motion to dissolve: *Clark v. Clark*, 64 N. C. 150; *Hale v. Richardson*, 89 N. C. 62.

It has been held that an attachment issued without affidavit and bond could not be quashed on motion, but only be abated by plea: *Free v. Howard*, 44 Ala. 195. And to the same effect is *Didier v.*

Galloway, 3 Ark. (3 Pike) 501; Evans v. Andrews, 52 N. C. (7 Jones) 117; Messner v. Hutchins, 17 Tex. 597.

But in *Bank of Alabama v. Fitzpatrick*, 23 Tenn. (4 Humph.) 311, a motion to quash, and not a plea in abatement, was held the proper remedy when the attachment bond was defective. And in *Tingle v. Bryson* 14 W. Va. 295, where an attachment was sought to be vacated on the ground that the bond had been executed by plaintiff's attorney in fact without authority, it was decided that the irregularity should be met by plea and not by motion to quash.

In *Hecht v. Wassel*, 27 Ark. 412, after property had been attached and sold, the assignee in bankruptcy appeared in the action and moved to quash the attachment and have the proceeds of the sale turned over to him, but it was held that the matters set up in his petition could only be considered when pleaded in abatement.

b. For Defects not Apparent of Record.—If the grounds upon which the dissolution of an attachment is sought are apparent upon the face of the record, the authorities are practically uniform that the proper remedy is by motion to quash. But there are some cases which hold that if the matters complained of are not apparent on the face of the record, the remedy is by plea in abatement only. Of course those cases which we have already cited under the heading "falsity of affidavit," holding that the truthfulness of the grounds alleged in an affidavit for attachment cannot be inquired into on a motion to dissolve, necessarily determine that such matters can only be reached by plea in abatement. But in addition to those cases there are others which sustain the doctrine that when an attachment is regular on its face, it cannot be attacked for matters dehors the record by motion to quash, but only by plea in abatement: *Cooper v. Reeves*, 13 Ind. 53; *Graham v. Bradbury*, 7 Mo. 281; *Seavey v. Platt County*, 10 Mo. 269; *Isaacks v. Edwards*, 26 Tenn. (7 Humph.) 465, 46 Am. Dec. 86; *Waffles-Patter Grocer Co. v. Basham*, 9 Tex. Civ. App. 638, 29 S. W. 1118; *Caldwell v. Lamkin*, 12 Tex. Civ. App. 29, 33 S. W. 316.

In *Isaacks v. Edwards*, 26 Tenn. (7 Humph.) 465, 46 Am. Dec. 86, it was held that where an attachment issued on the ground that the defendant was about to remove himself and property from the state, the fact that he was not about to remove should be pleaded in abatement. And in *Waffles-Platter Grocer Co. v. Basham*, 9 Tex. Civ. App. 638, 29 S. W. 1118, a defense to an attachment on the ground that the debt is not due can only be met by plea in abatement. But the cases above cited are opposed by the decided weight of authority. We have shown under a previous heading that it is the duty of the court on a motion to quash to inquire into the truthfulness of the alleged grounds, when they are denied by the defendant, and the cases there referred to are applicable as holding that matters dehors the record can be met by motion to quash, the motion being supported by proof that the alleged grounds are not true.

In addition to those cases, however, this general doctrine is upheld in *Holliday v. Cohen*, 34 Ark. 707; *Barbieri v. Ramelli*, 84 Cal. 174, 24 Pac. 113; *Wehle v. Kerbs*, 6 Colo. 167; *Robinson v. Morrison*, 2 App. Cas. (D. C.) 105; *Barberer v. Paige Hotel Co.*, 2 App. Cas. (D. C.) 174; *Weston v. Jones*, 41 Fla. 188, 25 South. 888; *Martin v. Berry*, 1 Ind. Ter. 399, 37 S. W. 835; *Wm. W. Kendall Boot & Shoe Co. v. August*, 51 Kan. 52, 32 Pac. 635; *Lambden v. Bowie*, 2 Md. 334; *Ferrell v. Farnen*, 67 Md. 76, 8 Atl. 819; *Johnson v. Stockham*, 89 Md. 368, 43 Atl. 943; *Bower v. Town*, 12 Mich. 230; *Newell v. Whitwell*, 16 Mont. 243, 40 Pac. 866; *Jordan v. Dewey*, 40 Neb. 639, 59 N. W. 88; *Belmont v. Signa Iron Co.*, 42 N. Y. Supp. 122, 12 App. Div. 441; *Hale v. Richardson*, 89 N. C. 62; *Harrison v. King*, 9 Ohio St. 388; *Seville v. Wagner*, 46 Ohio St. 52, 18 N. E. 430; *Carnahan v. Gustine*, 2 Okl. 399, 37 Pac. 594; *Kerchner v. McCormac*, 25 S. C. 461; *Hansen v. Doherty*, 1 Wash. 461, 25 Pac. 297; *Collins v. Stanley*, 15 Wyo. 282, ante, p. 1022, 88 Pac. 620. In *Harrison v. King*, 9 Ohio St. 388, it is said that when an attachment is issued for a debt which is not due, the debtor's course is to move to quash, and not to answer the petition. And in *Lambden v. Bowie*, 2 Md. 334, it was held that a defendant can move to quash an attachment on ex parte affidavits for any defects not apparent on the record, for the reason that as the defendant never appears to the attachment, but only to the capias, that he could not question the attachment proceedings for defects not apparent on their face by plea. The reasons for upholding the right of a party to proceed by motion to quash an attachment for irregularities not apparent in the record are well stated in *Johnson v. Stockham*, 89 Md. 368, 43 Atl. 943, where the court said: "This will be done whether the defects are apparent or proved. The difference consists merely in the mode of establishing these defects. In the one instance it is by an inspection of the record; in the other, it is by the production of evidence. But this dissimilarity in the mode of proof can make no difference in the nature of the thing proved."

IV. Persons Entitled to Move for Dissolution.

a. *In General.*—It is held in some jurisdictions that any party interested may dispute the validity of an attachment and move to dissolve it. Thus in *Capehart's Exrs. v. Dowery*, 10 W. Va. 130, parties who claimed an interest in certain attached real estate by virtue of deeds or executory contracts were permitted to move to quash the affidavit and the writ. And in *Lambden v. Bowie*, 2 Md. 334, a third person who claimed an interest in certain attached property was allowed to move to quash, even though the defects complained of were not apparent on the face of the record. In *Dickenson v. Cowley*, 15 Kan. 269, the right of a third party claiming to be the owner of attached land, to move to quash was upheld, if the affidavit for attachment was fatally defective. And in *Cit-*

izens' Bank v. Corkings, 9 S. D. 614, 62 Am. St. Rep. 891, 70 N. W. 1059, it was held that a subsequently attaching creditor can move to discharge an attachment levied on his debtor's property. But these decisions must have been based on the statutory provisions of those states, for it is undoubtedly true, as a general rule, that in the absence of fraud in procuring the writ, attachment proceedings cannot be attacked collaterally for an infirmity in the affidavit, but can only be dissolved for irregularities or the grounds for its issuance traversed by a defendant to the suit or his assignees. Thus in *Shea v. Robinson*, 101 Cal. 455, 35 Pac. 1023, where a junior attaching creditor sought to have his attachment decreed a prior lien on account of the falsity of the alleged grounds of the former attachment which had been obtained on a bona fide debt without tinge of fraud, the court said: "Such an objection to the attachment proceedings as that insisted on in the case at bar can be successfully made only by the defendant in the attachment suit." And in *Hillman v. Griffin* (Cal.), 59 Pac. 194, one who claimed title to certain personal property under attachment was not allowed to impeach the affidavit upon which the attachment was issued, because he had not been a party to the attachment suit. And to the same effect is *Loring v. Edes*, 8 Iowa, 427. In *Williams v. Walker*, 11 Iowa, 77, an attachment on land was held to have been erroneously dissolved on motion of one not a party to the attachment suit, although he was the owner of the land attached. And in *Martin v. Wiggin*, 67 N. H. 196, 29 Atl. 450, a junior mortgagee of attached property who had been permitted to appear in the attachment suit was not allowed to move to dissolve the attachment upon the ground of lack of service on the defendant, though the defendant himself could have done so. In *Meyer v. Keefer*, 58 Neb. 220, 78 N. W. 506, certain mortgagors of chattels levied on in an attachment proceeding were permitted by the trial court to intervene in the attachment suit and traverse the alleged grounds of the affidavit for attachment. Said the supreme court: "It is obvious that they had no right to move for a dissolution of the attachment, and the sustaining of their motion was clearly erroneous." And this ruling is followed in the late case of *Wagner v. Wolf*, 75 Neb. 780, 106 N. W. 1024, where it is held that a subsequent purchaser of land on which an attachment had been levied could not question the existence of the grounds for the issuance of the writ, as that right belonged to the attachment debtor alone. To the same effect are *Barth v. Burnham*, 105 Wis. 548, 81 N. W. 809, and *Rowe v. Kellogg*, 54 Mich. 206, 19 N. W. 957.

b. Attachment Defendant.—The general right of an attachment defendant to move for the dissolution of an attachment issued on the ground of a fraudulent transfer of his property is not affected by the fact that a third party interposes a claim and equitable issues are tendered: *Falvey v. Adamson*, 73 Ga. 493. And when actual possession of property attached remains in the debtor, he is not pre-

vented from moving to dissolve, because later levies have been made: *Schall v. Bly*, 43 Mich. 401, 5 N. W. 651. Nor is he precluded from exercising this right where the attachment is based upon an affidavit of his fraudulent misconduct, because there are other attachments upon the same property, and he therefore would not be entitled to possession, even if his motion was granted: *Sheldon v. Stewart*, 43 Mich. 574, 5 N. W. 1067. In *Drs. K. & K. U. S. Med. & Surg. Assn. v. Detroit P. & T. Job Printing Co.*, 58 Mich. 487, 25 N. W. 477, it was held that the fact that an execution is levied in favor of a third person upon property which had been previously attached does not affect the defendant's right to move to dissolve. And this is true, even though the plaintiff gives the sheriff an indemnity bond against such claim: *Whitelegge v. Dewit*, 12 Daly (N. Y.), 319.

So, too, a defendant may move to vacate an attachment upon property which he has encumbered beyond its full value: *McCord Brady Co. v. Bowen*, 51 Neb. 247, 70 N. W. 950; *Kountze v. Scott*, 52 Neb. 460, 72 N. W. 585; *Skinner v. First Nat. Bank*, 59 Neb. 17, 80 N. W. 42; or upon property to which he has assigned all of his interest: *McCord Brady Co. v. Bowen*, 51 Neb. 247, 70 N. W. 950; *Kountze v. Scott*, 52 Neb. 460, 72 N. W. 585; *Gasherie v. Apple*, 14 Abb. Pr. (N. Y.) 64; *Claussen v. Easterling*, 19 S. C. 515; even though he disclaims any interest in it: *Salmon v. Mills*, 49 Fed. 333, 1 C. C. A. 278. And a defendant who owns, and is entitled to have restored to him, a portion of the property attached, may move to vacate the attachment, the same as if he owned it all: *Patterson v. Goodrich*, 31 Mich. 225. In *Miller v. Fewsmith Lumber Co.*, 42 W. Va. 323, 26 S. E. 175, it was held that a defendant in an action for debt can move to dissolve an attachment issued in the action, though he makes no counter-affidavit denying the indebtedness. And in *Blossom v. Estes*, 59 How. Pr. 381, a defendant who had assigned his property was permitted to move to vacate an attachment, where there had been failure to publish summons within the statutory time, even though his only object was to assist his assignees.

c. **Assignor for Benefit of Creditors.**—We have already seen that a defendant's right to move to dissolve an attachment is not defeated by his parting with his interest in the attached property. And when this assignment of interest is made for the benefit of his creditors, the defendant still has a reversionary interest in the assigned estate, and the right of an assignor for the benefit of creditors to move for dissolution of an attachment is very generally recognized: *Richards v. White*, 7 Minn. 345; *First Nat. Bank v. Randall*, 38 Minn. 382, 37 N. W. 799; *Brewer v. Tucker*, 13 Abb. Pr. (N. Y.) 76; *Tolerton & Stetson Co. v. Casperson*, 7 S. D. 206, 63 N. W. 908; *Keith v. Armstrong*, 65 Wis. 225, 26 N. W. 445, the last case holding that a defendant who had assigned for the benefit of creditors could move to dissolve the attachment, though the grounds assigned for its issuance were that the assignment was made in

fraud of his creditors. But in *Quebec Bank v. Corral*, 1 S. D. 372, 47 N. W. 397, it was held that though an assignor for the benefit of creditors has such resultant interest in the trust as to entitle him to move to traverse the grounds for attachment, he cannot ask for the discharge as a means of protecting the property assigned, because, said the court, "that would be a plain invasion of the rights of the assignee."

d. Assignee for Benefit of Creditors.—It is held in *P. Cox Mfg. Co. v. August*, 51 Kan. 59, 32 Pac. 636, that an assignee for the benefit of creditors who had possession of the property attached could move for a dissolution of the attachment, and in *Wichita Wholesale Grocery Co. v. Records*, 40 Kan. 119, 19 Pac. 346, an assignee was permitted to make such motion though he was not a party to the original action. But in *Howitt v. Blodgett*, 61 Wis. 376, 21 N. W. 292, it is held that when a debtor whose property has been attached makes an assignment before the time for answer to the action has expired, the assignee cannot, without leave of court, appear in such action and in his own name traverse the affidavit for attachment.

V. Estoppel or Waiver of Right to Move for Dissolution.

a. In General.—There is some difficulty in determining from the cases whether a defendant in an attachment suit is estopped from moving to dissolve the writ by appearing and pleading to the main action. The question seems to have been raised most frequently in Wisconsin, and the language in some of the cases justifies the inference that a defendant is not estopped, by appearance and answer, from moving to quash if the attachment is issued against a person not subject to attachment, or for a demand for unliquidated damages: *Heckscher v. Trotter*, 48 N. J. L. 419, 5 Atl. 581. Mr. Justice Dixon, in a well-considered opinion in this case, said: "By appearing generally the defendant acknowledges that due steps have been taken to bring him personally into court to answer whatever demands the plaintiff may lawfully present in such an action as he has instituted; and by pleading the defendant confines the inquiry touching his personal liability to the issues which his pleadings raise; but neither of these concessions seems to involve an obligation to leave his property charged with a lien for which there is no lawful warrant." But a majority of the cases hold that by making an appearance and pleading to the main action, the defendant was thereby estopped from moving to quash the writ, but not from moving to quash the levy: *Connelly v. Lerche*, 56 N. J. L. 95, 28 Atl. 430; *Moore v. Richardson*, 65 N. J. L. 531, 47 Atl. 424; *Sullivan v. Moffat*, 63 N. J. L. 211, 52 Atl. 291; *Cord v. Newlin*, 71 N. J. L. 438, 59 Atl. 22. The reasons given by the court in *Connelly v. Lerche*, 56 N. J. L. 95, 28 Atl. 430, for denying a defendant's right to move to quash an attachment after appearing in the main action are, that by such appearance the attachment suit became transformed

into a suit by summons, and therefore proceeded as a suit in personam, and remained a proceeding in rem only as to such property as had already been affected by the lien, and that the result of such appearance prevented any other claims being put in under such attachment, thereby affecting the rights of other creditors and preventing their filing claims. In *Harrisburg Boot & Shoe Co. v. Johnson*, 3 Pa. Dist. Rep. 433, it was held that in an attachment for fraud the defendant was not estopped from moving to dissolve the attachment, because he filed an answer denying the fraud, but not going into the merits of the case.

Where a defendant agrees, after the seizure of the property attached, that the sheriff shall sell summarily and retain the proceeds until final judgment, he is thereby estopped from moving to quash the writ, because, by this consent, he is deemed to have waived all legal proceedings looking to a release of the attached property: *Wickham v. Nalty*, 41 La. Ann. 284, 6 South. 123. But a request by a defendant against whom an attachment has issued to suspend legal proceedings does not estop him from moving to vacate the attachment on the ground of defective service of summons: *Mojarietta v. Saenz*, 80 N. Y. 547.

b. **When Defendant has Mortgaged the Property.**—We have already shown under the title "Persons Entitled to Move," that a defendant can move for dissolution of an attachment, although he has mortgaged his property beyond its full value. Consequently the general rule is, that the fact that a defendant in attachment has mortgaged the attached property does not estop him from moving to discharge the attachment. In addition to the cases heretofore cited, this doctrine is upheld in *Smith-Frazer Boot & Shoe Co. v. Derse*, 41 Kan. 150, 21 Pac. 167; *P. Cox Mfg. Co. v. August*, 51 Kan. 59, 32 Pac. 636; *Grimes v. Farrington*, 19 Neb. 44, 26 N. W. 618. Though in *McCord-Brady Co. v. Krause*, 36 Neb. 764, 55 N. W. 215, it was held error to dissolve an attachment on personal property upon the application of a debtor who had consented to a sale of all the attached property under the guise of chattel mortgages given to a few of his largest creditors, his interest being limited to such residue as might remain after the mortgages were satisfied.

c. **Want of Ownership of Property Attached.**—We have already shown that a defendant may move to vacate an attachment on property to which he has assigned all of his interest, and even when he disclaims any interest in it. The reason given why the defendant is not estopped in such cases is, because the right to attach depends upon its being the debtor's property, and the plaintiff having obtained the attachment on that ground, cannot afterward raise that question. Besides the cases previously cited on this point, the doctrine is strongly announced in *Holmes v. Langston*, 99 Ga. 555, 27 S. E. 155.

d. Effect of Giving Bond to Secure Release of the Property.—There is great conflict of opinion among the cases on the question whether a defendant is estopped from moving to dissolve an attachment, by executing a bond for the release of the property. Perhaps this conflict may be explained in part by the character of the undertaking which the statutes of the different states require in order to secure a release of the property. In some states only a forthcoming bond is required, while in others the statutes provide only for an undertaking to perform the eventual judgment of the court. Some cases, as we shall hereafter see, draw a distinction between the effect of these two classes of bonds, but in many others, no such distinction is made, and a defendant's right to move to dissolve an attachment after he has obtained a release of the property by giving bond is a question upon which the highest courts of the different states have reached opposite conclusions. In some jurisdictions it is held that the effect of giving a bond operates as a discharge of the attachment by operation of law, that the undertaking stands in place of the attachment, and consequently there is no function of a traverse or trial of it afterward, as the affidavit for attachment has become *functus officio*: *Morrison v. Alphin*, 23 Ark. 136; *New Haven Lumber Co. v. Raymond*, 76 Iowa, 225, 40 N. W. 820; *Brady v. Onffroy*, 37 Wash. 482, 79 Pac. 1004; *Dierolf v. Winterfield*, 24 Wis. 143. And in case *Threshing Machine Co. v. Merrill*, 68 Iowa, 540, 27 N. W. 742, the reason the court gave for holding that the defendant was estopped was that he "ought not to be permitted to give bond wherein it is recited that the property was held by attachment and afterward deny that fact," while in *Payne v. Snell*, 3 Mo. 409, the reason assigned for a similar holding is that the giving of bond has the effect of bringing the defendant into court as if by summons, and the suit is thereby transferred into an action in personam.

And there are some cases which hold that after giving bond, the defendant cannot attack the validity of the levy, for the reason that giving the bond is a waiver of all technical objections to the form of the levy: *Wharton v. Conger*, 17 Miss. (9 Smedes & M.) 510; *Fenner v. Boutte*, 72 Miss. 271, 16 South. 259; *Brack v. McMahan*, 61 Tex. 1. But a great many, and perhaps the greater number of, cases hold that a defendant who releases property under attachment by giving bond does not thereby acknowledge that the attachment was properly granted, and is not estopped from applying to discharge the writ on the ground that it was irregularly or improperly issued: *Winters v. Pearson*, 72 Cal. 553, 14 Pac. 304; *Carson v. The Talma*, 3 Ind. 194; *Baker v. Hunt*, 1 Mart. (O. S.) 193; *Quine v. Mays*, 2 Rob. (La.) 510; *Pailhes v. Roux*, 14 La. 82; *Avet v. Alvo*, 21 La. Ann. 349; *Hilton v. Ross*, 9 Neb. 406, 2 N. W. 862; *Rowles v. Hoare*, 61 Barb. (N. Y.) 266; *Garbutt v. Hanff*, 15 Abb. Pr. (N. Y.)

189; *Claffin v. Baere*, 57 How. Pr. (N. Y.) 78; *Bates v. Killian*, 17 S. C. 553.

There are other cases which hold that if the bond is given under a statute requiring an unconditional promise to perform the final judgment of the court, that the defendant is estopped to raise any question as to the regularity of the attachment proceedings, and though some of these cases do not distinctly so hold, it is a fair inference from the language used that if the undertaking is made under a statute which requires only a forthcoming bond, that there is no estoppel: *Ferguson v. Glidewell*, 48 Ark. 195, 2 S. W. 711; *Endress v. Ent*, 18 Kan. 236; *Inman v. Strattan*, 4 Bush (Ky.), 445; *Hazelrigg v. Donaldson*, 2 Met. (Ky.) 445; *Paddock v. Mathews*, 3 Mich. 18; *Rachelman v. Skinner*, 46 Minn. 196, 48 N. W. 776; *Fox v. McKenzie*, 1 N. D. 298, 47 N. W. 386; *Bunneman v. Wagner*, 16 Or. 433, 8 Am. St. Rep. 306, 18 Pac. 841; *McLaughlin v. Wheeler*, 1 S. D. 497, 47 N. W. 81; *Kennedy v. Morrison*, 31 Tex. 207; *Dierolf v. Winterfield*, 24 Wis. 243. But in *Garbutt v. Hanff*, 15 Abb. Pr. (N. Y.) 189, *Claffin v. Baere*, 57 How. Pr. (N. Y.) 78, and *Bates v. Killian*, 17 S. C. 553, it was held that a defendant is not estopped from moving the dissolution of an attachment, by executing an undertaking to perform the judgment. The ruling in the two New York cases, however, is somewhat weakened by the decision of the court of appeals in *McCombs v. Allen*, 82 N. Y. 114, where it was held that a discharge bond destroyed the attachment. True, the precise question under consideration was not involved in the *McCombs* case, but both the decision and the language of the court seem to overrule the holding in *Garbutt v. Hanff*, 15 Abb. Pr. 189, and *Claffin v. Baere*, 57 How. Pr. 78. In this case the defendant having discharged an attachment by rebonding, went into bankruptcy within four months after the time the attachment was issued. The bankruptcy act under such circumstances destroyed the attachment. In an action on the bond, it was contended that the bond was a mere substitute for the writ, and that the attachment having been annihilated by the bankruptcy proceedings, that the bond was also swept away. But the court, in holding that there was no attachment existing after the defendant had rebonded, said: "There was no attachment lien, nor any attachment in force upon which such proceedings could operate, and this fact is conclusive upon defendants." And a similar ruling is found in *Hill v. Harding*, 93 Ill. 77, and *Carpenter v. Turrell*, 100 Mass. 450. But the case of *Bates v. Killian*, 17 S. C. 553, is a strong case on the point that the giving of a bond to pay the judgment does not estop a defendant from moving to discharge an attachment for irregularity in its issuance.

There is still another line of decisions which holds that giving a bond, even for payment of the judgment, does not estop the defendant from moving to discharge a void attachment. These cases are based on the theory that the security on the bond would not be

bound if the attached property was not bound, and that a void attachment would uphold the levy or the bond given to supersede it: *Williams v. Skipnith*, 34 Ark. 529; *Bruce v. Conyers*, 54 Ga. 678; *Hamilton v. Merrill*, 37 Ohio St. 682; *Vose v. Cockroft*, 44 N. Y. 415; *Fox v. McKenzie*, 1 N. D. 298, 47 N. W. 386; *Shevlin v. Whelan*, 41 Wis. 88; and this doctrine has the sanction of the supreme court of the United States in *Butler v. Coleman*, 124 U. S. 721, 8 Sup. Ct. Rep. 718, 31 L. ed. 567.

The main theory, doubtless, upon which all of those opinions rest, which hold a defendant estopped after giving bond, is that he had an opportunity to move to discharge before he gave the bond—thus following the old English practice with reference to a defendant who sought release from civil arrest by giving bail. If the bond was given during vacation, he was not prevented from moving at the next term to quash the writ: *Jarrett v. Dillon*, 1 East, 18. But if he gave bond at the term to which the writ was returnable, he could not afterward move to quash the writ, because he could have moved to quash before executing the bond: *D'Argent v. Vivant*, 1 East, 330. At any rate, the English rule affords us some basis for deciding which of the opposite conclusions reached by the different courts is based upon the better reasoning.

VI. Persons Entitled to Oppose Motion to Discharge.

It is held that the plaintiff in an attachment proceeding is not entitled, as a matter of right, to appear and oppose the defendants' motion to discharge the attachment: *Sanborn v. Elizabethport Mfg. Co.*, 22 How. Pr. (N. Y.) 106. And in Pennsylvania, where the statute provided that in proceedings to levy an execution upon stocks belonging to defendant, if the stock was held in another name than that of the real owner, the plaintiff should file an affidavit stating that he verily believed such stock to be the property of the defendant, and enter into a recognizance for the benefit of the party to whom such stock really belonged, it was held that upon a levy on such stock without such affidavit and recognizance, the plaintiff could not oppose a motion to quash, even though made by one having no right to make such motion: *Eby v. Guest*, 94 Pa. 160. These views are manifestly absurd. The plaintiff is as deeply interested in this question as in any other which may arise in his case, and, therefore, as much entitled to be heard before it is decided.

Where no want of jurisdiction to issue a writ of attachment appears on the face of the papers, the plaintiff is entitled to form an issue and contest the defendants' right to discharge: *Stringer v. Dean*, 61 Mich. 196, 27 N. W. 886.

VII. Time of Moving for Dissolution.

a. In General.—It seems that a defendant can voluntarily appear at any time after an attachment has been issued against him,

even before the return day of the summons, and move to dissolve the writ: *Palmer v. Boschner*, 71 N. C. 291; *Wilson v. Louis Cook Mfg. Co.*, 88 N. C. 5. And even before the writ has been levied: *Sparks v. Bell*, 137 Cal. 415, 70 Pac. 281; *Andrews v. Schofield*, 50 N. Y. Supp. 132, 27 App. Div. 90. The question upon which there is any conflict of opinion is, not how soon a defendant may move for dissolution of an attachment issued against him, but how far his laches in moving will amount to a waiver of his right. There are cases which hold that the motion must be made at the earliest opportunity or good cause shown for not so doing. Otherwise the right to move is waived: *Beecher v. James*, 2 Scam. (Ill.) 462; *Brewster v. James*, 2 Scam. (Ill.) 464; *Lawrence v. Jones*, 15 Abb. Pr. (N. Y.) 110; *Thatheimer v. Hays*, 42 Hun (N. Y.), 93, 14 Civ. Proc. Rep. 232. Many other cases hold that the motion can be made at any time before final judgment: *Kennedy v. Mitchell*, 4 Fla. 457; *Quinlan v. Danford*, 28 Kan. 507; *Merchants' Nat. Bank v. Danford*, 28 Kan. 512; *Doggett v. Bell*, 32 Kan. 298, 4 Pac. 292; *Guest v. Ramsey*, 50 Kan. 709, 33 Pac. 17; *Bruce v. Cook*, 6 Gill & J. 345; *Gove v. Ray*, 73 Mich. 385, 41 N. W. 329; *Herman v. Hayes*, 58 Neb. 54, 78 N. W. 365; *Cheyenne First Nat. Bank v. Swan*, 3 Wyo. 356, 23 Pac. 743. While in New York it is held that a motion to vacate an attachment can be made at any time before the attached property has been applied to the payment of the judgment: *Andrews v. Schofield*, 50 N. Y. Supp. 132, 27 App. Div. 90. In *Trent v. Edmonds*, 32 Ind. App. 432, 70 N. E. 169, a motion to discharge an attachment made after judgment was rendered was held too late. And to the same effect is *Smith v. Parkersburg Co-operative Assn.*, 48 W. Va. 232, 37 S. E. 645. In *Jarvis v. Barrett*, 14 Wis. 591, it was held that the motion must be made before trial of the action. And in *First Nat. Bank v. Randall*, 38 Minn. 382, 37 N. W. 799, that a defendant can move to vacate an attachment at any time before his answer is disposed of, even though it may be insufficient.

b. After General Appearance and Pleading to the Merits.—In our discussion of the subject "Waiver of Defendant's Right to Move for Dissolution," ante, V, we have shown the rule generally sustained by the authorities to be, that a defendant, by a general appearance and answer in the action, is thereby estopped from moving to quash the attachment, but not from moving to quash the levy. In addition to the cases there referred to it was held in *Gill v. Downs*, 26 Ala. 670, that where an attachment was sued out in a case not authorized by law, the objection is waived if the defendant appears and pleads before moving to quash. And in *Wolffe v. State*, 79 Ala. 201, 58 Am. Rep. 590, that in an attachment by the state under a statute authorizing the attorney general to sue out such attachment at the direction of the governor, the objection that such direction was not given should be taken by motion. In *Fos-*

ter v. Dryfus, 16 Ind. 158, the defendant was not allowed to move to dissolve the attachment, after trial of the issues in the principal case, upon the ground that no evidence was offered in support of the affidavit of attachment. And a further reason assigned in this case for refusing to entertain the motion was, that the defendants' plea, not having controverted the facts alleged in the plaintiff's affidavit for attachment, amounted to an admission of such facts, except as to the existence of the debt sued for. In Hyde v. Nelson, 11 Mich. 353, it was held that a defendant can move to discharge an attachment issued against him after he has appeared and pleaded to the main action. And to the same effect is Connelly v. Lerche, 56 N. J. L. 95, 28 Atl. 430. In Hart v. Kanady, 33 Tex. 720, it is said that a motion to quash an attachment may be made in limine.

VIII. Proceedings on Motion to Dissolve.

a. In General.—When the affidavit required for quashing an attachment has been filed and shows, if uncontradicted, that the writ was illegally issued, the defendant can move to quash and the court proceed to a trial of the facts: State v. Quick, 45 N. J. L. 308. And a motion before a judge at chambers to dissolve an attachment need not first be filed with the clerk: Gillespie v. Lovell, 7 Kan. 419. Where a defendant causes his appearance to be entered in an attachment, but allows his default to be entered for failure to plead to the declaration which is afterward filed, he cannot move to set aside the writ on the ground that the declaration shows the writ was issued for unliquidated damages, his proper course being to move for an order to show cause why the attachment should not be dissolved: Roelofsen v. Hatch, 3 Mich. 277.

b. Sufficiency of Application.

1. In General.—An application to dissolve an attachment should specify the particular points of irregularity upon which the motion is made. The mere allegation that the attachment has been improperly issued is not sufficient: Freeborn v. Glazer, 10 Cal. 337; Omaha Upholstering Co. v. Chauvin-Fant Furniture Co., 18 Mont. 468, 45 Pac. 1087, the latter case holding that a reference in the motion to affidavits filed for the grounds would not cure the defect in a motion which failed to specify the grounds on which it was claimed the attachment was improperly issued. The general principle is also upheld in J. L. Coker & Co. v. Barfield, 73 S. C. 179, 53 S. E. 174. So where the plaintiff's statement of claim in his affidavit for attachment is not sufficiently definite and certain, the application for dissolution must set forth in what particulars the affidavit is uncertain: Ferguson v. Smith, 10 Kan. 396. Hence, where a motion to discharge states no other reason than that "the affidavit and proceedings for attachment are informal, defective and not according to law," it is insufficient in not pointing out the defects or informalities complained

of: *Payne v. First Nat. Bank*, 16 Kan. 147. And to the same general effect are *Klob v. New York Fertilizer Co.*, 86 Hun, 266, 33 N. Y. Supp. 343, and *Windt v. Banniza*, 2 Wash. 147, 26 Pac. 189. An averment that there was no legal petition on file at the time of issuing the attachment authorizing the same is too general an assignment to support a motion for dissolution: *Crouch v. Crouch*, 9 Iowa, 269. *Stock v. Reynolds*, 121 Mich. 356, 80 N. W. 289, holds that where the affidavit for attachment charged that defendant "was about to remove his property from said county, and refuses and neglects to pay or secure payment of his debts," a petition for dissolution which denied that he "was about to remove his property from said county with intent to defraud his creditors" was not a sufficient denial of the ground charged. And when an attachment is issued on several grounds, a motion to dissolve which fails to deny one of the alleged grounds must be denied: *Hornick Drug Co. v. Lane*, 1 S. D. 129, 45 N. W. 329. So, too, a petition for dissolution which denies collectively the existence of the several grounds of attachment alleged in the plaintiff's affidavit is insufficient, as it denies only the combination of grounds and not the existence of each ground: *Bane v. Keyes*, 115 Mich. 244, 73 N. W. 230. But it was held in *Norden v. Duke*, 94 N. Y. Supp. 878, 106 App. Div. 514, that when the order vacating an attachment is made upon the merits, the general rule requiring specification of the irregularities relied on does not apply to the motion to vacate, and a petition for rehearing in this case was denied, 47 Misc. Rep. 473, 95 N. Y. Supp. 940. In *Patterson v. Goodrich*, 31 Mich. 225, a verified petition for dissolution of an attachment on the ground that the affidavit made for it was false, and that the movant was not about to dispose of his property to defraud his creditors, was held not open to objection, after a hearing upon the merits, for insufficiency, in that it did not directly, under oath, negative the cause assigned for suing out the writ. And to same effect is *Cottrell v. Hatheway*, 108 Mich. 619, 66 N. W. 596. And in *Fremont Cultivator Co. v. Fulton*, 103 Ind. 393, 3 N. E. 135, where there was no sufficient affidavit for the attachment, a motion to quash was sustained, though it did not with certainty specify any defects in the affidavit. So, also, if the defect in the affidavit for attachment is jurisdictional, specific allegation of irregularities need not be made in the petition for dissolution: *Weehawken W. Co. v. Knickerbocker Coal Co.*, 24 Misc. Rep. 683, 53 N. Y. Supp. 982.

In an application for the dissolution of an attachment, the attached property must be sufficiently described; otherwise the court has no jurisdiction to grant the motion. Thus, a statement in a petition for dissolution that "on said attachment writ, some of the goods and chattels of this applicant have been seized," is insufficient: *Osborne v. Robbins*, 10 Mich. 277. Or a statement that "property to the value of, etc., was attached, and is now in pos-

session of the sheriff," is not sufficient to sustain the motion: *Nelson v. Hyde*, 10 Mich. 521.

2. Allegations as to Ownership and Possession.—An application to dissolve an attachment should contain averments from which it will appear that the property attached belongs to the applicant: *Macomber v. Beam*, 22 Mich. 395. And it should also allege a right to the possession of the property: *Johnson v. De Witt*, 36 Mich. 95. But if the application clearly and distinctly alleges a present ownership, from which a right to the possession would, in the absence of anything to the contrary, be presumed, it is sufficient to give jurisdiction: *Zook v. Blough*, 42 Mich. 487, 4 N. W. 219. In *Holmes v. Langston*, 99 Ga. 555, 27 S. E. 155, a defendant against whom an attachment had been issued as an alleged fraudulent debtor without a hearing was permitted to contest the truth of the grounds upon which it was issued without alleging that the property upon which the writ had been levied belonged to him. But when a defendant, in his motion to dissolve, alleged that he did not own the attached property, he should not be allowed in the hearing to strike that statement from the motion: *People's Bank v. Morris*, 71 Kan. 849, 80 Pac. 586. But the doctrine supported by the above cases does not apply to the levy of an attachment on land, for the reason that the owner is not dispossessed by the levy, and it is therefore not necessary for him on petition to dissolve to set up his right to restoration of the property: *Smith v. Collins*, 41 Mich. 173, 2 N. W. 177.

c. Verification of Application.—It is said in *Osborne v. Robbins*, 10 Mich. 277, that even when the verification of a motion to dissolve an attachment is not required by the statute, still it is the proper course and should not be omitted. In *Kendall Boot & Shoe Co. v. August*, 51 Kan. 53, 32 Pac. 635, however, it was held that when the motion to discharge contains explicit denial of the allegations in plaintiff's affidavit for attachment, it is sufficient to raise an issue as to the truth of the grounds, and a verification of the motion or of the allegations of denial is not necessary.

d. Notice of Motion.

1. Necessity for in General.—The question whether it is necessary to give notice to the plaintiff of an application for the dissolution of an attachment is generally regulated by statute, and when the statute requires such notice, it seems that a judge would have no right to release an attachment upon an ex parte affidavit of the defendant: *Claffin v. Lisso*, 31 La. Ann. 171. And this general doctrine is upheld in *Freeborn v. Glazer*, 10 Cal. 337; *Quinlan v. Danford*, 28 Kan. 507; *Smith-Frazer Boot & S. Co. v. Derse*, 41 Kan. 150, 21 Pac. 167; *Guest v. Ramsey*, 50 Kan. 709, 33 Pac. 17; *Stringer v. Dean*, 61 Mich. 196, 27 N. W. 886; *Blake v. Sherman*, 12 Minn. 420; *Omaha Upholstering Co. v. Chauvin-Fant Furniture Co.*, 18 Mont. 468, 45 Pac. 1087; *Herman v. Hayes*, 58 Neb. 54, 78 N. W. 365.

In *Blake v. Sherman*, 12 Minn. 420, it was held that when the statute did not fix the time in which the notice should be given, ten days' notice was sufficient. While in *Stringer v. Dean*, 61 Mich. 196, 27 N. W. 886, a notice served on the 14th of a motion to dissolve, to be heard on the 18th, was deemed sufficient.

In those jurisdictions where there is no statutory requirement as to giving notice of a motion to dissolve an attachment, such motion is not one of which the plaintiff is entitled to notice, or which he is entitled as matter of right to appear and oppose: *Sanborn v. The Elizabethport Mfg. Co.*, 22 How. Pr. (N. Y.) 106. And to the same effect is *Boyes v. Coppinger*, 2 Yeates (Pa.), 277. These rulings are based on the theory that the affidavit on which the attachment is grounded is not conclusive.

2. **Sufficiency of Notice.**—We have already seen that a motion to dissolve an attachment is not sufficient unless it specifies the grounds of irregularity upon which the motion is made, and the same rule applies with reference to the notice of the motion. Hence an attachment will not be set aside unless the notice of the motion specifies the irregularity complained of: *Omaha Upholstering Co. v. Chauvin-Fant Furniture Co.*, 18 Mont. 468, 45 Pac. 1087; *Kloh v. New York Fertilizer Co.*, 86 Hun, 266, 33 N. Y. Supp. 343; *Weehawken W. Co. v. Knickerbocker Coal Co.*, 24 Misc. Rep. 683, 53 N. Y. Supp. 982; *Cupit v. Park City Bank*, 10 Utah, 294, 37 Pac. 564. Therefore, where the motion is made on a mere irregularity, a notice simply stating that the motion would be made on "papers named" is not sufficient: *Van Wickle v. Weaver Coal etc. Co.*, 85 N. Y. Supp. 82, 88 App. Div. 603. But in the late case of *Jones v. Hoefs*, 14 N. D. 232, 103 N. W. 751, defendant's notice of motion to dissolve an attachment, which recited that the motion would be based on an affidavit served herewith, which denied the truth of the attachment affidavit, was held sufficient to show that the ground of the motion to dissolve was that the affidavit was false. And in *Whitfield v. Hovey*, 30 S. C. 117, 8 S. E. 840, where the notice of a motion to vacate an attachment levied on the interest of a nonresident partner recited that it would be made on the affidavits and papers served herewith, it was held that the notice sufficiently showed the grounds on which the motion would be made where the affidavit and papers showed that the attachment defendant was sued on a partnership debt with his copartner, that he owned no property in the state except his interest in the partnership effects, and that this interest had been attached; although the notice did not state that the motion would be made "on the ground" that such interest was not attachable. The above cases, however, are applicable only when the grounds of the motion are based on irregularities; for when the ground is that there was no evidence to justify the court in granting the attachment, the rule requiring that the notice specify the irregularity complained of has no application: *Andrews v. Schofield*, 50 N. Y.

Supp. 132, 27 App. Div. 90. Nor does it apply when the motion is made on a jurisdictional defect: *Weehawken W. Co. v. Knickerbocker Coal Co.*, 24 Misc. Rep. 683, 53 N. Y. Supp. 982; *Rallings v. McDonald*, 78 N. Y. Supp. 1040, 76 App. Div. 112.

e. Affidavits in Support of Motion.

1. Right to Use in General.—The general rule is, that when a motion to vacate an attachment is made on matters dehors the record, the defendant may support his motion by affidavits. In our discussion of the grounds for dissolving an attachment we cited many cases holding that a defendant can deny the truthfulness of the attachment affidavit, and these cases also hold that he can support his denial by affidavits. In addition to those cases it is necessary to cite only a few others in which the rule is strongly stated: *Jordan v. Dewey*, 40 Neb. 639, 59 N. W. 889; *Bank of Commerce v. Rutland & W. Ry. Co.*, 10 How. Pr. (N. Y.) 1; *Heilbronn v. Herzog*, 45 N. Y. Supp. 268, 17 App. Div. 416; *Jenks v. Richardson*, 71 Fed. 365. And in *Nelson v. Munich*, 23 Minn. 229, it was held that a defendant may use his verified answer as an affidavit so far as it is pertinent. When the defendant supports his motion with affidavits, the plaintiff can use counter-affidavits: *Johnson v. Laughlin*, 7 Kan. 359; *New York & E. Bank v. Codd*, 11 How. Pr. (N. Y.) 221; *Hammerschloz v. Cathoscope Electric Co.*, 44 N. Y. Supp. 668, 16 App. Div. 185; *Heilbronn v. Herzog*, 45 N. Y. Supp. 268, 17 App. Div. 416.

2. When Motion is Based on the Original Papers.—If a motion to vacate an attachment is based on the original papers, additional affidavits cannot be used to take the place of the originals: *Teutonia Loan & B. Co. v. Turrell*, 19 Ind. App. 469, 65 Am. St. Rep. 419, 49 N. E. 852. Thus, on a motion to vacate an attachment on the original papers, a defect in the proof of jurisdictional facts cannot be supplied by additional affidavits: *Nevada Bank v. Cregan*, 17 Misc. Rep. 241, 40 N. Y. Supp. 1065.

3. Sufficiency of Affidavits.—The affidavit of a defendant in support of his motion to dissolve an attachment must be sufficient to put in issue the allegations of the plaintiff's affidavit for attachment. Thus, where plaintiff's affidavit for attachment alleged as grounds that the defendant was about to convert his property into money with intent to place it beyond the reach of his creditors, and was about to assign and dispose of his property with intent to delay and defraud his creditors, an affidavit filed by defendant in support of his motion to dissolve, which merely denied that he "was about to convert his property into money for the purpose of placing it beyond the reach of his creditors, or that he was about to assign and dispose of his property with intent to delay and defraud his creditors," was held not sufficient to put in issue the allegations of the affidavit for attachment, the court saying: "The denials of the

traversing affidavit should be as direct and positive as if the affidavit were an answer to a complaint in an ordinary action, and must be tested by the same rules of pleading. To allege that the defendant is not about to assign, secrete, and dispose of his property with intent to delay and defraud his creditors is, in effect, to admit that he is about to do any one of the acts mentioned, but not all of them conjointly. Such a denial raised no issue": *Hansen v. Doherty*, 1 Wash. 461, 25 Pac. 297.

But in *Finch v. Armstrong*, 9 S. D. 255, 68 N. W. 740, where the affidavit for attachment alleged that defendant is about to dispose of his property to defraud his creditors, it was held that an affidavit in support of a motion to discharge, denying that defendant "is" about to dispose of his property, was sufficient, as the affidavit relates retrospectively to the time when the suit was instituted. And the allegations in an affidavit in support of a motion to discharge must not be legal conclusions. Thus a defendant's affidavit denying the indebtedness sued for would be insufficient, as that would be a matter to be submitted to the jury: *Bascher v. Roullier*, 4 Abb. Pr. 396.

f. **Issues and Questions Considered.**—As a general rule, the merits of an action aided by attachment cannot be inquired into in a motion to dissolve the attachment. This doctrine is so universally upheld by the courts that a few illustrations of its application will suffice without giving an extended citation of the cases. Thus, where it appeared by the plaintiff's affidavit in support of his motion for attachment that the real issue between the parties was whether the debt sued on was due wholly or in part only, and this question could be determined only by looking into the entire merits of the controversy, on defendant's motion to dissolve the writ, the court said: "We do not think that it is within the terms of the statute or . . . within the scope of any inquiry into whether there has been an improper issuance of the writ, for the district court to try the merits of the main action in a motion to dissolve the attachment. If it were, the court, by the expression of an opinion upon disputed questions of fact, could, on a motion to dissolve today, render a judgment involving the merits of the suit, which the law says a jury alone can do tomorrow, if either party elects to have a jury. It is urged that an attachment proceeding is but ancillary to the main action, and that a trial upon that issue does not affect the merits of the suit. This is true, but it does not dispose of the anomalous position to which the defendant's reasoning carries us, if the judge may try the facts and destroy the entire value of the plaintiff's judgment by dissolving the attachment, thus declaring it improvidently issued; while a jury upon precisely the same testimony, and upon the identical issue, might decide contrary to the judge, and award the plaintiff a verdict for all he asks, upon the ground that the debt is due. Or, to carry the illustration further, after the defendants have had

the motion to dissolve sustained because the debt was not due, they might default as to the action, and then confess it was due. Under such conditions, what would plaintiff's position be? By the previous ruling of the judge on the merits, his debt was not due, but by the verdict of the jury on the merits his debt was due. Between this legal game of battledoor and shuttlecock, he would have a judgment good only in form, without any substance wherewith to satisfy it": *Newell v. Whitwell*, 16 Mont. 243, 40 Pac. 866. And in the hearing of a motion by defendant to discharge an attachment obtained on the ground that he had fraudulently disposed of his property with intent to defraud, the alleged fraudulent transaction being a conveyance by mortgage, the court properly refused to allow the question as to the validity of such mortgage: *Landauer v. Mack*, 43 Neb. 430, 61 N. W. 597. In *Goodyear v. Commercial Fire Ins. Co.*, 68 N. Y. Supp. 756, 58 App. Div. 611, an order dissolving an attachment on the ground that the action had been prematurely brought was set aside, because that question went to the merits and should not have been considered by the trial court on a motion to discharge. Another good instance of application of this well-established doctrine is found in the late case of *Collins v. Stanley*, 15 Wyo. 282, ante, p. 1022, 88 Pac. 620. And in *Martin Lumber Co. v. Menominer*, 116 Mich. 354, 74 N. W. 649, the rule is held to apply, even if the motion is accompanied by a stipulation as to the facts. In *Omaha Upholstering Co. v. Chauvin-Fant Furniture Co.*, 18 Mont. 468, 45 Pac. 1087, on a motion to discharge an attachment upon the ground that the writ was improperly issued, it was held that the question whether the defendant owed a part of the amount claimed, and whether another portion of the alleged indebtedness was due, could not be considered, because they went to the merits.

In the four states of Colorado, Kansas, Pennsylvania, and Texas there are cases where inquiry into the merits on a motion to discharge seem to have been allowed. But even in these cases the general doctrine above stated was recognized by the courts, and the rulings are based entirely on the statutory provisions governing procedure in such cases: *Woods v. Tanquary*, 3 Colo. App. 515, 34 Pac. 737; *Robinson v. Melvin*, 14 Kan. 484; *Walls v. Campbell*, 125 Pa. 346, 17 Atl. 422; *Avery v. Zander*, 77 Tex. 207, 13 S. W. 971. Though these cases do not establish any general exception to the rule which is so universally upheld by the decisions, still we have seen that there is an exception to, or rather a relaxation of, the rule, when upon an inquiry into the existence of the alleged grounds for attachment some of the merits of the action are incidentally involved. The question when this relaxation is permitted and the cases bearing upon it will be found above in our discussion of the right of a defendant to attack the truthfulness of the plaintiff's affidavit for attachment. And though ordinarily the merits of the action will not be inquired into on a motion to discharge the attachment, yet

if the undisputed facts upon which the motion to discharge is heard are such as lead up to certain legal conclusions, which address themselves entirely to the court and not a jury, they will be tried by the court although involving the plaintiff's right of action. Thus in *Elling v. Kirkpatrick*, 6 Mont. 119, 9 Pac. 900, a secured creditor had consented to an assignment by his debtor for the benefit of creditors, and afterward had an attachment issued against the property of the debtor. The facts upon which the motion to dissolve was made depended upon the construction to be placed upon, and the validity of, certain written instruments, and it was held that an order dissolving the attachment was proper.

IX. Evidence and Effect of Affidavits.

a. **In General.**—We have seen that when a motion to dissolve an attachment is based on the original papers the defendant cannot use additional affidavits to take the place of the originals, because the averments contained in the original papers, as well as the fair inferences to be drawn therefrom, are to be deemed as true for the purposes of the motion. But where the motion is based on matters dehors the record, both parties can present all the facts which will enable the court to decide whether the grounds upon which the writ was issued in fact existed; and the complaint and affidavit on which the writ issued are a part of the record of which the court must take notice though not formally introduced in evidence: *Goldman v. Floter*, 142 Cal. 388, 76 Pac. 58. But in an issue on an attachment affidavit, petitions in other cases for attachment against the same defendant are not admissible in evidence: *Sackett v. Partidge*, 4 Iowa, 416. An affidavit identifying the affidavit on which an attachment was issued is proper evidence on a motion to discharge: *Hallock v. Van Camp*, 55 Hun (N. Y.), 1, 8 N. Y. Supp. 588. And where an attachment was dated two days prior to the date of summons, the fact that the summons was in existence at the date of the attachment could be shown by evidence aliunde, because the effect of the summons on the defendant's rights depended wholly on the date of its service and not upon the date placed on it: *Smith v. Walker*, 6 S. C. (6 Rich.) 169. In *Hanna v. Barrett*, 39 Kan. 446, 18 Pac. 497, depositions were allowed to be used in evidence, though taken upon insufficient notice, upon the ground that they were the written declarations of the witnesses, and fulfilled the statutory definition of affidavits, irrespective of any question of notice. Where a notice of motion to vacate an attachment recites that the defendant moves to vacate both on the attachment papers and on the judgment recovered in the action, without limiting the use he desires to make of the judgment, such judgment is as available to the plaintiff as to the defendant to establish any facts of which it furnishes proof: *Belmont v. Sigua Iron Co.*, 80 N. Y. Supp. 771, 80 App. Div. 537. And where an attachment was

levied on a stock of liquors and saloon fixtures on the ground that defendants had not enough property to satisfy plaintiff's demand and collection would be endangered by delay in obtaining the judgment and return of no property, evidence as to what the stock would bring at retail was held inadmissible on a motion to discharge the attachment, because the real question at issue was what the stock would bring at an immediate sale. It was here further held that evidence of the value of the licenses could not be considered, because they were not subject to execution: *Lexington Brewing Co. v. Goode & Co.*, 30 Ky. Law. Rep. 639, 79 S. W. 338. When a motion to quash an attachment is based on a variance between the petition and affidavit for attachment, the variance cannot be corrected by evidence: *Sanger v. Texas Gin & Compress Co.* (Tex. Civ. App.), 47 S. W. 740.

b. Presumptions and Burden of Proof.—The authorities are all practically uniform in holding that when the grounds upon which an attachment is issued are positively denied by the defendant in an affidavit filed by him in support of a motion to dissolve, the burden rests with the plaintiff to prove his alleged grounds by a preponderance of evidence. This rule will be found clearly stated in *Dolan v. Armstrong*, 35 Neb. 339, 53 N. W. 132; *Jones v. Hoefs*, 14 N. D. 232, 103 N. W. 751; *Seville v. Wagner*, 46 Ohio St. 52, 18 N. E. 430; *Collins v. Stanley*, 15 Wyo. 282, ante, p. 1022, 88 Pac. 620; and these cases but follow an almost unbroken line of earlier decisions. In *Jones v. Hoefs*, 14 N. D. 232, 103 N. W. 751, the rule is held to apply even when there is no defense to the action on the merits. But where all the facts with reference to allegations made in affidavits for attachment rest within a defendant's knowledge, who, instead of supporting his motion to vacate with affidavits, rests it on the affidavits on which the attachment was granted, all legitimate deductions and inferences must be construed in favor of the plaintiff. Thus, where the affidavit upon which an attachment was issued showed circumstances strongly tending to establish fraud in the absence of any explanation on the part of defendant, of circumstances peculiarly within his knowledge, a motion by defendant to vacate on plaintiff's affidavits was held to have been properly decided: *Stewart v. Lyman*, 70 N. Y. Supp. 936, 62 App. Div. 182, approving a similar ruling in *Stevens v. Middleton*, 26 Hun, 470.

c. Evidence as to Fraud.—On a motion to dissolve an attachment obtained on the ground of fraud, evidence of all material facts going to prove the truth or falsity of the alleged grounds is admissible. Thus, where an attachment was granted on the ground that defendants had disposed of their property with intent to defraud their creditors, the testimony of a witness who held a mortgage on some of defendants' property, as to what the particular property was, and whether he had ever paid defendant anything for the mortgage, was proper: *Genesee Savings Bank v. Michigan Barge Co.*,

52 Mich. 164, 17 N. W. 790. And when fraudulent disposition of property is the fraud alleged for an attachment, testimony of defendant, on his motion to dissolve, that he did not know that he owed plaintiff anything, is admissible as bearing on the question of fraudulent intent. In Florida, where the statute provided that the applicant for an attachment upon the ground of fraud on the part of his debtor should make oath that the amount of the debt was actually due, and that he had reason to believe that defendant would fraudulently part with his property before judgment could be recovered, it was held that, on motion to dissolve, the issue to be tried was not confined to facts which had come to the knowledge of the applicant: *Zinn v. Dzialynski*, 13 Fla. 597. And in *Rosenberg v. Burnstein*, 60 Minn. 18, 61 N. W. 684, where a writ of attachment was issued against two defendants as partners, on motion of one of them to dissolve, evidence that the property levied on was the individual property of the movant, and that he was not a partner, and had never contracted and did not owe the debt, it was held admissible for the purpose of showing that the movant was not responsible for the fraudulent acts and intent of the other defendant which were alleged as one of the grounds for the attachment, though in this case it was further held that such evidence afforded no ground for dissolving the writ, as these were grounds to be determined on the trial.

d. **Evidence as to Matters After Issuance of Writ.**—As the validity of an attachment must be determined by the facts existing at the date when it issues, proof of matters transpiring since the attachment was issued cannot be considered: *Geneva Nat. Bank v. Bailor*, 48 Neb. 866, 67 N. W. 865.

e. **Parol Evidence.**—The most usual method of supporting a motion to vacate an attachment is by affidavits, but in some jurisdictions it is held that such motion may be supported by either affidavits or oral proof: *Carnahan v. Gustine*, 2 Okl. 399, 37 Pac. 594; *Hansen v. Doherty*, 1 Wash. 461, 25 Pac. 297; *Wearne v. France*, 3 Wyo. 273, 21 Pac. 703. In *Hansen v. Doherty*, 1 Wash. 461, 21 Pac. 297, it is stated that when a defendant elected to base his motion on affidavits, he could not depart from that mode of proof, and introduce oral testimony.

f. **Weight and Sufficiency.**—The sufficiency of evidence offered in support of a motion to vacate an attachment necessarily depends upon the circumstances of each case. Thus, when the affidavits of both sides show that the plaintiff could not have known the facts to which he swore positively in the affidavit on which the attachment was obtained, the writ should be discharged: *O'Reilly v. Freel*, 37 How. Pr. (N. Y.) 272. But an affidavit in attachment against a corporation that plaintiff on certain representations made to him by defendants' treasurer, subsequently ascertained to be untrue, had parted with a fixed sum of money, is sufficient to sustain the

attachment against an unsupported motion to dissolve: *Simon v. Kugler Syndicate*, 34 Misc. Rep. 806, 68 N. Y. Supp. 1128. And in an action for forcible entry where an attachment was obtained on the ground that the debt was fraudulently and criminally contracted, evidence to the effect that defendants went to plaintiff's ranch, and by threats and intimidations caused plaintiff's agent to leave, and that they intended to use such force as might be necessary for the purpose, was held sufficient to sustain the attachment: *Collins v. Stanley*, ante. p. 1022. In *Herman v. Bailey*, 19 Misc. Rep. 709, 43 N. Y. Supp. 1155, it was held that an insufficient affidavit of defendant's nonresidence was cured by an affidavit showing that fact placed in evidence by defendant on his motion to vacate the writ. And to same effect is *Vogelman v. Lewitt*, 48 Misc. Rep. 625, 96 N. Y. Supp. 207.

X. Hearing and Determination.

a. **In General.**—As an application for the dissolution of an attachment is in the nature of a motion, it can be heard at chambers, but the hearing must be before a judge or a circuit court commissioner: *Genesee Savings Bank v. Michigan Barge Co.*, 52 Mich. 164, 17 N. W. 790. And whether the motion is based on the original papers or on matters dehors the record, the question of sustaining or dissolving the writ rests within the sound discretion of the court: *Busbin v. Ware*, 69 Ala. 279; *Cohen v. Burr*, 6 Wis. 200. Thus, where a motion to dissolve an attachment levied on property as that of a debtor, after he had transferred the same, the evidence being conflicting as to the bona fides of the transfer, there was no abuse of discretion in denying the motion: *Rahn v. Hull*, 94 Ga. 303, 21 S. E. 567.

b. Order or Judgment.

1. **In General.**—Where an attachment has issued on two claims, only one of which is matured, it seems that it may be dissolved as to the immatured claim that sustained as to the other if the affidavit as to the matured claim is sufficient: *Danforth v. Carter*, 1 Iowa (1 Clark), 546. And on the hearing of a motion to dissolve on the ground of a defective affidavit which is amendable, the proper order to make is that the attachment be dissolved unless the plaintiff in a certain time files an amended affidavit: *Wells, Fargo & Co. v. Danford*, 28 Kan. 487. An order quashing an attachment which shows that the grounds assigned in the motion to quash are not sufficient, but fails to show on what grounds the attachment was dissolved, is improper: *Dawson v. Miller's Admr.*, 20 Tex. 171, 70 Am. Dec. 380.

2. **Effect of Order Denying Motion to Dissolve.**—An order denying a motion to vacate an attachment is conclusive between the parties until reversed: *Strauss v. Cooch*, 47 Ohio St. 115, 24 N. E. 1071; *Walls v. Boteler*, 125 Pa. 346, 17 Atl. 422. Hence, after making

such an order, it is error for the court to enter again upon the question of its dissolution: *Sheppard v. Guisler*, 10 Wash. 41, 38 Pac. 759. But it seems that a second motion for dissolution may be made, if it is based on different grounds from those alleged in the former motion, for in *Steuben County Bank v. Alberger*, 83 N. Y. 274, a party to the suit moved to dissolve an attachment on the ground that it was an obstruction to the enforcement of a judgment and execution, and he was held not to be precluded by a denial of this motion from making a second motion to vacate on the ground that it was a cloud upon the title of the moving party, and this notwithstanding the fact that he could have proceeded upon this ground in his first motion. And in *Thalheimer v. Hays*, 42 Hun (N. Y.), 93, it was said that a motion to dismiss an attachment may be made, as a matter of right, on affidavits tending to disprove the nonexistence of plaintiff's grounds, although a previous motion to vacate on the papers used by plaintiff has been denied. But in *Strauss v. Vogt*, 24 N. Y. Supp. 483, 23 Civ. Proc. Rep. 251, it was held that where a defendant has moved to vacate, a similar motion by his assignee would not be allowed.

XI. Appeal and Error.

a. Right of Appeal in General.—There is some conflict of opinion as to the right of appeal from an order dissolving, or refusing to dissolve, an attachment. This conflict is explained in part by the difference in the statutes of the various states regulating the appealability of such orders. The decided weight of authority upholds the doctrine laid down by the court in *State v. Miller*, 63 Ind. 475, namely: "That there can be no appeal from an order in attachment proceedings until after final judgment, and then only in connection with the judgment in such main action": *Didier v. Galloway*, 3 Ark. 501; *Heffner v. Day*, 54 Ark. 79; *Abbott v. Zeigler*, 9 Ind. 511; *Snively v. Abbott Buggy Co.*, 36 Kan. 106, 12 Pac. 522; *Simpson v. Kirschbaum*, 43 Kan. 36, 22 Pac. 1018; *Gray v. York*, 44 Mich. 415, 6 N. W. 874; *Machen v. Keeler*, 11 N. M. 413, 68 Pac. 937; *Catlin v. Ricketts*, 91 N. Y. 668; *Haebler v. Bernharth*, 115 N. Y. 459, 22 N. E. 167; *Crawford v. Roberts*, 8 Or. 324; *Van Voorhies v. Taylor*, 24 Or. 247, 33 Pac. 380; *Moss v. Mitchell*, 174 Pa. 517, 34 Atl. 125; *Slingluff v. Sisler*, 193 Pa. 264, 44 Atl. 423; *Hamner v. Scott*, 60 Fed. 343, 8 C. C. A. 665; *Leitsdendorf v. Webb*, 20 How. (U. S.) 176; *Atlantic Lumber Co. v. Bucki & Son Lumber Co.*, 92 Fed. 864, 35 C. C. A. 59. In California the question has been decided both ways. The right to have an order refusing to dissolve an attachment reviewed after final judgment is upheld in *Taaffe v. Rosenthal*, 7 Cal. 514, the court saying that any other ruling "could practically destroy the appellate power of this court conferred by the constitution. If true, the defendant, however great may have been the injury sustained by him, in consequence of the wrongful

issuance of the attachment, could have no remedy when the order of the court, below should be against him.''' While in *Allender v. Fritts*, 24 Cal. 447, it was held that the statutory provision authorizing the court upon an appeal from a final judgment to review any order involving the merits and necessarily affecting the judgment, implies that it shall not review intermediate orders not affecting the judgment, and that as neither the action nor the judgment in any manner depends upon the attachment, an order refusing to dissolve an attachment was not reviewable on appeal from the judgment.

The decision in all of these cases rests on the theory that an order vacating or sustaining an attachment is not a final judgment, but interlocutory only, and does not affect the pending action or any judgment which may be rendered in it. There are cases, however, which hold that an order dissolving an attachment is a final judgment, because it terminates the attachment proceeding, and is therefore appealable even before any final judgment is rendered in the main action: *Bayne v. Cusimano*, 50 La. Ann. 361, 23 South. 361; *Stewart & Stewart v. Chappel*, 98 Md. 527, 57 Atl. 17; *Gale v. Seifert*, 39 Minn. 171, 39 N. W. 69; *Adams County Bank v. Morgan*, 26 Neb. 148, 41 N. W. 993; *Findlay Rolling Mill Co. v. National Bank*, 57 Ohio St. 115, 48 N. E. 508 and *Adkins v. Loucks*, 107 Wis. 587, 83 N. W. 934. In the last case the court bases its ruling on the theory that as an order dissolving does not affect the merits of the action nor the judgment so as to render it reviewable, that when the attachment is vacated or otherwise disposed of before final relief is granted, the appeal should be taken at once from the order of dissolution, for while an attachment must have an action pending to support it, the two are distinct remedies. The position taken in this case is directly opposed to the leading case of *Abbott v. Zeigler*, 9 Ind. 511, where the court assigned as its reasoning for not allowing an appeal from an order dissolving an attachment, when no appeal had been taken from the judgment in the main action, was that the attachment proceeding could not be regarded as a separate suit without involving the objection of "two suits for the same cause pending at the same time." In *Bayne v. Cusimano*, 50 La. Ann. 361, 23 South. 361, plaintiff took a suspensive appeal from an order dissolving the attachment. A motion to dismiss the appeal on the ground that no appeal would lie from an interlocutory order dissolving an attachment was denied, the court saying: "The suit, in so far as relates to the attachment, was tried upon its merits, and the rights involved in the controversy were determined adversely to the plaintiff. The merits of the cause were not placed at issue. The rule filed was a preliminary proceeding in the case, and the judgment on the rule was interlocutory. Nevertheless, the decision may have included a right of as great importance as any which can possibly be involved on the final decision. Weighed as a question of value or moment, the judgment dissolving an attachment

may be considered, in some respects at least, as in the nature of a final decree. The issues had been, as related to the attachment ultimately passed upon by the district court. The judgment did not have the effect of dismissing the personal action; yet it brought to a close and terminated the possibility of recovering anything on the property which had been attached. Moreover, if the plaintiff were to gain his suit for the amount he claims there would be no object in appealing from the judgment in his favor in the personal action. He would have the right to appeal from the judgment dissolving the suit of attachment, although nothing done since the date of the judgment could finally add to the finality of the judgment dissolving the attachment." The case of *Stewart & Stewart v. Chappel*, 98 Md. 527, 57 Atl. 17, draws a distinction as to the appealability of an order dissolving an attachment and one refusing to dissolve, and while holding that the former is appealable because it terminates the proceedings, denies the right of appeal from an order refusing to discharge an attachment. And while there are many cases holding that an order refusing to discharge an attachment is not appealable, no such distinction is drawn as that in *Stewart & Stewart v. Chappel*, 98 Md. 527, 57 Atl. 17, but the courts generally speak of the rule as being the same, whether the order was one dissolving or refusing to dissolve the writ.

b. **Rules Controlling.**—We have seen that the matter of sustaining or refusing to sustain an attachment on the hearing of a motion to vacate rests in the sound discretion of the court, and the decision of the trial court will not be reversed unless a clear abuse of discretion is shown. Thus an order dissolving based on conflicting affidavits will not be reversed unless opposed to a clear preponderance of the evidence: *Finance Company of Pennsylvania v. Hursey*, 60 Minn. 17, 61 N. W. 672; *Rosenberg v. Burnstein*, 60 Minn. 18, 61 N. W. 684; *Holland v. Commercial Bank*, 22 Neb. 571, 36 N. W. 113; *Geneva Nat. Bank v. Bailor*, 48 Neb. 866, 67 N. W. 865; *Harrison v. King*, 9 Ohio St. 388. And where, on a motion to vacate for alleged fraud, the facts set forth in the affidavits are such as might reasonably lead different minds to different conclusions as to the fact of fraud, the decision will not be reversed: *First Nat. Bank v. Randall*, 38 Minn. 382, 37 N. W. 799. In *Berry v. Gravel*, 11 Iowa, 135, it was held that on an appeal from an order dissolving or sustaining an attachment, the court will not consider errors assigned on the proceedings in the principal suit. And in *Godfrey v. Godfrey*, 75 N. Y. 434, on an appeal from an order granting an application by a lienor to vacate an attachment which recited the making of certain specified affidavits on the part of the plaintiff, but did not note any objections thereto, the only question upon appeal was whether, upon all the papers before the trial court, its order was justified. In *National Broadway Bank v. Barker*, 128 N. Y. 603, 27 N. E. 1029, the trial court was held justified in holding that an

affidavit on which a motion to dismiss a prior attachment was based, showing that the mover had attached the same property, was insufficient, on the ground that the affiant had no personal knowledge of the facts stated therein.

TYTLER v. TYTLER.

[15 Wyo. 319, 89 Pac. 1.]

HABEAS CORPUS—Jurisdiction—Custody of Children.—Under a constitutional provision that district courts and their judges “shall have power to issue writs of habeas corpus on petition by, or on behalf of, any person in actual custody in their respective districts,” the jurisdiction is an unqualified one lodged in the district judge, to hear and determine upon habeas corpus questions as to the right to the custody of children arising within the limits of his district, and is as broad in its scope as that of a court which has the power to exercise jurisdiction in a like proceeding. (p. 1069.)

HABEAS CORPUS—Custody of Children.—The right to the custody of minor children may be litigated in habeas corpus proceedings. (p. 1069.)

HABEAS CORPUS—Custody of Children.—In a habeas corpus proceeding to determine who shall have the custody of a minor child, the question of personal freedom is not involved, except in the sense of a determination as to which custodian shall have charge of one not entitled to be freed from restraint. (pp. 1069, 1070.)

PARENT AND CHILD—Custody of Child.—In a controversy between parents for the custody of their minor child the court will regard the welfare of the child as the paramount consideration, notwithstanding the statute provides that “the father of the minor, if living, and in case of his decease the mother, whether remarried or not, being themselves respectively competent to transact their own business, and not otherwise unsuitable, must be entitled to the guardianship of the minor.” (p. 1070.)

PARENT AND CHILD—Custody of Child, Father's Right.—The right to the custody of minor children is a joint one, to be enjoyed by their parents so long as the latter live together and exercise the right, but the father has no paramount right to the custody of his infant child. (pp. 1070, 1071.)

PARENT AND CHILD—Custody of Children—Separation of Parents.—Upon the separation of parents the right to the joint custody of their minor child is severed, and must then go to one or the other. (p. 1071.)

PARENT AND CHILD—Custody of Children—Law of Forum. In a controversy between parents for the custody of their minor child, the law of the place where the question is litigated controls, regardless of the law of the domicile of the parties. (p. 1071.)

HABEAS CORPUS—Appeal—Custody of Children.—On appeal in a habeas corpus proceeding to determine the custody of a minor child, the case will not be tried anew, and the record will be examined only to ascertain if it discloses an abuse of discretion by the trial court in awarding the custody of the child. (p. 1072.)

PARENT AND CHILD—Custody of Children—Desertion by Parent.—In a controversy between parents for the custody of their minor children, there should be some good, substantial reason to warrant the court in giving the custody to the parent who is guilty of violating the marital duty and of deserting the other spouse. (p. 1076.)

PARENT AND CHILD—Custody of Children—Separation Between Parents.—If a separation of a wife from her husband is rendered necessary by her physical ailments, compelling a cessation of the marriage relation, her refusal to live with him as his wife is not such willful desertion or disregard of her duty toward him as to deprive her of the right to the custody of their minor children, when she is otherwise a suitable person to have such custody. (pp. 1076, 1077.)

PARENT AND CHILD—Custody of Children.—If husband and wife are living apart through necessity, caused by her physical ailments, the fact that she takes their minor children from the custody of the father, peaceably, but without his knowledge or consent, being moved thereto by pure motives and acting out of love and affection for such children, in an effort to do what she believes will better their condition, does not stamp her as an unsuitable person to have their custody, and require that they be returned to their father. (p. 1077.)

PARENT AND CHILD—Custody of Children—Testimony of Child.—In a controversy between parents for the custody of their minor child, it is competent for the child, who is bright and intelligent and thirteen and one-half years old, to make a statement, based on substantial reasons, as to whom she prefers to live with. In many cases such expressed wish should be controlling. (p. 1078.)

D. A. Reavill and N. E. Corthell, for the plaintiff in error.

J. W. Lacey, for the defendant in error.

326 SCOTT, J. The defendant in error, Frederick John Tytler, plaintiff below, under the provisions of the habeas corpus act, applied to the judge of the third judicial district for a writ of habeas corpus to recover the custody of his two minor children, Muriel, aged thirteen and one-half years, and Eric, aged five and one-half years, from their mother, Helen Maud Tytler, defendant below. John St. A. Boyer, the brother of Helen Maud Tytler, was joined as defendant. but there was a disclaimer of any right to the possession of the children by him, a finding in his favor and a dismissal of the writ as to him. Plaintiff and defendant are husband and wife, having been married November 18, 1890. They **327** had separated, and were living separate and apart prior to and at the time of the institution of this proceeding, and the children are the fruit of their marriage. The writ was issued and made returnable before the judge, and at the time and place therein mentioned the children were brought before him, the issues made up and the hearing had on Jan-

uary 2, 1906, and upon consideration the judge found generally in favor of the father, and awarded him the custody of the children. The papers in the case were filed with the clerk of the district court and the order was entered upon the journal pursuant to the provisions of the statute. The mother, Helen Maud Tytler, brings the case here on error, and, having given a supersedeas bond, was permitted to retain the custody of the children with permission to the father to visit them at reasonable times pending these proceedings.

1. It is urged that the order and judgment in said cause is contrary to law. Under the provisions of the constitution the supreme court has original jurisdiction in such cases, and each of its judges "has power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and make such writs returnable before himself or before the supreme court, or before any district court or any judge thereof": Art. 5, sec. 3. The district courts and their judges "shall have power to issue . . . writs of habeas corpus on petition by or on behalf of any person in actual custody in their respective districts": Art. 5, sec. 10. By these provisions the jurisdiction is an unqualified one, lodged in the district judge to hear and determine questions of this nature arising within the limits of his district, and is as broad in its scope as that of a court which has the power to exercise jurisdiction in a like proceeding: *Rust v. Vanvacter*, 9 W. Va. 600. It has long been established that the right of the custody of minor children may be litigated in habeas corpus proceedings. In such cases the question of personal freedom is not involved, for an infant, from ³²⁸ humane and obvious reasons, is presumed to be in the custody of someone until it has attained its majority. As was said by Day, J., in *New York Foundling Hospital v. Gatti*, 203 U. S. 429, 27 Sup. Ct. Rep. 53, 51 L. ed. 254: "Such cases are not decided upon the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but upon the court's view of the best interests of those whose welfare requires that they be in custody of one person or another. In such cases the question of personal freedom is not involved except in the sense of a determination as to which custodian shall have charge of one not entitled to be freed from restraint." It is urged that this rule does not govern in the case before us by reason of the provisions of section 4870, Re-

vised Statutes, as amended, chapter 84, S. L. 1901, which is as follows: "The father of the minor, if living, and in case of his decease the mother, whether remarried or not, being themselves respectively competent to transact their own business and not otherwise unsuitable, must be entitled to the guardianship of the minor." By section 4871, Revised Statutes, it is provided: "If the minor has no father or mother living, competent to have the custody and care of his education, the guardian shall have the same." In *Jones v. Bowman*, 13 Wyo. 79, 77 Pac. 439, this court held that in habeas corpus proceedings involving the custody of an orphan child the interest of the child is the sole consideration. It is clear that in a controversy between the parents for the custody of their minor children the court will regard the welfare of the children as the paramount consideration: 22 Cyc., tit. "Custody and Protection," p. 519, and cases there cited. Similar statutory provisions to sections 4870 and 4872, *supra*, have been construed by courts of different states. In Indiana the statute provided: "That the father of such minor (or if there be no father, the mother, if suitable persons respectively) shall have the custody of the person and the control of the education of such minor." The supreme court of that state, in construing that statute ³²⁹ in a like proceeding to the one before us, said: "The question of the custody of the child was one in which the rights of the child were primarily involved, and where those of his parents were of secondary consideration merely": *Joab v. Sheets*, 99 Ind. 328. In *Jones v. Darnall*, 103 Ind. 569, 53 Am. Rep. 545, 2 N. E. 229, and *Sturdevant v. State*, 15 Neb. 459, 48 Am. Rep. 349, 19 N. W. 617, the facts were quite similar. In each of those cases the father instituted proceedings in habeas corpus to recover custody of his minor child, who was of tender age and being cared for by its maternal grandparents, and in each case it was held, notwithstanding similar statutory provisions, that in such controversy the order of the court should be made with reference to the best interests of the child. In *Nugent v. Powell*, 4 Wyo. 173, 62 Am. St. Rep. 17, 33 Pac. 23, 20 L. R. A. 199, which involved the validity of adoption proceedings, this court said: "And hence from a careful examination of the question, we come to the conclusion that the right of a father with respect to his minor child is not an absolute paramount proprietary right or interest in or to the custody of the infant, but is in the nature of a trust reposed in him."

This declaration of the law respecting the nature of the right of the father to the custody of his minor child is in so far as it goes conclusive upon the courts of this state. Upon principle and authority a court or judge having jurisdiction to inquire into a question of such vital interest ought not to be hampered with a strict construction of statutes which would be the cause of much embarrassment and often defeat the ends of justice. The right to the custody of their minor children is a joint one to be enjoyed by their parents so long as the latter live together and exercise the right. The right of the father to the custody of his minor child is limited as stated in *Nugent v. Powell*, 4 Wyo. 173, 62 Am. St. Rep. 17, 33 Pac. 23, 20 L. R. A. 199. He has no legal or arbitrary right to keep such child away from its mother if the separation from her endangered its health, and especially if it was of such an age as to require a mother's care. Upon the separation of the parents the joint right of custody is severed; it must then go to the one or the other. If the parents cannot agree as to which shall have such custody, and resort to courts to determine that question, they must abide the law of the place where the question is litigated, regardless of the law of the domicile. *Woodworth v. Spring*, 4 Allen, 321. The inability of the parents to live together and exercise a joint custody and interest in the welfare of their children is something for which the latter are in no wise responsible, and when such inability exists the judge or court will, in a proceeding of this nature, designate one or the other, if suitable to perform the trust which has ceased and failed as a joint one and which should be carried on by someone. We are of the opinion that sections 4870 and 4872, Revised Statutes, *supra*, are directory, and in a case like the one before us permit of the exercise of a sound discretion in behalf of the children as to who should have their custody. In theory and in fact they are the ones whose interests are involved, and the writ is primarily issued for their benefit, and the court or judge must of necessity decide the case from the standpoint of their welfare: 22 Cyc. 519; 15 Am. & Eng. Ency. of Law, 187.

In the case before us the parties and their children are subjects of the king of Great Britain. The children prior to coming to Wyoming were, ever since their birth, in the joint custody of their father and mother until the parents separated, and since then, until they were taken by their

mother, as hereinafter stated, they were in the custody of the father and resided with him in British Columbia. Since coming to Wyoming they have been in the custody of and residing with their mother. Such being the case, she was their protector and entitled to their custody, even as against the father, whether he resided within or without the jurisdiction, until he made it appear that a due regard for their welfare required that their custody should be taken from her. In *Woodworth v. Spring*, 4 Allen, 321, in a controversy over the custody of a child, the supreme court of Massachusetts said: "He [meaning the child] is now lawfully within the territory and under the jurisdiction of this commonwealth, and ³³¹ has a right to claim the protection and security which our laws afford to all persons coming within its limits, irrespective of their origin or the place where they may be legally domiciled. Every sovereignty has the right of determining the status or condition of persons found within its jurisdiction. The laws of a foreign state cannot be permitted to intervene to effect the personal rights or privileges even of their own citizens while they are residing within the territory and within the jurisdiction of an independent government. . . . The question whether a person within the jurisdiction of a state can be removed therefrom depends not on the laws of the place from whence he came or in which he may have his legal domicile, but on his rights and obligations as they are fixed and determined by the laws of the state or country in which he is found. . . . The comity of a state will give no effect to foreign laws which are inconsistent with or repugnant to its own policy, or prejudicial to the rights and interests of those within its jurisdiction. Even the parental relation, which is everywhere recognized, will not be deemed to carry with it any authority or control beyond that which is conferred by the laws of the country where it is exerted."

2. It is urged that the finding, judgment and order are not sustained by sufficient evidence. The finding was a general one upon the issues, and the evidence is in the record, part of which was oral. The trial judge had the benefit of having the parties and some of the witnesses before him. The case does not come before this court for trial de novo. In considering the evidence we do not, sitting as a court of review, assume to weigh it, but only look into the record to ascertain if the judge abused his discretion in awarding the custody of the children to their father. From the pleadings

and the evidence both parents are very much attached to their children, and both are anxious to do everything within their power for them. The exact cause of the separation does not clearly appear, though it may be inferred by reading between the lines. Their home was ³³² and had for many years been in British Columbia, and the evidence tends to show that they had lived in comparative happiness until the birth of Eric, after which the mother was in poor health as the result of improper medical attendance during confinement and the necessity for a surgical operation. Her physician recommended a complete change and rest for two years, and advised that such change and rest were absolutely necessary for her recovery. The parties were in poor circumstances financially, though he had always been able to comfortably support his family. They owned a house at Mission, British Columbia, where they first lived after they were married. He is a civil engineer by profession and followed that as an occupation whenever he could obtain work, which was only a part of the time. Such work was not always in the vicinity of his home and the family moved as occasion required, so it would be more convenient for them to live together. They were living at Victoria at the time they separated and soon after he moved with his children to Esquimalt, a suburb of Victoria, where they were living at the time she took the children as hereinafter stated. She went away in August, 1903, for a few weeks for the benefit of her health and returned to her home, where at the end of three weeks she was seized with acute mania, as the result of which she was placed in a hospital. Leaving the hospital in a short time, she started for Rock Springs in this state, her husband accompanying her as far as Seattle, Washington, where they had Christmas dinner, since which time they have not lived together as husband and wife. He returned to the home in British Columbia, where the children were, and she came to Rock Springs and then went east, being operated on in March, 1904. During her convalescence she visited relatives in Canada. Because of his inability to do so, her brother paid her expenses for the operation and her traveling about. She returned to Rock Springs in this state, making her home in the family of a Mr. Kendall, whose wife is her sister, and at whose home she and the children were at the commencement ³³³ of these proceedings. Her health is much better since the operation and

she has never had a return of acute mania. She was robust and in good health at the time of her marriage, and after the operation, during her convalescence, she in part supported herself as a nurse, but since coming to Rock Springs the support, care and maintenance of herself and the children has been and is being provided for by her brother, who is financially able and anxious to do so. During her absence and until she got possession of the children they were cared for by the father, who had no one to look out for or give them personal care and attention but himself. The housework was done by him and Muriel, and during the daytime his work kept him away from the house, where they were left without a protector or anyone to care for them. He always remained home evenings, sometimes taking them out to entertainments, and in every way tried within his limited means to care for them, and showered his love and affection upon them. It is admitted in the pleadings that for two years prior to coming to Rock Springs Muriel's health was such that it was deemed inadvisable to send her to school, and it appears in the evidence that since coming to Rock Springs her health has been good, and that she has been and is attending school there. While residing with her father he gave her instruction at home, but she was not as far advanced in her studies as other children of her age who had the advantage of attending school. That Eric's health was not good at Esquimalt, where the parties lived, and that he is in good health at Rock Springs. That the father wrote the mother at different times while she was away, telling of Eric's health and physical condition, which in her condition of health worried her very much. The children were not permitted to go to her, and she testifies that the physician advised her that it was necessary for her recovery to have them with her, and also that she stay away from Victoria. She says: "At Esquimalt they had no mother to look after them, no one to work for them, no education. They were running 334 wild there, and here they are having an education, and they have money to clothe them and feed them properly, and certainly my care and love is, of course, an advantage, and then they have the advantage of this climate and change." She has no means and the children are supported and cared for by their uncle, who is financially able and anxious to do so. Muriel said in her testimony: "When I was living with my father, I was always—a father is different to a mother,

you know; he couldn't look after us like a mother can. I always needed her care. . . . Here I have no worry at all. I go to school here and I never went to school there. I love my mother as I could never love my father. That is the difference." She also testified that she and Eric loved their father all the time, but that she preferred to live with her mother; that she would like to live with her father and mother, but when they were so living her mother "was very unhappy and, of course, that made me unhappy." Late in October, 1905, the mother and her brother went from Rock Springs, Wyoming, to Esquimalt, British Columbia, to obtain custody of the children amicably or by legal proceedings. They stopped at a hotel instead of going to the home, and on the evening of the day of her arrival the brother went to plaintiff's home and told him his wife was at the hotel and desired to see the children. Plaintiff, upon inquiry as to why she did not come home, was informed that she was too tired and desired to rest at the hotel that night, and plaintiff took the children to see their mother, at the hotel. After the children had come from her room, telling him that their mother wanted to see him, he visited her, but says he soon found that he was not welcome, and left the hotel, leaving the children to stay all night with their mother. They were brought home the next day. The children were permitted to visit their mother during the daytime for about a week, after which he denied them that privilege, but permitted their mother to visit them at their home, and on such occasions he absented himself, so that they might be alone with their mother. The father testified that his reason for ³³⁵ not letting the children visit their mother at the hotel was that he feared she would take them away. He alleges in his petition that his wife's brother had proposed to him that he turn the custody of the children over to their mother, which proposal he declined, and that he proposed that his wife should return and live with him, or live in the vicinity, where she could be constantly near the children. He testified that she did not return to his home as his wife. The evidence tends to show that on November 10th following, in his absence, the mother and her brother went to his home and the home of his children and took them without his knowledge or consent and brought them to Rock Springs, in this state, where they have been residing with their mother ever since. The father, upon his arrival home in the evening from his work, found the chil-

children gone, and, upon inquiry, found they had gone away with their mother and uncle. The next day he received a telegram from his wife, dated at some station in the state of Washington, telling him not to worry, that the children were with her. Muriel says she went willingly with her mother, although she did not know, but was suspicious, that she and Eric were going away from her father to live with their mother and that she wanted to go.

It is alleged in the petition: "That the sole pretense of the said restraint, so far as your petitioner is advised and according to his best information, is the wish of the said Helen Maud Tytler to have possession of the said children; . . . that the said restraint is illegal and was originated and continued solely by the unlawful invasion of the home of your petitioner as aforesaid by the said Helen Maud Tytler and the said John St. A. Boyer, and the unlawful and forcible taking possession of the said children by the said Helen Maud Tytler and John St. A. Boyer, as aforesaid, and the unlawful and forcible and clandestine carrying away of the children by the parties last above named from the home of your petitioner to the said county of Sweetwater, in the State of Wyoming." This allegation ³³⁶ was met in the return and answer of the defendant and also in the evidence, and while it appeared that the defendant acted upon her desire to have the children with her, it is not the sole reason; it was that in connection with a desire to release them from the condition in which they were living. To relieve their condition she should, if her health permitted, have shared the home with her husband and children. It is, of course, the marital duty of a wife to live with her husband, having taken upon herself the responsibility to so conduct herself toward him, and his duty to her is the same, so that their children may have the benefit of the joint care and affection of both father and mother. This duty is a most sacred one, and its nonperformance ought not to be easily excused, but should be for some good, substantial reason to warrant the court in giving the custody of minor children to the parent who is guilty of violating such duty. Such duty is not, however, violated when a separation is necessary by reason of physical ailments, and when for that reason the marriage relation cannot be continued either in the locality of the home or elsewhere without danger of becoming a hopeless mental wreck. Such are rare and extreme cases, but we are unable to understand from the

evidence how the refusal of the defendant to live with her husband as his wife could be construed as a willful disregard of her duty toward him or their children. His allegation that he proposed through her brother that she live in the vicinity, where she could be constantly near the children, is not supported by any evidence in the record, notwithstanding it is directly put in issue by the answer and return of her brother to the writ, who alleges that the only proposal made by the plaintiff was that she return and live with him as his wife. If there had been such proposal, we doubt very much from the evidence if it would have been a just requirement or proper for her to live where her surroundings would have been a constant reminder of her former unfortunate condition. Upon the facts, it cannot be said that she willfully deserted her husband and children. Defendant says ³⁸⁷ that the reason she did not institute legal proceedings to obtain their custody is that her brother was called home sooner than he expected and that she did not feel able to carry on such proceedings alone. It is not shown that the manner and method of taking the children was criminal under the laws of their domicile, and they were brought into this state for no illegal or unlawful purpose, but, on the contrary, they were so brought by their mother, who was living in this state and who seems to have been acting out of love and affection for them, and in an effort to do that which she believed would better their condition. Such acts were clandestine in so far as they were done without the knowledge and consent of the father, but they were done by a natural parent of good character, moved by pure motives and for what such parent deemed, in the condition of her health and the surrounding circumstances, for their best interest. Such acts were not so done as to violate the rights of the children, nor were they so repugnant to the rules of equity and good conscience as to stamp her as unsuitable to have their custody and require that their custody be returned to their father. In *Jones v. Bowman*, 13 Wyo. 79, 77 Pac. 439, a minor orphan child was spirited away from its domicile in another state from its custodian, and where proceedings were pending for the appointment of the latter as its guardian. The child not being *sui juris*, could not change its domicile nor could it be changed by those who without authority took it away. The court proceeded to appoint the applicant as guardian, who followed the child to this state and instituted habeas corpus as a foreign

guardian to obtain the custody of the child against a local guardian who in the meantime had been duly appointed in this state and whose wife, the child's aunt, had assisted in removing the child to this state. It is clear that the injury, if any, in that case was to the child, and yet it was held by this court that, notwithstanding the child was so clandestinely taken from its custodian at the place of its domicile and brought into this state, the foreign guardian was not entitled to its custody. ³³⁸ It was the children's right to live with both parents, and if for any reason they were prevented from doing so, then to live with the one, if otherwise suitable, whose presence, care and attention was most needed in view of their age and requirements. The statement of Muriel, though but thirteen and one-half years, should be considered in connection with all the other evidence in the case. Her evidence shows her to be bright and intelligent—indeed, more than ordinarily so for one of her age—and in view of all the evidence and surrounding circumstances, her choice was a wise as well as a natural one. In such cases age is not the criterion, but it depends upon the reasonableness of its preference and its intelligence whether an infant has sufficient judgment and discretion to choose for itself: 15 Am. & Eng. Ency. of Law, 186, and cases there cited; Hurd on Habeas Corpus, 532; Church on Habeas Corpus, secs. 431, 432. In *Chunn v. Graham*, 117 Ga. 551, 43 S. E. 987, a case like the one before us, the court said: "It was competent upon the hearing to permit the child to state with whom she preferred to live. In many cases such wish ought to turn the scale. The nearer the child approaches fourteen, with the legal right to choose her guardian, the greater the weight to be given to such wish." Before that time its wish "is not controlling, but may be considered by the habeas corpus judge along with all the evidence as to what is the minor's best interest." Such we think is the general rule, for if the happiness and welfare of the infant is to be consulted, nothing could be more potent upon that question than the expression of its preference based upon kindness or unkindness, care or want of care, love and affection or want thereof, and as to the surrounding conditions either with one or the other.

In the case before us the children are with their mother. At the time of hearing, Muriel, who was just approaching the age of fourteen, expressed her wish to remain and live with her mother. She has now reached the age of fourteen,

and her wish at this time as to who shall be her guardian is ³³⁹ expressly recognized by statute. She may nominate her own guardian, "who, if approved by the court or judge, must be appointed accordingly": Rev. Stats., sec. 4867. While the supervisory power of the court or judge goes to the fitness and suitability of the person so nominated, the statute assumes that the minor having reached the age of fourteen can act intelligently in the matter of selecting her guardian. Eric is of tender years and cannot speak for himself on the subject, but it would be cruel, in our judgment, to take him away from his mother at his age and compel him to live separate and apart from her and from his sister. This court said in *Jones v. Bowman*, 13 Wyo. 79, 77 Pac. 439. "We are unable to return this case for final determination without references to some of the writings upon that subject and to some showing that the courts have always held that when it is possible a family or those remaining should be kept together." Numerous authorities are there cited in support of this humane rule, which it is not necessary to here discuss. Both children need their mother's care. She is devoted to them, and no breath of suspicion rests upon her character, either by allegations in the pleadings or in the evidence. She is such a woman as to command their love and respect which they give her. They are attending school and are under her immediate care, and ought not to be separated, but, if possible, be kept together. She may not be able to furnish them a good home from independent means of her own, but they are, with a prospect of a continuation of their present surroundings and conditions, well provided and cared for by her brother, who is financially able and willing to do so, and they are being educated and their health is better in this climate than when residing in Esquimalt with their father. It may be conceded that their father is a good man and equally solicitous for their welfare, yet there are many things that he is unable to do personally or that could be done by a nurse or governess and which their mother can do for them. Neither he, nurse or governess could supply the place of their mother. In *Redmond v. Redmond*, 113 Mo. App. 351, 88 ³⁴⁰ S. W. 129, the controversy was between the parents over the custody of five children, the eldest age thirteen years and the youngest age five years. The mother had no means of her own to support, care for and maintain the children, and she and the two younger children were living

with and being cared for, while the three elder children were being educated in a school where they were away from their mother, at the expense of the maternal grandmother. The case was one of original jurisdiction, and in that respect unlike *Sturdevant v. State*, 15 Neb. 459, 48 Am. Rep. 349, 19 N. W. 617, and *Jones v. Darnall*, 103 Ind. 569, 53 Am. Rep. 545, 2 N. E. 229, which were of appellate jurisdiction. It was held that, although the father, who brought the proceeding, was financially able and morally fit to have the custody of the children, yet he would have to hire a housekeeper to look after their wants. That court said: "We can never consent to the substitution of a hireling to look after these children in the place of their mother," and the children were permitted to remain in the custody of their mother. In *Sturdevant v. State*, 15 Neb. 459, 48 Am. Rep. 349, 19 N. W. 617, the court said: "It is no doubt true that the defendant in error is greatly attached to his child, and the facts as found by the court show that he is in every respect a suitable person to have its care and custody. But when we consider his age and want of experience, we are driven to the conclusion that, personally, he could not care for the wants of a child so young and helpless. True, he has means and has employed a suitable nurse, yet so far as we are informed this nurse is a stranger to the child, and of course does not feel that personal interest in its welfare as would be felt by a near relative." In that case the child was eight months of age and if its helpless condition would not inspire such interest in its welfare by a nurse who was caring for it as would be felt for it by a near relative, much less would such an interest be aroused in a stranger to children who were older, one of whom is a girl who has reached that age where she needs and is entitled to the careful attention, direction and guidance of a mother, and which could not be given by a father. Her mother's presence, interest, care, ⁸⁴¹ love and affection during the formative period of her character and upon which her future health and happiness largely depend, are factors too valuable to be lightly brushed aside, and especially in view of her expressed wish and desire to live with her mother.

We are of the opinion that the finding of the trial judge in favor of the father upon the issue as to the best interest and welfare of the children is not supported by the evidence, and that the awarding of their custody to him was such an

abuse of discretion as to call for a reversal of the judgment and order. Muriel having now reached the age which entitles her to nominate some suitable person to be her guardian, her wishes as to which of her parents, each being suitable, should have her custody should, we think, be respected by the court, in view of her manifest intelligence as disclosed by her testimony. Such being the rule governing this class of cases, it would neither be proper nor right as against her wishes upon a retrial of the issues to take her from her mother, and Eric, under the rule laid down by this court in *Jones v. Bowman*, 13 Wyo. 79, 77 Pac. 439, ought not to be separated from her and his mother. There is, therefore, nothing to be retried. Upon the facts the plaintiff in error was and is entitled to the custody of the minor children, and the defendant in error is entitled to see and visit them at all reasonable times.

For the reasons above stated the judgment is reversed and the case is remanded to the district court of Sweetwater county, with directions to enter judgment in accordance with the views herein expressed.

Potter, C. J., and Beard, J., concur.

The Right to the Custody of a Child may be Determined in Habeas Corpus proceedings, and the determination will usually be considered conclusive in subsequent applications for the writ, unless new facts have occurred or circumstances arisen which alter the status of the case: *Dawson v. Dawson*, 57 W. Va. 520, 110 Am. St. Rep. 800.

In Awarding the Custody of a Child the governing consideration is the welfare of the child rather than the technical right of either parent. By this is not meant, however, that the parental right will be lightly invaded. The wishes of the child should be consulted, but they are not controlling: *Ex parte Reynolds*, 73 S. C. 296, 114 Am. St. Rep. 86; *Hernandez v. Thomas*, 50 Fla. 522, 111 Am. St. Rep. 137, and cases cited in the cross-reference note thereto.

WAISNER v. WAISNER.

[15 Wyo. 420, 89 Pac. 580.]

ARBITRATION AND AWARD—Entry of Judgment on.—A court has no power, on motion and against objection, to enter up as its judgment a common-law award made by arbitrators. (p. 1087.)

ARBITRATION AND AWARD—Impeachment for Fraud.—A statutory award may be impeached upon a showing of fraud and mistake, though honestly made, which would work a fraud on either party. (p. 1088.)

ARBITRATION AND AWARD—Exceptions to Jurisdiction.—If, in a pending suit for a dissolution of a partnership, the partners submit the matter in controversy to arbitration, under which an award is made, to which one partner files objections in court, while

the other asks that the award be confirmed, the trial court has jurisdiction, under a statute authorizing the setting aside of an award obtained by fraud, to pass upon such objections, regardless of whether the award was brought into the case either as a common law or as a statutory one. (p. 1088.)

ARBITRATION AND AWARD—Objections to Jurisdiction.—A party to an action who has petitioned the court to render judgment on an award resulting from an arbitration of the matter in dispute agreed upon by the parties pending the suit, and who has appeared and introduced evidence at the hearing, and has stipulated that the matter in controversy shall be wound up by the decree of the court, cannot question the jurisdiction of the court to pass on exceptions to the award filed by the other party. (pp. 1088, 1089.)

ARBITRATION AND AWARD—Divisibility—Effect of Acceptance.—The rule that one accepting the fruits of an award cannot thereafter question its validity does not apply to awards as a whole which are divisible. (p. 1089.)

ARBITRATION AND AWARD—Divisibility.—If the void part of an award is divisible from the other part, it will be upheld as to that part which is valid. (p. 1089.)

ARBITRATION AND AWARD—Divisibility.—The acceptance by the parties of a divisible part of an award does not estop one of them from challenging the validity and justness of the other part. (p. 1090.)

ARBITRATION AND AWARD—Partnership—Dissolution.—Upon the dissolution of a partnership, an indebtedness of a partner to the firm for improvements made upon his homestead belongs to the personal assets of the firm, and is a proper charge against the interest of the partner owning the homestead, and such indebtedness must be presumed to have been taken into consideration by arbitrators in making an award and division of the personal property and the apportionment of the indebtedness of the firm. (pp. 1090, 1091.)

ARBITRATION AND AWARD—Partnership—Dissolution—Realty of Partner's Wife.—Land of the wife of a partner purchased with her own means and to which she holds the legal title is not a proper subject of award by arbitrators between the members of the firm on a dissolution thereof and an accounting, although such land may have been used by the firm, if no contract is shown for such use, nor circumstances constituting the owner a trustee of the title for the firm. (p. 1091.)

PARTNERSHIP — Assets—Government Land.—Although a partnership may have used land entered by one of the members of the firm under homestead and desert land laws, but upon which final proof has not been made, such land cannot be considered as partnership assets upon a dissolution and winding up of the partnership affairs. (p. 1092.)

HOMESTEAD ENTRY—Inchoate Title.—An original homestead entry amounts to nothing more than a declaration of intention, and while the entryman thereby obtains an inchoate title, he does not acquire any vested right against the government or any ownership in the land until final proof is made. (p. 1092.)

PARTNERSHIP ASSETS—Homestead Entry.—An Agreement, Express or Implied, that a partner's homestead entry, upon which final proof has not been made, is made for, or inures to, the benefit of the partnership, is void as against public policy, and the land embraced therein is not an asset of the firm to be considered on a dissolution and accounting of the partnership. (p. 1092.)

M. B. Camplin and Burgess & Kutcher, for the plaintiff in error.

Metz & Sackett, for the defendant in error.

⁴²⁷ SCOTT, J. This action was originally commenced in the district court of Sheridan county by the plaintiffs in error against the defendant in error for a dissolution of a partnership then and theretofore existing between them, and for the appointment of a receiver to take charge of the firm property, for an accounting, and for a division of the personal partnership property. The property consisted of sheep, some real estate, state land leases and necessary personal property to care for the sheep. It was alleged in the petition and admitted by the answer that the real estate belonging to the firm could not be equitably divided and should be sold and the proceeds divided. The parties were equal partners. The court appointed a receiver, who duly qualified and took into his possession all of the partnership ⁴²⁸ property. While the suit was pending and after the issues were made up the parties entered into and signed the following agreement, viz.:

“ARBITRATORS—SUBMISSION AGREEMENT.

“Know All Men by These Presents: That we, the undersigned, do hereby mutually agree to submit the matters in difference between us hereinafter set forth, to the determination and award of J. J. Blackbourn of Sheridan, Wyoming, C. E. Halbert of Sheridan, Wyoming, with such other party as the two may select, as arbitrators, J. I. Kirby. Said arbitrators to meet at Coffeen-Redly hall, in the Town of Sheridan, Wyoming, on Saturday, February 18th, 1905.

“Said arbitrators shall take up all questions of the ownership of all real estate, leased land, live stock, assets, and liabilities, either of the parties composing the firm of Waisner & Sons, or of outside parties to said firm, but in the latter case the account is to be accepted by the firm, before being passed on by the arbitrators, except the claim of R. R. Selway, also regarding the sale of 120 ewes to G. C. Waisner, which are to be decided by the arbitrators; said property is to be divided without public sale, but it is in the discretion of the arbitrators to allow the parties composing the firm of Waisner & Sons to bid either on the homestead, or the leased land. Should it happen in the division of the property that one partner shall have what exceeds his share, payment shall be made

to the other parties, of the amount so due, within 30 days from the time the decision of the arbitrators is given.

"It is mutually agreed by the parties to this agreement, that no attorneys shall be present at any meeting of the arbitrators, either to examine witnesses, or to argue any matter in the case, but the arbitrators may present any question, touching the legality of any action of theirs, or the legal status of any matter coming up before them in this case to any lawyer, but his opinion shall not be binding on said arbitrators.

429 "The said arbitrators shall hear and determine said above questions, *make division of said property*, and award the payment of the costs and expenses incurred in said arbitration, and shall make their award in writing on or before February 25th, 1905, at 4 o'clock P. M.

"G. W. WAISNER.

"J. A. WAISNER.

"W. E. WAISNER.

"Witness:

"J. G. HUNTER."

The following agreement is indorsed on the reverse side of the agreement to submit to arbitration:

"We, the undersigned parties to the arbitration submission, on reverse side of this sheet, hereby mutually agree to abide by the decision of said arbitrators, and mutually agree that any court may render judgment and issue execution thereon.

G. W. WAISNER.

"J. A. WAISNER.

"W. E. WAISNER.

"Witness: .

"J. G. HUNTER."

The arbitrators met pursuant to the terms of this agreement and proceeded to divide the personal property between the parties and to apportion the indebtedness of the firm among them; they also attempted to divide and apportion the real estate among the parties. In so far as the award of the personal property is concerned, each of the parties accepted from and receipted to the receiver for his part, and the action of the receiver in so turning the personal property over to the parties entitled thereto under the award was affirmed by the court, and the receiver was, on September 21,

1905, by consent of the parties, they being personally present, discharged by order of the court and his bondsmen released. The following recital appears in the award made and filed by the arbitrators, viz.: "The said arbitrators do further award that all actions and suits commenced, brought or pending between the said G. W. Waisner, W. E. Waisner and J. A. Waisner for any matter, cause or thing whatsoever, arising or happening at the time of, or before, entering ⁴³⁰ into the said agreement of arbitration, shall from henceforth cease and determine, and be no further prosecuted or proceeded in by them, or either of them, or by their or either of their means, consent or procurement." The agreement to submit to arbitration, the oath and award of the arbitrators were filed in the case on February 24, 1905. The receiver made his final report on March 25, 1905, in which he recites that "the said parties to this action, the plaintiffs and defendants composing the members of said copartnership of Waisner & Sons, have by agreement submitted all their difficulties existing between them and involved between them in this action to arbitration; said parties mutually agreeing in writing to abide by the decision of said arbitrators, and therein agreeing in writing that this court may render judgment and issue execution thereon, both of which instruments are on file in this court." In the order approving this report and discharging the receiver the court found "by the consent of said parties that there has been no necessity for said receiver since March 24, 1905, and that all his duties terminated at that time." The defendant filed exceptions to the award as to the real estate on March 9, 1905. Upon hearing, the exceptions were sustained, the court found that the real estate belonging to the partnership could not be equitably divided, and ordered the same to be sold and the proceeds of the sale to be equally divided among the partners.

1. The jurisdiction of the court to consider defendant's exceptions to the award was challenged. The exceptions filed were not entitled in the cause, and over plaintiffs' objections the court permitted the exceptions to be amended by the insertion of the title.

A great part of plaintiff's brief is devoted to the question of jurisdiction. The arbitration was not in pursuance of any rule of the court. It was with reference to property in custodia legis, and in so far as the division of the personal property and apportioning the debts is concerned seems to

have been satisfactory, and the custodian divided the personal ⁴³¹ property of the firm in accordance with the award, took receipts therefor and his action was approved by the court; and he was discharged and his bondsmen released by and with the consent of the parties. If plaintiff's contention is correct, that it was a common-law arbitration and that the exceptions had no place in the record of this case, they could, upon the overruling of their objection to the jurisdiction of the court to consider the exceptions, have declined to proceed further and rested their rights upon the award. They did not do so, but after the ruling complained of they filed their petition and motion for judgment upon the award, and in which they alleged, among other things, that the defendant was estopped from questioning the award, he having voluntarily agreed to the arbitration and to abide by the award to be made by the arbitrators, and having received his share of the personal property as fixed in the award. The petition and motion partook of the nature of a supplemental petition. It was entitled in and was in effect a pleading in the original case. It says: "Comes now the plaintiffs in the above-entitled cause, being an action brought for the dissolution of a copartnership theretofore existing between the plaintiffs and the defendant under the firm name of Waisner & Sons, the plaintiffs and defendant constituting said firm, and for an accounting, adjustment, determination, settlement and winding up the partnership affairs of said concern." The estoppel so plead was directed to the exceptions on file, and the arbitration award and exceptions thereto were thus brought into the original case by the plaintiffs, and by thus petitioning the court to try issues so raised they submitted the matter to the jurisdiction of the court. Such being the case, it is unnecessary to determine when a submission to arbitration of matters in controversy in a suit pending operates as a discontinuance of the suit. The petition and motion, together with the exceptions, raised an issue of fact as well as of law, and the motion could not be granted except upon a hearing in the face of the defendant's objections and ⁴³² exceptions, and upon which he was entitled to be heard. The indorsement on the back of the agreement to submit the matters to arbitration is in effect to abide by the decision of the arbitrators, and its purport is to authorize any court to render judgment and issue execution thereon. This indorsement is not dated, and

it does not appear whether made and signed prior or subsequent to the decision of the arbitrators. It was made out of court, and if the arbitration be deemed one under the rules of the common law, the court had no authority upon a motion as against objection to enter judgment thereon. In *Ex parte Dudley*, 79 Ala. 187, a case in chancery, the parties pending the action, without any order of court submitted their differences to arbitration. It was stipulated that the award should be the decision and decree of the chancery court. The award was filed and a motion was made to have it entered up as the judgment and decree of the court. This motion was contested by the defendants, who filed objections in writing to the award. Upon hearing the objections were sustained and the motion denied, and it was sought, notwithstanding such rulings, by proceedings in mandamus to compel the chancellor to enter up the award as the decree of the court. The court said: "A court has no authority to enter up as its judgment a common-law award unless by the consent of parties litigant solemnly given in *judicio*. A consent given out of court and afterward revoked will not do." In *Childs v. Updyke*, 9 Ohio St. 333, it is said: "The award rendered in such common-law arbitrations has no judicial force. It operates neither as a judgment nor as the verdict of a jury." The filing of the objections and exceptions to the award was a revocation by the defendant of his agreement to abide the decision of the arbitrators and his consent that judgment should be entered upon the award. The revocation was on file and he was also present in court objecting to and opposing the motion. Such being the case the court was without authority to grant the motion. The award having ⁴³³ been plead and brought into the original case the judgment, in the absence of the consent of the parties, would have to be based on a finding from the evidence upon the issues raised. The plaintiffs did not however, treat it as an arbitration independent of the supervisory powers of the court. Their motion was for a confirmation of the award in addition to judgment thereon. If it was a common-law award, it needed no confirmation to give it validity. The jurisdiction to confirm implies also jurisdiction to inquire into and hear any valid objections to such confirmation. By their motion they invoked the power of the court in aid of the arbitration proceedings, and sought to make it a rule of court and bring it within the provision of the statute but even if all the provi-

sions of the statute had been followed, the court would still have had jurisdiction to consider the exceptions. Section 4078, Revised Statutes, provides that "If it be made to appear, on oath, at the term of the court at which the award and arbitration bond are filed that the award was obtained by fraud, . . . the court may set aside the award, and the matters submitted shall be retained by the court for trial as upon appeal." It is clear from the statute that in a statutory proceeding of this nature the award may be impeached upon a showing of fraud. It is not necessary that the fraud which will warrant the court to set aside the award should be shown to be intentional or perpetrated by the parties. A mistake, though honestly made, which would work a fraud on either party would be sufficient to vitiate the award. In *Corrigan v. Rockefeller*, 67 Ohio St. 354, 66 N. E. 95, the court said in construing statutes identical in terms: "The very purpose is to reach in a speedy and inexpensive way a final disposition of the controversy between them, and to avoid future litigation concerning the same matters. It is in the furtherance of this purpose that by the general rule the award cannot be overturned by the dissatisfied party. And as the rule is that it cannot be impeached for error, nothing but fraud, in the parties or the arbitrators or such manifest mistake ⁴³⁴ as naturally works a fraud, can be alleged to avoid it." The same rule is announced in an earlier case by that court in *Ormsby's Admr. v. Bakewell*, 7 Ohio, 98. We are of the opinion that the trial court had the jurisdiction to hear and pass upon the exceptions and objections to the award, regardless of whether the award was brought into the case either as a common law or as a statutory one.

The court proceeded to try the issues, and upon the trial the plaintiffs as well as the defendant submitted evidence. At the close of the evidence the bill of exceptions recites: "It is hereby agreed between the parties to this suit that the partnership heretofore existing between the parties is dissolved by decree of this court, and that the affairs of this estate with reference to the real estate be wound up." This was a stipulation or agreement made during the trial, in open court, when the very question was the disposition of the real estate owned by the partnership—a question which was within the issues of the pleadings independent of any arbitration, attempted arbitration, or award. Having so stipulated, they will be deemed, if for any reason the court should find that

the terms of the award were inequitable and unjust, to have waived their right to stand upon the terms of the award and to have resubmitted the question to the court. The court having by its decree dissolved the partnership and settled all matters except as to the real estate, the parties, as shown by this stipulation, placed themselves in the attitude of invoking the power of the court as to the disposition of such real estate. Having done so the plaintiffs are not in a position, after having petitioned the court in the original case to render judgment on the award, appeared and introduced evidence at the hearing, and so stipulated, to question the jurisdiction of the court to act in the matter.

2. It is urged that the defendant was estopped both by record and by conduct to deny the legality of the award. It is true that he accepted his share of the personal property and assumed his share of the indebtedness of the firm as ⁴³⁵ fixed by the arbitrators in the award, and in that respect the division appears to have been just and equitable upon the evidence, and the court so found, and all the parties complied with the terms of the award with reference to those matters. At the time the receiver was discharged, the parties were all present in court consenting thereto, and immediately thereafter, and on the same day, plaintiffs made their motion to strike the exceptions to the award from the files. These exceptions had been on file in the case for several months, having been filed March 9, 1905, and before the duties of the receiver had terminated as found by the order discharging him, and the plaintiffs must have had knowledge of them and their purport at the time they consented to the discharge of the receiver. They were then advised of the mistake complained of in the award, and which the court afterward, upon hearing, found to exist. The division of the real estate as fixed by the award was inequitable, unjust, and would, if permitted to stand, work a fraud upon the defendant. It is uniformly held that one who accepts the fruits of an award cannot thereafter question its validity. This holding, however, by no means applies to awards as a whole which are divisible, for when so divisible each part is independent of the others and distinct in itself. The award in such cases is not void in toto, but void pro tanto. So it is held that if the void part of an award is divisible from the other part it will be upheld as to that part which is good:

3 Cyc. 713. This rule applies in cases not alone when the bad part of an award is void ab initio, but also in cases where such portion is voidable: 3 Cyc. 715. The consent to the discharge of the receiver and the approval of his report as to the division of the personal property and the assumption of the indebtedness pro rata by the individuals comprising the firm, the allegations of their petition that the real estate could not be equitably divided, and that it was necessary to sell the same and divide the proceeds, the agreement and stipulation made in court "that the affairs of the estate with reference ⁴³⁶ to the real estate be wound up," taken together, show that the plaintiffs elected to treat everything pertaining to the partnership affairs as closed except as to the real estate. Such being the theory upon which they presented the case, and the court having acted upon that theory, they are not now in a position to urge that the award was an entirety and not divisible. It may also be further said that the award being so divisible, and all the parties having acceded to and accepted the benefits and burdens of that part of the award with reference to all matters except as to the real estate, they are estopped from questioning its validity to that extent. The defendant was bound by the award to that extent, but was not estopped from questioning on the grounds alleged that part which was divisible and separate therefrom.

3. By the terms of the award "160 acres of deeded land known as the home ranch, with 280 acres adjoining home ranch and lying on the east and south of same. Also 160 acres of land to the north and adjoining home ranch, with all improvements on and under construction on desert claim, and homestead owned by J. A. Waisner," is the part of the real estate awarded to the plaintiffs. The arbitrators awarded "all improvements on his homestead and desert claim which may have been placed there by the firm of Waisner & Sons, also lease or school land of 320 acres lying on Powder River, near Arvada, and held at this time by Waisner & Sons. Also 40 acres of scrip land near home ranch which is in the name of J. A. Waisner." Neither the value nor kind of improvements placed on defendant's homestead are shown. The value of the improvements in such settlement would be a proper charge against his interest in favor of the firm. Such improvements constituted a part of the realty, the title to which is not claimed to be in the firm, and the indebtedness for such improvements was a part of the personal assets, and it must be

assumed to have been taken into consideration by the arbitrators in the division of the personal property and the apportionment ⁴³⁷ of the indebtedness. This was evidently the view of the trial court, for it found and recited in the decree "That all the personalty of said firm has been equitably distributed among the said copartners."

4. The court found from the evidence "that the said award is void as to the awarding or disposition of the real estate and leases referred to therein; that all other matters determined in said award being separable from the portion of said award as to said real estate and leases is hereby affirmed; that the division of the property by the award except as to the said real estate and leases appears to have been equitable, but the arbitrators without authority considered real estate belonging to third persons not members of the firm of Waisner & Sons, and real estate not belonging to said firm which materially affected said award." It was shown by the evidence that the forty-acre tract was purchased by the defendant's wife, she having paid for it with her own money. She held the legal title, and no evidence was introduced which would constitute her a trustee of the title, either expressly or impliedly, for the partnership or any member thereof. The evidence showed that it had been used by the partnership, but fails to show that it was so used in pursuance of any contract, nor was it in the name of defendant at the time of the award or at any time. It was selected and entered as scrip land on August 8, 1904, and her deed thereto bears date February 27, 1905. At the time the arbitrators had the matter before them for consideration the defendant was asked as to the value of this land in connection with the business of the firm, but he made no statement that it belonged to the firm. Upon the evidence a mistake through no fault of the defendant was committed by the arbitrators which, if permitted to stand, would work a fraud upon him. He was entitled to his share of the partnership real estate, and the arbitrators had no authority to consider or subject any not so owned by the partnership to the arbitration. The evidence supports the finding, and the award being divisible, the court properly set aside so much ⁴³⁸ thereof as attempted to divide the real estate between the parties: *Ormsby's Admrs. v. Bakewell*, 7 Ohio, 98; *Corrigan v. Rockefeller*, 67 Ohio St. 354, 66 N. E. 95.

5. The decree finds that certain real estate described therein belonged to the partnership, directs that it be sold, and the

proceeds, after deducting expenses of sale, be divided equally between the parties; and the court commissioner is directed to have the same appraised, make sale thereof as upon execution, and make return of such sale within ninety days from the date of the order. As there was no controversy in the pleadings as to the necessity of a sale of the real estate, the plaintiffs in error cannot be heard to complain of this part of the decree.

6. It is urged that the court erroneously omitted from the decree certain real estate aside from the forty-acres already referred to that should be considered as partnership property. No mention is made in the decree of the land embraced in defendant's desert and homestead entries.

These entries were by virtue of filings made by the defendant under the land laws of the United States, and it does not appear that at the time of the trial any final proof had been made upon the tracts of land embraced in the entries or either of them. Defendant's title was inchoate, and in so far as the homestead is concerned he had no title which he could convey. His original homestead entry amounted to nothing more than a declaration of intention, and while he thereby obtained an inchoate title, he did not acquire any vested right against the government or any ownership in the land: 26 Am. & Eng. Ency. of Law, 254, and cases there cited. It is urged that impliedly the entries were for and inured to the benefit of the firm, and should, therefore, be deemed and considered assets of the firm. An express agreement, and, of course, an implied one, to that effect with reference to the homestead would be void as against public policy: 26 Am. & Eng. Ency. of Law, 410, 416, and cases there cited. There is no showing that the law is different with reference to obtaining title to the land embraced in the ⁴³⁹ desert entry. Aside from this legal phase of the question, the defendant testified that these lands were not partnership lands, and that they were not included in the agreement of submission to arbitration, and the plaintiffs offered no evidence in opposition thereto, nor did they allege in their petition that the lands embraced in these filings were owned by the firm, but rested that question, so far as they were concerned, upon the fact that the land had been used by the partnership during its existence. This, we think, was not sufficient. The defendant could not legally convey title to the land. It could not, therefore, be considered as partnership assets, though it may have been used

in connection with the firm business. The right to its use was permissive and terminated with the partnership.

The judgment will be affirmed and the case remanded, with directions to the district court of Sheridan county to make any further order necessary to carry the decree into effect.

Potter, C. J., and Beard, J., concur.

An Award by Arbitrators is in the nature of a judgment, and ordinarily conclusive upon the parties: *Hynes v. Wright*, 62 Conn. 323, 36 Am. St. Rep. 344. Awards are favored in law, and reluctantly set aside; every presumption is in favor of their fairness, and the burden of proof is on the party seeking to set them aside to do so by clear and strong proof: *Brush v. Fisher*, 70 Mich. 469, 14 Am. St. Rep. 510; *Roberts v. Consumers' Can Co.*, 102 Md. 362, 111 Am. St. Rep. 377. As to vacating awards for mistake, fraud or misconduct, see *Jackson v. Roane*, 90 Ga. 669, 35 Am. St. Rep. 238; *In re Curtis*, 64 Conn. 501, 42 Am. St. Rep. 200; *Brush v. Fisher*, 7 Mich. 469, 14 Am. St. Rep. 510; *Sweet v. Morrison*, 116 N. Y. 19, 15 Am. St. Rep. 376; *Hewett v. Reed City*, 124 Mich. 6, 83 Am. St. Rep. 309; *Christianson v. Norwich Union Fire Ins. Co.*, 84 Minn. 526, 87 Am. St. Rep. 379.

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2. ARBITRATION AND AWARD—Impeachment for Fraud.—A statutory award may be impeached upon a showing of fraud and mistake, though honestly made, which would work a fraud on either party. (Wyo.) *Waisner v. Waisner*, 1081.

3. ARBITRATION AND AWARD—Exceptions to Jurisdiction.—If, in a pending suit for a dissolution of a partnership, the partners submit the matter in controversy to arbitration, under which an award is made, to which one partner files objections in court, while the other asks that the award be confirmed, the trial court has jurisdiction, under a statute authorizing the setting aside of an award obtained by fraud, to pass upon such objections, regardless of whether the award was brought into the case either as a common law or as a statutory one. (Wyo.) *Waisner v. Waisner*, 1081.

4. ARBITRATION AND AWARD—Objections to Jurisdiction.—A party to an action who has petitioned the court to render judgment on an award resulting from an arbitration of the matter in dispute agreed upon by the parties pending the suit, and who has appeared and introduced evidence at the hearing, and has stipulated that the matter in controversy shall be wound up by the decree of the court, cannot question the jurisdiction of the court to pass on exceptions to the award filed by the other party. (Wyo.) *Waisner v. Waisner*, 1081.

5. ARBITRATION AND AWARD—Divisibility—Effect of Acceptance.—The rule that one accepting the fruits of an award cannot thereafter question its validity does not apply to awards as a whole which are divisible. (Wyo.) *Waisner v. Waisner*, 1081.

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7. ATTACHMENT—Motion to Dissolve—Inquiry into Facts.—On the trial of a motion to dissolve an attachment on a denial of the existence of the alleged grounds therefor, the circumstances of the transaction out of which plaintiff's cause of action arose may be inquired into, although they may involve some of the facts upon the merits; but such inquiry is for the purpose of determining whether grounds for the attachment exist, and not whether there is or is not a cause of action. (Wyo.) *Collins v. Stanley*, 1022.

8. ATTACHMENT—Motion to Dissolve—Denial—Appeal.—The denial of a motion to dissolve an attachment on a traverse of the alleged ground therefor will not be disturbed on appeal, when the trial judge had evidence before him to support the ruling. (Wyo.) *Collins v. Stanley*, 1022.

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- See Intervention.

ATTORNEY AND CLIENT.

1. **ATTORNEYS—Right of Client to Settle Litigation.**—A clause in a contract of retainer between an attorney and client prohibiting the latter from making a settlement of the litigation without the consent of the former is void as against public policy. (N. Y.) *Matter of Snyder*, 533.
2. **ATTORNEYS—Compensation upon Settlement of Litigation.**—A clause in a contract of retainer fixing the attorney's fee at a percentage of the money recovered, so closely connected with an-

other clause void because forbidding the client to settle the litigation as to be part of a single plan, falls when the client repudiates the latter clause, and the attorney may then recover for his services according to the real value, independently of the original provision for compensation. (N. Y.) *Matter of Snyder*, 533.

See Witnesses, 8.

BAGGAGE.

See Carriers, 12, 13.

BANKS AND BANKING.

1. BANKING—Right of Indorser to Recover Money Paid on a Forged Indorsement, When Lost by His Laches.—If a bank, on the presentation to it of a check drawn by one of its depositors having indorsed thereon the name of the payee, credits such check to the bank from which it had been received, and charges the amount to the drawer, and the latter, on being informed of the forged indorsement, fails for six weeks to notify the bank, and in the meantime the bank so receiving credit becomes insolvent, so that no recovery can be enforced against it, the bank on which the check was originally drawn is not liable to repay the amount thereof to its depositor, because his laches deprived it of the means of obtaining indemnity from the bank so credited with the amount of the check. (Pa.) *Cunningham v. First National Bank*, 657.

2. BANKING.—To Sustain an Action Against the Drawer of a Check, it must ordinarily be presented to the bank and payment thereof refused. (Minn.) *First National Bank v. McConnell*, 336.

3. BANKING, CHECKS, When do not Constitute an Equitable Assignment of the Drawer's Funds in the Bank so as to Prevent an Action Against Him for the Amount of His Check.—If a depositor draws checks on a bank, and they are lost before presentation, they do not amount to an assignment of his fund on deposit, so as to preclude an action against him by the payees or holders of the checks on their giving a bond to indemnify him from loss should the checks turn up in the hands of bona fide holders. (Minn.) *First National Bank v. McConnell*, 336.

4. BANKING.—The Drawer of a Check is Liable thereon, there being no agreement that it should be accepted as an unconditional payment. (Minn.) *First National Bank v. McConnell*, 336.

See Lost Instruments.

BASTARDS.

1. LEGITIMATION OF CHILDREN—Conflict of Laws.—When an illegitimate child has by the subsequent marriage of his parents become legitimate by virtue of the laws of the state or country where the marriage took place, he is thereafter legitimate everywhere; but to have this effect the marriage must be lawful, not polygamous, incestuous nor prohibited by law. (N. Y.) *Olmsted v. Olmsted*, 585.

2. LEGITIMATION OF CHILDREN—Conflict of Laws.—If a resident of New York deserts his wife and goes to another state where he obtains a divorce which is void under the law of New York, and where he thereafter marries the mother of his illegitimate child, the child will not be recognized as legitimate by the courts of New York, although in the state of the marriage the law provides

that illegitimate children are legitimated by the subsequent marriage of their parents. (N. Y.) *Olmsted v. Olmsted*, 585.

BIOYCLES.

See Municipal Corporations, 15, 16.

BIGAMY.

1. **BIGAMY—Presumption as to Validity of Marriage.**—In a prosecution for bigamy the law does not presume that the former marriage was valid, but it devolves upon the state to prove the validity of such marriage beyond a reasonable doubt. (Tex. Cr.) *McCombs v. State*, 855.

2. **BIGAMY.—If a Marriage is a Nullity**, a subsequent marriage does not constitute the crime of bigamy. (Tex. Cr.) *McCombs v. State*, 855.

3. **BIGAMY—Validity of Marriage.**—It is essential in the crime of bigamy that the first marriage be legal and the second illegal; it is not enough to support a conviction to show that the first marriage is illegal and the second legal. (Tex. Cr.) *McCombs v. State*, 855.

BILL OF EXCEPTIONS.

See Appeal and Error.

BILLS AND NOTES.

1. **PROMISSORY NOTE—Defense of Breach of Parol Promise Made to the Maker.**—If one is induced to make a promissory note by a parol promise to him that before it falls due it shall be paid out of the proceeds of another transaction, the breach of such promise amounts to a want of consideration and is a defense to an action on the note. Though the note was not procured by fraud nor by any pre-existing intention not to perform the promise, yet if the payee attempts to exact payment without making good his promise, he is thereby guilty of such fraud as precludes his recovery. (Pa.) *Gandy v. Weckerly*, 691.

2. **PLEADING WANT OF CONSIDERATION.**—If, in an action upon promissory notes, the defendant alleges that he received no consideration for such notes, this is a sufficient plea of want of consideration for their execution. (Minn.) *Anderson v. Nystrom*, 320.

3. **CONTRACT, Consideration for, When Insufficient.**—If a creditor holds several promissory notes against a decedent, all of which were barred prior to his death, and his heirs execute a new note for the amount of the old notes on the promise of the creditor not to make any trouble for the estate of the decedent, this promise is not a sufficient consideration for a new note. (Minn.) *Anderson v. Nystrom*, 320.

4. **TENANTS in Common of Commercial Paper, Implied Authority of One to Indorse for the Other.**—Where negotiable paper is payable to two or more persons, there is no presumption that one indorses and transfers it for the others, and if the title is to be transferred, it must be by the indorsement of all. (Mich.) *Kaufman v. State Savings Bank*, 259.

See Injunctions, 2; Husband and Wife, 3; Garnishment; Limitation of Actions; Lost Instruments.

BLASTING.

See Municipal Corporations, 3.

Note.

Blasting, injunction against, 585.

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on railroad right of way, liability for, 583.

sickness, liability for, 585.

BOARD OF HEALTH.

See Health.

BRIBERY.

BRIBERY, Limitation of Prosecution for.—Though a statute makes the asking, receiving, or agreeing to receive, a bribe criminal, the crime may consist of either of these acts, and a conviction may be sustained under an indictment found within the statutory time after the receiving of the bribe, notwithstanding it was asked for, and agreed to be received, before that time. (N. Y.) *People v. Gibson*, 597.

BULL FIGHTS.

See Nuisances, 3-8.

CARRIERS.*Of Goods.*

1. **CARRIERS—Right to Recover—Parties.**—If a contract of shipment is made directly with the consignor, he has the right to sue in his own name for a breach of the contract, without reference to his ownership of, or property in, the goods. (Tex.) *Southern Kansas Ry. Co. v. Morris*, 834.

2. **CARRIERS—Contract of Transportation—Joint Owners.**—A consignor who contracts with a carrier in his own name for the transportation of property may maintain an action for the breach of the contract, although others were joint owners with him in the property. (Tex.) *Southern Kansas Ry. Co. v. Morris*, 834.

Of Passengers.

See Railroads, 5.

3. **RAILROADS—Persons on Track Between Train and Depot.**—If a railroad company stops a passenger train on a sidetrack so that there are other tracks between the train and the depot platform, the entire space between the depot and the train must, with regard to people having business at the train, be regarded the same as if it constituted the platform. They, therefore, have a right to assume that they will be protected by the company, and they need not be on their guard against approaching trains. The ordinary rule of "look and listen" has no application to such a situation. (Kan.) *Atchison etc. Ry. Co. v. McElroy*, 134.

4. **RAILROADS—Licensee on Track.**—A Boy sent by his father to deliver a package to a passenger on an expected train is rightfully on the premises of the railway company, and entitled to at least reasonable care while returning from the train over tracks inter-

vening between the train and the station platform. (Kan.) *Atchison etc. Ry. Co. v. McElroy*, 134.

5. RAILROADS—Running Trains Between Depot and Passenger Train.—Where a railroad company stops a passenger train on a side-track, leaving other tracks between it and the depot platform, it is negligence to run another train on these intervening tracks at a high rate of speed, without warning, while business is being transacted at the standing train, and the company is liable to one rightfully there who is injured by the moving train. (Kan.) *Atchison etc. Ry. Co. v. McElroy*, 134.

6. RAILWAYS, Negligence of in Running Train Between Station and Another Train from Which Passengers are Alighting.—If a passenger train is stopped at a station, it is negligence on the part of the railway company to allow another train to run between the passenger train and the station at which the passengers are being discharged. (Pa.) *Besecker v. Delaware etc. Ry. Co.*, 714.

7. RAILWAYS, Duty to Passengers, How Long Continues.—The duty of a carrier of passengers is not fully discharged until it has set the passenger down in a place of safety at his destination. It must not only carry him to his destination in safety, but must provide a safe place to discharge him when he arrives. (Pa.) *Besecker v. Delaware etc. Ry. Co.*, 714.

8. RAILWAYS, Passenger's Right to Assume that a Train will not be Run Between Him and His Station.—Where passengers are alighting from a train and proceeding across the tracks at the station, they have a right to assume that their safety will not be endangered by permitting a train to pass on intervening tracks. (Pa.) *Besecker v. Delaware etc. Ry. Co.*, 714.

9. RAILWAYS, Passenger Crossing Tracks of at Station—Duty to Stop, Look and Listen.—It is not always the duty of a passenger before attempting to cross tracks which are necessary to be crossed after alighting from a train to reach their station to observe the rule compelling a person crossing tracks of a railway on a highway to stop, look and listen. The failure to look for a train when thus crossing a track is not necessarily negligent. (Pa.) *Besecker v. Delaware etc. Ry. Co.*, 714.

10. RAILWAYS—Alighting from a Train at a Station While It is Still in Motion.—When a passenger train has reached a station where it is to stop and where the passenger intends to alight, the door of the car having been opened by the brakeman to permit passengers to alight, it is not contributory negligence for a passenger to alight before the train ceases to be in motion, and hence such alighting does not preclude his recovery if injured by another train running between that from which he alighted at a station on a track necessary to be crossed by him to reach such station. (Pa.) *Besecker v. Delaware etc. Ry. Co.*, 714.

11. RAILWAYS, Rules of, Passengers' Right to Assume that They will be Observed.—A passenger about to alight from a train has a right to assume, and is not negligent in assuming, that the company will observe its own rule and that a train shall not be run between the station and the train from which passengers are alighting. (Pa.) *Besecker v. Delaware etc. Ry. Co.*, 714.

Baggage.

12. CARRIER, Liability of, is Dependent on the Delivery of the Property.—Delivery is essential to create liability of a party sought to be held as a common carrier, but such delivery may be constructive as well as actual. (Tenn.) *Southern Ry. Co. v. Bickley*, 754.

13. CARRIER, Delivery of Check to, When does not Amount to a Delivery of Baggage.—The delivery of a check for baggage to the agent of a railway corporation and the promise of the latter that the baggage would be in the train of a railroad represented by such agent does not amount to a constructive delivery of the baggage to it, nor render it liable for the destruction of the property by fire while still in the possession of the carrier which issued the check. Nor is it material that the two carriers had a common station and were represented by the same agent. (Tenn.) *Southern Ry. Co. v. Bickley*, 754.

Street Railways.

14. STREET RAILWAYS, Rules of and the Right to Make.—A street railway company has the right to make reasonable rules to facilitate its business and protect it from imposition and fraud. If such rules do not impose unreasonable and unnecessary burdens and restrictions upon the public and are consistent with the rights of the public to transportation, they will be enforced by the courts. (Minn.) *Morrill v. Minneapolis St. Ry. Co.*, 341.

15. STREET RAILWAYS—Transfer Checks.—A rule requiring transfer checks is reasonable, but it is the duty of the carrier to furnish the passenger who has paid his fare with a correct, valid transfer check. (Minn.) *Morrill v. Minneapolis St. Ry. Co.*, 341.

16. STREET RAILWAYS.—A Transfer Check is not Exclusive Evidence of the right to ride on a street-car, and the law does not impose on the passenger the absolute duty to examine the check to see that it is correct. (Minn.) *Morrill v. Minneapolis St. Ry. Co.*, 341.

17. STREET RAILWAYS.—The Contract Between a Carrier and Passenger is complete when the passenger pays his fare, and when he reaches the place where he desires and is entitled to be transferred to another car it is the duty of the carrier to furnish him with proper evidence for presentation to the next car of the right to ride thereon. (Minn.) *Morrill v. Minneapolis St. Ry. Co.*, 341.

18. STREET RAILWAYS—Transfer Checks, Duty of Seeing to Correctness of cannot be Imposed on the Passenger.—Where the ordinance of a municipality in which a street railway is operated requires it to issue transfers to passengers, this duty cannot be shifted by the railway company upon the passenger by any rule or principle which requires him to see that the transfer is properly made out. (Minn.) *Morrill v. Minneapolis St. Ry. Co.*, 341.

19. STREET RAILWAYS.—Nothing Printed on a Transfer Check Which is Contrary to the Provisions of an Ordinance, requiring a street railway company to furnish passengers with transfer checks, cannot have any force or effect. (Minn.) *Morrill v. Minneapolis St. Ry. Co.*, 341.

20. STREET RAILWAYS, Liability of for Ejecting Passenger Because of a Mistake in a Transfer.—A street railway whose conductor issues a transfer check to a passenger which does not entitle him to ride on the line for which he demands a transfer is liable to him in tort if he is ejected from a car to which he asked to be transferred because of a mistake in the transfer check. It is not the duty of the passenger to pay additional fare to avoid such ejectment. (Minn.) *Morrill v. Minneapolis St. Ry. Co.*, 341.

21. STREET RAILWAYS, Right of Passenger to Resist Expulsion Because of a Mistake in Transfer Check.—A passenger has not the right to use force in resisting ejectment from a car because of a mistake in his transfer check. He should yield quietly and not await

the application of actual force. His right of action is then complete. He acts at his peril and cannot recover damages for injuries or humiliation suffered by reason of his resistance to actual force. The damages he is entitled to for his wrongful expulsion are such only as result from being required to leave the car, and cannot be enhanced by his conduct which results in an assault with its resulting injuries and humiliation. (Minn.) *Morrill v. Minneapolis St. Ry. Co.*, 341.

CERTIORARI.

1. **CERTIORARI—Evidence.**—A writ of certiorari brings up only the record proper of the tribunal to which it is addressed and not the evidence, and when the record shows that the tribunal was dealing with a subject within its peculiar province, and that its proceedings were regular, its decision will not be disturbed. (Mo.) *State v. City of St. Louis*, 376.

2. **CERTIORARI may be Maintained Though There is a Right of Appeal**, if, before the question can be determined on appeal, the judgment must become fruitless, as where a public office being involved, the right of the relator thereto will expire before relief can be obtained by an appeal. (Wash.) *State v. Superior Court*, 948.

CHECKS.

See Banks and Banking; Lost Instruments.

CHILLING BIDS.

See Judicial Sales.

CLAIMS.

See Municipal Corporations, 20-26; State.

COMMON LAW.

COMMON LAW—Effect of Adoption of.—If a state adopts the common law by statute, it thereby takes the body of all of the common law, and such becomes the law of the state, except as repealed, changed, or modified by statute. (Mo.) *Perry v. Strawbridge*, 510.

COMMUNITY PROPERTY.

See Husband and Wife.

CONDITIONS.

CONDITION PRECEDENT.—The Omission of an Averment of Performance of a condition precedent, or of an excuse for non-performance, is fatal on demurrer. (N. Y.) *Winter v. City of Niagara Falls*, 540.

CONFLICT OF LAWS.

See Contracts, 4, 5; Husband and Wife, 4, 5; Railroads, 2; Limitation of Actions, 4-6.

CONFUSION OF GOODS.

CONFUSION OF GOODS, Burden of Proof with Respect to by a Claimant Under a Trust Deed.—If a deed of trust to secure indebtedness conveys all of a stock of goods, with which other

goods are afterward commingled without the consent or fault of the trustee, and a levy is subsequently made upon the whole and an action commenced by the trustee to recover the property, the burden is not upon him to pick out the property included in the deed. On the contrary, that burden must be assumed by the levying officer, and on his failing to do so, the trustee may recover the possession. (W. Va.) *Weaver v. Neal*, 972.

CONSTITUTIONAL LAW.

1. **CONSTITUTIONAL LAW—Presumption as to Validity of Statute.**—The constitutionality of an act of the legislature is presumed, and all doubts and uncertainties arising either from the language of the constitution or the act must be resolved in favor of the validity of the act, and the court will only assume to declare it void in case of a clear conflict with the constitution. (Ill.) *People v. McBride*, 82.

2. **CONSTITUTIONAL LAW—Construction of Statutes.**—It is the duty of a court, in construing a statute, to uphold its constitutionality and validity if this can reasonably be done, and if its construction is doubtful, the doubt must be resolved in favor of the law. (Ill.) *People v. McBride*, 82.

3. **CONSTITUTIONAL LAW.**—Courts do not Entertain objections to the constitutionality of a statute unless the objection is made by one whose rights have been in some way affected. (Ill.) *People v. McBride*, 82.

4. **CONSTITUTIONAL LAW—Statute Unconstitutional in Part, When must be Declared Wholly Unconstitutional.**—A statute purporting to create a board of public safety to be appointed by the governor and to have control of the police and fire departments of a municipality, being unconstitutional as to the latter department, the whole act must fall. (Mich.) *Davidson v. Hine*, 267.

5. **CONSTITUTIONAL LAW—Police Power.**—Under a proper exercise of the police power property may be destroyed without compensation to the owner. (Ill.) *City of Chicago v. Bowman Dairy Co.*, 100.

6. **CONSTITUTIONAL LAW—Rules of Evidence.**—The legislature may prescribe that a fact shall be prima facie evidence of a certain other fact, if it has a tendency to prove such other fact. The fact upon which the presumption is to rest must have some fair relation to, or some natural connection with, the fact to be proved, and the existence of the established fact must reasonably tend to raise an inference of the main fact. (Ill.) *People v. McBride*, 82.

7. **CONSTITUTIONAL LAW—Municipal Corporation, Authority of Over Fire Department not Subject to Legislative Control.**—A statute undertaking to create a board of public safety to be appointed by the governor and to give it control of the fire department of a city is unconstitutional, because the authority of the municipality over such department cannot be taken away by the legislature. (Mich.) *Davidson v. Hine*, 267.

See Health; Logs and Logging.

CONTEMPT.

1. **CONTEMPT OF COURT, Proceedings for, When Properly Dismissed on the Ground that the Questions Involved have been Adjudicated.**
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cated.—If a debtor is proceeded against for contempt of court in transferring certain of his property, notwithstanding an injunction against his transferring his property not exempt, such proceedings for contempt are properly dismissed when it is shown that in suits between the debtor and the receiver prosecuted for the benefit of creditors to set aside the same transfer, it was adjudged that the receiver had no interest in such property, and that it had not been transferred in fraud of creditors. (Minn.) *Dohs v. Holbert*, 329.

2. CONTEMPT, Judgment for, Conclusiveness of.—In an action to recover damages for the false imprisonment of the plaintiff, a judgment showing that the imprisonment was authorized as a punishment for contempt of court is conclusive against the plaintiff, though the court discharged him on the payment of costs. (Pa.) *Hoskins v. Somerset Coal Co.*, 667.

3. CONTEMPT—Sufficiency of the Judgment for Contempt.—If the adjudication in the body of the order of court for contempt in violating an injunction is not sufficient, the moving papers, as indicating the particular character of the violation, may be looked to to cure the defect. (Tex. Cr.) *Ex parte Cash*, 865.

4. CONTEMPT by Ticket-scalpers—Invited Violation of Injunction.—A railroad company does not invite a violation of an injunction which it has procured against ticket-scalping when it sends out an agent to purchase an inhibited ticket for the purpose of ascertaining whether the injunction is being violated. Hence a ticket-scalper who sells a ticket to such agent may be adjudged guilty of contempt. (Tex. Cr.) *Ex parte Cash*, 865.

5. CONTEMPT—Violation of Injunction.—The fact that an injunction may have been improvidently granted does not relieve one from responsibility for contempt in violating it. (Tex. Cr.) *Ex parte Cash*, 865.

CONTINUANCE.

CONTINUANCE—When Properly Denied.—A motion for a continuance in a homicide case, based on the absence of a witness, is properly denied when his testimony will not have any material effect on the verdict, and due diligence in procuring his attendance is not shown. (Tex. Cr.) *Early v. State*, 889.

CONTRACTS.

Capacity of Parties.

1. CONTRACTS, Capacity to Make.—A Deaf Mute is not incapable of entering into contracts if shown to have sufficient mental capacity. (Mich.) *Alexier v. Matzke*, 255.

2. CONTRACTS, Capacity to Make When Established on the Part of a Deaf Mute.—If the evidence is undisputed and conclusive that a deaf mute understood the contract when he signed it, the jury should be instructed that the contract is binding on him, when it was entered into understandingly by him, with the consent of his father, and was to serve his brother in law for the remainder of their lives in consideration of support and care. (Mich.) *Alexier v. Matzke*, 255.

Consideration.

3. CONTRACTS, Consideration Consisting of Promise to Refrain from the Doing of an Act.—The mere promise to refrain from the doing of an act does not constitute a sufficient consideration to support a contract, unless some advantage accrues to the promisee or

some loss or disadvantage is sustained by the promisor. (Minn.) *Anderson v. Nystrom*, 320.

Conflict of Laws.

4. CONFLICT OF LAWS—County—Foreign Contracts.—The rule by which courts of one country test the validity of contracts made and to be performed in other countries in accordance with the laws thereof is one of comity only, and cannot be applied in opposition to the positive law of the former, and while the legislature might set aside the rule of comity by which contracts elsewhere made are enforced in conformity with the law governing their making and performance, it could not render such contracts void, and the purpose to do so should not be imputed. (Tex.) *Chicago etc. Ry. Co. v. Thompson*, 798.

5. CONFLICT OF LAWS—Place of Performance.—The right of a person to recover for an injury received in one state under a contract of employment made and performed there is governed as to his failure to give notice of his claim by the laws of that state, although the contract was to give notice at the general office of the company in another state. (Tex.) *Chicago etc. Ry. Co. v. Thompson*, 798.

Restraint of Trade.

6. CONTRACTS IN RESTRAINT OF TRADE.—Contracts in general restraint of trade are void, but trade to a certain extent may be regulated and by consequence to some extent restrained, within a prescribed territory not unreasonable in extent. (Ala.) *Harris v. Theus*, 17.

7. CONTRACTS IN RESTRAINT OF TRADE—Legality.—A contract by which one sells to another pine lease land and agrees not to engage in the turpentine business within ten miles of a certain town so long as the purchaser is engaged in business there, though in partial restraint of trade, is valid. (Ala.) *Harris v. Theus*, 17.

8. CONTRACTS IN RESTRAINT OF TRADE—Limit as to Time. In respect to the time stipulated, a contract in partial restraint of trade is not rendered invalid by a failure to specify any limit of time for its duration. (Ala.) *Harris v. Theus*, 17.

9. CONTRACTS IN RESTRAINT OF TRADE—Limit as to Place. A contract that one will not engage in the turpentine business within ten miles of a certain town so long as a certain other person operates a still "at" that town, will prevent the former from engaging in that business within such limits, although the latter's still is not within the corporate limits of the town. (Ala.) *Harris v. Theus*, 17.

10. CONTRACTS IN RESTRAINT OF TRADE—Consideration.—A sale of a business is a sufficient consideration for a contract on the part of the seller not to engage in that business within ten miles of a certain town so long as the purchaser remained in business there. (Ala.) *Harris v. Theus*, 17.

11. CONTRACTS IN RESTRAINT OF TRADE—Breach Stipulation for Damages—Injunction.—The fact that a contract in partial restraint of trade stipulates for a fixed sum as liquidated damages for a breach thereof does not oust the jurisdiction of a court of chancery to enjoin such breach. (Ala.) *Harris v. Theus*, 17.

12. CONTRACTS IN RESTRAINT OF TRADE—Injunction to Prevent Breach.—Jurisdiction of equity is generally exercised, in respect to contracts in partial restraint of trade, for the purpose of indirectly compelling their specific performance by means of an injunction preventing their violation, and it is not indispensable that

the covenantee should wait until the covenantor commits a breach of the contract before invoking the aid of the chancery court. (Ala.) *Harris v. Theus*, 17.

13. CONTRACTS IN RESTRAINT OF TRADE—Breach—Injunction—Parties.—If a petition for an injunction to prevent a breach of agreement by the defendant not to engage in a certain business in a certain town, for a certain time, alleges that the defendant and his wife design to evade such agreement by establishing the business in the name of the wife, she is a proper party defendant to the proceedings. (Ala.) *Harris v. Theus*, 17.

See Damages, 5; Insane Persons; Judicial Sales.

CONVERSION.

See Trover and Conversion.

CORPORATIONS.

Authority of Executive Committee.

1. CORPORATIONS—Authority of Executive Committee.—The executive committee of the board of directors of a manufacturing corporation, authorized by the by-laws to exercise the powers of the board when it is not in session, has no authority, a few hours before a meeting of the board, which has been called for that day, to execute a contract appointing a sole selling agent of the output of the corporation for a term of years. The calling of the meeting suspended the power of the committee to act in governmental matters; and the directors at such meeting having repudiated the contract, and the persons entering into it being chargeable with notice of the want of authority in the committee, no action for a breach of the contract can be maintained. (N. Y.) *Commercial Wood etc. Co. v. Northampton Cement Co.*, 529.

Inspection of Books.

2. CORPORATIONS—Right to Inspect Books.—If a by-law of a corporation gives a stockholder an unconditional right to inspect its books, he is entitled to enforce such right without alleging or proving fraud or mismanagement, or the purpose for which inspection is sought. (Wyo.) *Wyoming Coal Min. Co. v. State*, 1014.

3. CORPORATIONS—Inspection of Books—Mandamus.—In a statute defining mandamus as a writ issued to an inferior tribunal, corporation, board or person commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station, the word "corporation" is a generic term, including public, quasi-public and private corporations. Therefore, mandamus lies to compel an officer of a private corporation to permit an inspection of its books by a stockholder, when the right of inspection, given him by by-law of the corporation, is denied, and in such case the remedy by injunction is inadequate. (Wyo.) *Wyoming Coal Min. Co. v. State*, 1014.

License Tax Against Foreign Companies.

4. FOREIGN CORPORATIONS—Failure to Pay License Tax as Defense to Action.—The neglect of a foreign corporation to pay its license fee is a matter of defense which must be averred in the answer. (N. Y.) *Halsey v. Jewett Dramatic Co.*, 546.

5. FOREIGN CORPORATION—Failure to Pay License Tax as Defense.—Where the omission of a foreign corporation to pay its license tax under the New York statute is relied upon as a defense to an action brought by it, a failure to allege in the answer that the tax has been assessed and has remained thirty days unpaid, renders the defense insufficient and the answer demurrable. (N. Y.) *Halsey v. Jewett Dramatic Co.*, 546.

6. FOREIGN CORPORATION—Failure to Pay License—Assignee. The defense to an action by a foreign corporation that it has not paid its license tax is available against its assignee, except as to negotiable paper taken in good faith before maturity. (N. Y.) *Halsey v. Jewett Dramatic Co.*, 546.

COTENANCY.

See Tenancy in Common.

COURTS.

Jurisdiction.

1. JURISDICTION—Amount in Controversy—Accrual of Interest.—Although the amount of damages and interest asked in a complaint is increased after suit is instituted by the accrual of interest to a sum beyond the jurisdiction of the court, this does not deprive the court of power to render judgment. (Tex.) *Fort Worth etc. Ry. Co. v. Underwood*, 806.

2. COURTS—Conflict of Jurisdiction.—Whenever a court of competent authority takes jurisdiction of a case, that fact excludes the jurisdiction of all other courts over the same case, as well as all the incidents thereto, excepting only such courts as are given appellate and supervising control over them. (Mo.) *State v. Reynolds*, 468.

Stare Decisis.

3. STARE DECISIS—Constitutional Questions.—In matters involving the interpretation of the constitution it is usual and proper to give less force to the doctrine of stare decisis than in other cases. (Kan.) *Weaver v. First Nat. Bank*, 155.

4. STARE DECISIS—Homestead Questions.—While substantial justice may often be better promoted by adhering to an erroneous decision than by overthrowing a rule once established, still in so important a matter as the enforcement of homestead rights guaranteed by the constitution, courts feel an obligation to re-examine a difficult and doubtful question in the aspect of any new light that may be offered. (Kan.) *Weaver v. First Nat. Bank*, 155.

CRIMINAL LAW.

Former Jeopardy.

1. FORMER JEOPARDY.—Where an Indictment is Quashed at the Instance of the Accused after the jury is impaneled, he is estopped, when subsequently indicted, to assert that the former indictment was valid and placed him in jeopardy. (Tex. Cr.) *Carroll v. State*, 851.

2. AUTREFOIS ACQUIT, Plea of as a Defense to a Charge not Complete or Provable When the Former Conviction was had.—On the trial of an indictment for murder, the defense of a prior conviction for assault and battery with intent to kill does not support the plea

of former conviction, if at the time of such conviction the person assaulted had not died. (Pa.) Commonwealth v. Ramunno, 653.

3. **CRIMINAL LAW—Former Acquittal.**—The question of former acquittal cannot be raised by a motion in arrest of judgment. (Ill.) People v. McGinnis, 73.

4. **CRIMINAL LAW—Former Acquittal—Entry of Nolle Prosequi.**—If an indictment contains several counts for murder and one for manslaughter, and the prosecution enters a nolle prosequi as to the manslaughter count, but the jury find the accused guilty of manslaughter under the murder counts, he cannot, on motion in arrest of judgment, set up the defense that the nolle prosequi was equivalent to a verdict of not guilty of manslaughter, and amounted to a former acquittal on that charge. (Ill.) People v. McGinnis, 73.

Evidence.

5. **CRIMINAL LAW—Evidence of Other Acts or Crimes.**—In an action for a libel contained in an anonymous letter, evidence that the defendant had admitted the writing of other anonymous letters and had stated that she was something of a white cap is incompetent. Such evidence is not admissible as showing the intent with which the libelous letter was written, when intent is apparent on its face. (Tenn.) Price v. Clapp, 730.

6. **CRIMINAL LAW.—Prima Facie Evidence is Merely** that upon which the jury may find a verdict unless rebutted by other evidence. It is not conclusive, but such as may be overcome by evidence to the contrary. It is to be weighed together with the other evidence, and in connection with the reasonable doubt and presumption of innocence which obtain in all criminal trials. (Tex. Cr.) McCombs v. State, 855.

7. **CRIMINAL TRIAL—Evidence of Former Crime.**—In a prosecution for robbery the state may prove by the accused on cross-examination that he had been convicted of murdering his wife. (Tex. Cr.) Williams v. State, 884.

8. **CRIMINAL TRIAL—Declarations of Deceased.**—It is proper in a homicide case to reject evidence for the defense of a statement made by deceased of what he would have done in a former altercation if he had not been interfered with. (Tex. Cr.) Early v. State, 889.

9. **CRIMINAL TRIAL—Evidence of Collateral Fact.**—In a homicide case it is permissible to show the conduct and movements of the accused during the entire night on which the crime was committed. (Tex. Cr.) Early v. State, 889.

Failure of Accused to Testify.

10. **CRIMINAL LAW—Failure of Accused to Testify.**—Where the jury, after retirement in a larceny case, discuss the failure of the defendant to testify, their verdict must be set aside. (Tex. Cr.) Carroll v. State, 851.

Trial.

11. **CRIMINAL LAW—Jury as Judge of the Law.**—An instruction that while the jury are judges of the law as well as the facts in criminal cases, it is the court's duty, if requested, to instruct them what the law is, but that they are not absolutely bound by such instruction; and that if they could say on their oaths that they knew the law better than the court, they had a right to do so, but before assuming so solemn a responsibility they should be sure that they were not acting from caprice, that they were not controlled by their will or wishes, but from a deep conviction that the court

was wrong, and that they were right, and that before saying this it was their duty to reflect whether they were better qualified to judge of the law than the court, and that if they were prepared to say that the court was wrong, the statute has given them that right, is properly given. (Ill.) *People v. Campbell*, 107.

12. CRIMINAL TRIAL.—No Argument Should be Made and no Facts should be brought forward to determine the guilt or innocence of one on trial for crime that are not testified to and not produced as evidence. (Tex. Cr.) *King v. State*, 881.

CUSTOM.

CUSTOM—Evidence of to Vary Contract in Case of Strike.—One who makes a contract, clear and unequivocal in its terms, cannot, in case he is prevented from fulfilling it because of a strike, plead a custom to the effect that such contracts are made subject to strikes at the mines. (Ky.) *City of Covington v. Kanawha Coal etc. Co.*, 219.

DAMAGES.

For Personal Injuries.

1. DAMAGES—When Excessive for Personal Injuries.—A verdict for ten thousand five hundred dollars for personal injuries is excessive, where the evidence is uncertain as to the extent of the plaintiff's injuries or as to what his condition will permanently be. (Ky.) *Illinois Cent. Ry. Co. v. Houchins*, 205.

2. DAMAGES—Personal Injuries—Life Expectancy.—The probable expectancy of his life is admissible on the issue of damages in an action by a person for personal injuries which impair his capacity to earn money. (Ky.) *Illinois Cent. Ry. Co. v. Houchins*, 205.

3. DAMAGES—Personal Injury—Aggravated Ailments.—In an action to recover for personal injury, a recovery may be had for the aggravation of existing ailments. (Mo.) *Smart v. Kansas City*, 415.

4. DAMAGES—Second Breaking of a Leg After an Accident.—Where, as the result of an accident, the plaintiff's leg was broken, and some weeks afterward, while walking on crutches, he slipped and fell, breaking his leg again in the same place as before, evidence of this second breaking is admissible in an action to recover damages on the ground that the accident was due to defendant's negligence. It is for the jury to say whether the second breaking was a direct result of the first. (Minn.) *Hyvonen v. Hector Iron Co.*, 332.

For Fraudulent Representation.

5. CONTRACTS—Fraudulent Representations—Measure of Damages.—On an exchange of property, the measure of damages for fraudulent representations inducing the contract is the difference between the value of the property received and that given in exchange. (Tex.) *George v. Hesse*, 772.

Exemplary Damages.

6. PUNITIVE DAMAGES.—When an Instruction is given as to punitive damages, the court should clearly tell the jury that the giving of such damages is a matter of discretion. (Ky.) *Illinois Cent. Ry. Co. v. Houchins*, 205.

Note.

Damage for Misrepresentation in the Sale of Real Property, basic principles controlling, 776.

cases holding it to be the difference between the actual value of the property and what its value would be if it were as represented, 783-786.

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where the misrepresentation relates to location or identity, 792, 793.

where the misrepresentation relates to quantity or boundaries, 790-792.

where the misrepresentation relates to title, 786-788.

whether is the difference between the actual value of the land and the amount paid for it, 778-783.

DANGEROUS PREMISES.

See Negligence, 8-12.

DEAF MUTE.

See Contracts, 1-3.

DEATH.

1. KILLING OF A HUMAN BEING, Liability for.—At the common law no liability existed for wrongfully causing the death of a human being, and none exists at present unless created by statute. (Minn.) *Stewart v. Great Northern Ry. Co.*, 318.

2. KILLING OF A HUMAN BEING—Who may Sue for.—Until the legislature has declared who shall bring an action for the killing of a human being and who shall be the beneficiary thereof, the common law has not been changed so as to enable the action to be maintained. (Minn.) *Stewart v. Great Northern Ry. Co.*, 318.

3. SUIT UNDER STATUTE Creating Liability for Killing a Human Being.—In an action for the killing of a human being in another state the plaintiff must plead the statute of that state creating the right of action and also that part of the statute showing he may maintain an action thereunder. It will not be presumed that the statute of the state where the cause of action arose is the same as that where the action was brought. (Minn.) *Stewart v. Great Northern Ry. Co.*, 318.

4. DAMAGES, Measure of for the Loss of a Son.—In an action by parents for the death of a minor son through defendant's negligence, where the father was a sales agent of a company within a certain territory and as such entitled to specified commissions, whether the sales were actually made by him or not, and on account of his illness he placed his son in the same territory, and while employed therein the son was killed, the measure of damages is not the value of the business lost, but the value of the son's assistance in carrying it on. (Pa.) *Holmes v. Pennsylvania R. R. Co.*, 685.

5. DEATH.—A Husband may Recover for Loss of Time and for Funeral Expenses directly resulting from negligent acts causing the death of his wife, notwithstanding there is no statute purporting to give him that right. (Wash.) *Philby v. Northern Pac. Ry. Co.*, 926.

See Abatement and Revivor.

DEDICATION.

1. DEDICATION to Public Use by Plat.—It is not necessary that the word "park" or "public square" be stamped on a plat of lots in order to operate as a grant to the public; if the intention to dedicate it to public use can be clearly discerned, whether from words to that effect or from symbols, or from the position and relation of the open spaces on the map or plat, it is sufficient. (Pa.) *Morrow v. Highland Grove Traction Co.*, 677.

2. DEDICATION of Property as a Public Road, Boundary of.—If lots are sold according to a plat on which a square appears designated as "Alliquippa Grove," with serpentine paths through it and with the announcement to purchasers that a grove had been set out as a public park, the lands so designated become a public park, and purchasers of lots according to such plan may maintain suit to enjoin the use of the grove for any other purpose. (Pa.) *Morrow v. Highland Grove Traction Co.*, 677.

3. PUBLIC GROVE or Square, Laches in Claiming that Property is.—If a parcel of land is dedicated as a public grove or square, the fact that owners of adjacent lots, who have a right to insist on the dedication, do not object to the use of the property for years by the German Turnverein, does not show such laches as precludes such lot owners from maintaining a suit to enjoin the use of the grove for private purposes. (Pa.) *Morrow v. Highland Grove Traction Co.*, 677.

4. PUBLIC GROVE or Square, Who may Maintain Suit to Enjoin Use of for Private Purposes.—The owners of lots purchased in reliance upon a plat designating a parcel of land as a public grove or square and their successors in interest are proper persons to maintain a suit to enjoin the use of the property for private purposes. (Pa.) *Morrow v. Highland Grove Traction Co.*, 677.

DEED OF TRUST.

See Trusts, 8-10.

DEEDS.***By Agents.***

1. DEED BY AGENT.—If one holding a power of attorney to sell the real estate of his principal executes a deed purporting to be made by him as agent for such principal and the latter's wife, and signed by such agent as attorney for his principal, the deed is that of the latter, and not that of the agent or attorney. (Mo.) *Hubbard v. Swofford Bros. etc. Co.*, 488.

Seal and Acknowledgment.

2. DEED BY AGENT—Seal.—The seal attached to a deed executed by an agent under a power of attorney is the seal of his principal, though the name of the latter is not written, and only the name of the agent as attorney for the grantor appears. (Mo.) *Hubbard v. Swofford Bros. etc. Co.*, 488.

3. DEEDS—Seal—Presumption.—If no seal appears in the record of a deed, but the closing clause thereof declares that it is under the seal of the grantor as he is therein described, and the acknowledgment is that it was duly executed, it must be presumed that the deed was sealed. (Mo.) *Hubbard v. Swofford Bros. etc. Co.*, 488.

4. DEEDS—Acknowledgment.—If a certified copy of a deed shows that the acknowledgment thereto was taken before the mayor of "Kansas, in the county aforesaid," the court will take judicial no-

tice that the city of Kansas was meant. (Mo.) *Hubbard v. Swofford Bros. etc. Co.*, 488.

5. **DEEDS—Acknowledgment—Official Seal—Omission in Copy.**—If a deed recites that it was given under the official seal of the officer taking the acknowledgment, it will be presumed that the omission of the (L. S.) in the certified copy was the mistake or oversight of the recorder making the copy. (Mo.) *Hubbard v. Swofford Bros. etc. Co.*, 488.

6. **DEEDS, ACKNOWLEDGMENT OF.**—If, from the language used by the officer in making his certificate of authentication, it appears that the law was substantially complied with, the certificate must be sustained. (Tex.) *Hughes v. Wright*, 827.

7. **DEEDS—Acknowledgment—Omission of "Each."**—If two persons separately execute a deed, and each appears before an officer and from the circumstances and the language of the certificate each acknowledged that he executed the deed for the purposes and consideration therein expressed, the language of the certificate must mean that the acknowledgment was by each of them. (Tex.) *Hughes v. Wright*, 827.

Conveyance of Timber.

8. **SALE OF STANDING TIMBER—Time Limit to Remove—Title.**—Under a conveyance of certain standing timber to be cut and removed within two years from the date of the conveyance, the legal title to the timber passes to the grantee, and he may cut and remove it after the time limit has expired, but in so doing he is liable to his grantor in trespass quare clausum for the actual damages to the possession. (Ala.) *C. W. Zimmerman Mfg. Co. v. Daffin*, 58.

9. **CONVEYANCE OF TIMBER.**—A conveyance of a tract of land in fee simple, to wit, all of the timber thereon, is a conveyance of the timber with an interest in the land, with the right to cut it any time without importing into such grant that it must be cut within a reasonable time. (Tex.) *Lodwick Lumber Co. v. Taylor*, 803.

10. **CONVEYANCE OF TIMBER—Right to Remove.**—If the owner of land conveys the timber thereon in fee simple, and the vendee, long afterward, enters and cuts the timber, he is not liable to one who has in the meantime acquired the title to the soil. (Tex.) *Lodwick Lumber Co. v. Taylor*, 803.

See Mortgages; Insane Persons.

Note.

Definition of intervention, 280.

DESCENT AND DISTRIBUTION.

1. **INHERITANCE—Murder of Intestate.**—A Husband Who Murders His Wife cannot inherit any part of her estate in which he has a mere expectancy. (Mo.) *Perry v. Strawbridge*, 510.

2. **INHERITANCE THROUGH MURDER.**—A mere prospective legal heir or devisee in a will cannot make that certain which is uncertain by the murder of the person from whom he or she expects to inherit, and by such act he or she cuts off all right to the inheritance. (Mo.) *Perry v. Strawbridge*, 510.

3. **INHERITANCE—Husband—Curtesy.**—A husband is entitled to inherit from his childless wife, although he has no curtesy in her estate. (Mo.) *Perry v. Strawbridge*, 510.

4. INHERITANCE THROUGH CRIME.—No one can acquire property through his own crime, nor can he nor those claiming under him take property by inheritance or will from an ancestor or benefactor whom he has murdered. (Mo.) *Perry v. Strawbridge*, 510.

5. INHERITANCE—Murder of Wife.—The common-law right of a man to succeed to the property of his wife upon her death does not operate in favor of a man who murders his wife, nor in favor of those claiming under him. (Mo.) *Perry v. Strawbridge*, 510.

6. INHERITANCE THROUGH CRIME.—The rule that a common-law right of succession to property does not operate in favor of one who willfully takes the life of his ancestor or intestate, applies against any person claiming through or under the slayer, and does not contravene a constitutional provision that a conviction of crime shall not work a forfeiture of the estate. (Mo.) *Perry v. Strawbridge*, 510.

7. INHERITANCE THROUGH CRIME—Husband and Wife.—The word "widower," in a statute providing that "when a wife shall die without any child or other descendants in being capable of inheriting, her widower shall be entitled to one-half of the real and personal estate belonging to the wife at the time of her death," means one who has been reduced to the state of a widower by the ordinary and usual vicissitudes of life, and not one who by his criminal and murderous act has himself created that condition, and by such act he deprives himself of the right to acquire any estate in the property of his wife to which his heirs could succeed upon his death. (Mo.) *Perry v. Strawbridge*, 510.

8. INHERITANCE OF ESTATE THROUGH MURDER—Forfeiture of Estate.—The rule that a man who murders his wife, or those claiming under him, cannot inherit any part of her estate is not in violation of a constitutional provision that no conviction can work corruption of blood or forfeiture of estate. (Mo.) *Perry v. Strawbridge*, 510.

DEVISES.

See Wills.

DOGS.

See Animals.

DOMICILE.

1. DOMICILE OF CHILD of Divorced Parents.—If parents are divorced in one state without disposing of the right to the custody of their minor child, and the father and mother removed to different states, the domicile of the child follows that of the father and he is not emancipated from the father's control by an agreement to return him to his mother at her request. (Tex.) *Lanning v. Gregory*, 809.

2. CHILDREN—Domicile.—The judgment of a court of one state upon habeas corpus proceedings awarding the custody of a child, which has been brought temporarily within such state to the mother for a number of years is to take the child from the custody of the father and place it in that of the mother, but this only changed the domestic status of the child for such time. (Tex.) *Lanning v. Gregory*, 809.

3. CHILDREN—Minor—Domicile of—Temporary Presence.—If a child is in the lawful custody of its father and has its domicile with

him, the court of another state cannot acquire jurisdiction of the child by reason of its temporary presence in that state to adjudge a change of relation between the father and child. If there is no unlawful restraint of the child, the question of the relative rights of the child belongs to the jurisdiction of the father's domicile. (Tex.) *Lanning v. Gregory*, 809.

EJECTMENT.

1. **EJECTMENT, Splitting Causes of Action in.**—If by the same act of trespass adverse possession is taken of land, but one action can be maintained to recover such possession, and if an action is brought and judgment rendered for part only of the tract, no subsequent action can be maintained for the balance, though it is claimed that the bringing of the action for a part only was due to accident and mistake. (Wash.) *Kline v. Stein*, 940.

2. **EJECTMENT.**—Crops Growing on Land when the successful party in ejectment is put in possession are a part of the realty and belong to him, in the absence of evidence showing any right of severance in favor of the other party. (Kan.) *Harrod v. Burke*, 179.

3. **EJECTMENT.**—When the Sheriff Returns that He has Executed a Writ of possession, and put out a certain person who was not a party to the action, and has put the plaintiff in possession, it is presumed that the officer has performed his duties properly, and that the person removed was in privity with a party to the action and therefore subject to the operation of the writ. (Kan.) *Harrod v. Burke*, 179.

EMBEZZLEMENT.

1. **EMBEZZLEMENT—Definition.**—Embezzlement is the fraudulent and felonious appropriation of another's property by a person to whom it has been intrusted, or into whose hands it has lawfully come. (Mo.) *State v. Casey*, 367.

2. **EMBEZZLEMENT—Accessory.**—If the principal is guilty of embezzlement, an accessory before the fact to such embezzlement who becomes the custodian of the embezzled goods lawfully in the principal's possession and assists him in feloniously appropriating and selling them, is also guilty of embezzlement, and cannot be convicted of larceny. (Mo.) *State v. Casey*, 367.

3. **EMBEZZLEMENT—Persons Standing in the Relation of Partners.**—Where A agrees to furnish B with a team and vehicle, and B is to sell organs which A obtains from an organ company, at what they cost, the two to divide the profits, and to pay the freight and the interest on deferred payments equally, and B to defray the expenses of the team and vehicle, the parties are partners so that B cannot be charged with the embezzlement of the organ or its proceeds. But if B takes the organ at cost and carriage price, and appropriates the same, he cannot be guilty of embezzlement, because he is then a purchaser, nor would he be guilty of embezzling trust funds. (Tex. Cr.) *McCrary v. State*, 903.

4. **EMBEZZLEMENT—Persons Standing in the Relation of Partners.**—Where A and B in selling organs agree that when an organ is placed in the hands of A to sell he is to account to B for the original purchase price of the instrument plus the freight; that when this is paid over, A and B are to share equally in the profits; that B is to furnish A a team and vehicle and pay his board while in town; that B is to be responsible to the organ company for the purchase

price and freight of the organ; and that the instrument is to remain the property of the organ company until sold, A and B are partners, so that when A sells an organ and appropriates the proceeds, B cannot charge him with embezzlement. (Tex. Cr.) *McCrary v. State*, 905.

5. **EMBEZZLEMENT**.—Where One has Authority as an Agent of another to sell an organ on certain terms, and he sells it on those terms and as the property of such other, he cannot be charged with embezzling the organ, although there may be a subsequent embezzlement of the proceeds. (Tex. Cr.) *McCrary v. State*, 905.

EMINENT DOMAIN.

1. **EMINENT DOMAIN**—Damages, to Whom must be Paid.—A constitutional requirement that the compensation for property taken for public use "must be paid to the owner or into court for his use," before the condemning party can take possession, is not met by a conditional deposit of money in court, nor by deposit in court of the damages assessed for the use of the parties other than the owner, nor by paying them into court for the special purpose of having the court determine which of two parties are entitled thereto, leaving out of the determination the owner or one of the owners. (Mo.) *Holmes v. Kansas City*, 495.

2. **PLEADING**.—In a Suit to Enjoin a Corporation from Taking Land for a Public Use it is sufficient to allege the taking or occupying of the land, seeking to exercise the right of eminent domain, without complying with the provisions of the statute. (W. Va.) *Harman v. Caretta Ry. Co.*, 985.

See Husband and Wife, 7-10; Injunction, 3.

EMPLOYER'S LIABILITY.

See Master and Servant.

ENTICING CHILD.

See Parent and Child, 1.

ENTIRETIES.

See Husband and Wife, 7-10.

EQUITY.

EQUITY—Considering Pleadings as Amended.—The presumption of amendments to a bill in equity does not authorize the retention thereof against a motion to dismiss, when to indulge such presumption would permit of amendments by alleging new and independent facts to those stated in bill. (Ala.) *Savage v. Bradley*, 39.

EVIDENCE.

In General.

1. **EVIDENCE**—Maps, When Admissible.—A map identified by a witness by whose testimony it appears to be reasonably accurate is admissible in evidence in connection with such testimony. (Wash.) *City of Spokane v. Patterson*, 921.

2. **EVIDENCE**—Hospital Record—Privileged Communications.—An official hospital record into which has been copied the attending

physician's diagnosis of the case of a certain patient is a privileged communication, and not admissible in evidence against such patient's objection. (Mo.) *Smart v. Kansas City*, 415.

3. **EVIDENCE—Declarations of Agent, When Admissible.**—If an accident occurs in a mine while the engineer is at work, and, within twenty or twenty-five minutes afterward, and while he is still at his work, he being asked how the accident occurred, answers that he got scared and turned a brake open entirely, or turned it the wrong way, this being in the presence of the injured parties and before the doctors arrived, such declaration is admissible in evidence, whether it be treated as a spontaneous exclamation or considered as an admission by an agent in the course of his employment. (Minn.) *Hyvonen v. Hector Iron Co.*, 332.

4. **EVIDENCE Admissible Against One of Two Defendants.**—In an action against two defendants, evidence may be admitted, notwithstanding it is competent as against only one of them, but the court must admonish the jury against whom the evidence may not be considered. (Ky.) *Illinois Cent. Ry. Co. v. Houchins*, 205.

5. **EVIDENCE.**—The American Mortality Table is admissible to show the expectancy of life. But it shows only the probable continuance of life of healthy persons who are insurable risks, and not the duration of ability to earn money, and the court should instruct the jury accordingly. (Ky.) *Illinois Cent. Ry. Co. v. Houchins*, 205.

Parol to Vary Writing.

6. **CONTRACTS, Parol Evidence to Vary.**—Parol evidence is admissible to alter, vary or contradict a writing if such evidence establishes an oral agreement contemporaneous with the execution of the writing and on the faith of which it was executed. (Pa.) *Gandy v. Weckerly*, 691.

Expert Testimony.

7. **EVIDENCE—Expert—Hypothetical Question.**—If an expert witness is present during the entire trial except about ten minutes, an objection to a hypothetical question propounded to him and based upon what he has heard, on the ground that it is not based on the entire evidence, should not be sustained, especially when that part of the evidence which the witness has not heard is immaterial to the question. (Mo.) *Smart v. Kansas City*, 415.

8. **EVIDENCE—Experts—Conclusion of Witness.**—If, in an action to recover for personal injury, there is an issue whether the amputation of plaintiff's leg was rendered necessary by the accident or by tuberculosis of the knee, it is improper to allow a physician testifying as an expert to state the cause of the amputation, and his testimony must be limited to an inquiry as to whether the accident was a sufficient cause to necessitate the amputation, and the jury must be left to determine the cause thereof. (Mo.) *Smart v. Kansas City*, 415.

See Constitutional Law, 6; Criminal Law, 5-9; Custom; Homicide; Marriage.

EXECUTIONS.

EXECUTION, Property Subject to—Goods Conveyed in Trust to Secure a Debt.—Where property is conveyed under a trust deed, it cannot be levied upon. A creditor by execution has a lien upon it subject to the trust, but must enforce his equity in chancery. (W. Va.) *Weaver v. Neal*, 972.

EXECUTORS AND ADMINISTRATORS.

See Judgments, 9, 10.

EXEMPTIONS.

1. EXEMPTION—Removal of Property to Another State, When Subjects to Execution Exempt Property Remaining in the State.—If a debtor having a number of animals and entitled to select some of them as exempt from execution removes part from the state of his residence into another state, he thereby makes his election to claim as exempt the property thus removed, and consequently subjects to execution animals remaining in the state of his residence, unless, after they are levied upon, he selects them as exempt and thereupon returns and submits to execution the other property. (Tenn.) *Rogers v. Ayers*, 725.

2. EXEMPTION.—If a Person Having Several Articles of Personal Property or Several Animals, one of which he is entitled to retain as exempt from execution, removes all but one beyond the reach of his creditors, he cannot, while thus retaining the others beyond the reach of creditors, claim that one as exempt. (Tenn.) *Rogers v. Ayers*, 725.

3. EXEMPTIONS.—A Traction Engine, and the Saws, Belts, Carrier and Other Appliances commonly used with it in sawing lumber, are tools and implements within the meaning of the exemption law. (Kan.) *Reeves v. Bascue*, 137.

4. EXEMPTIONS.—A Mortgage on Exempt Property, given without the consent or signature of the mortgagor's wife, is without validity. (Kan.) *Reeves v. Bascue*, 137.

Note.

Exemption, barbers, property which may hold as exempt, 147, 148.

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- Exemption of implements of professional men, effect on of temporary suspension of business, 146.**
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FRAUDS, STATUTE OF.

1. **STATUTE OF FRAUDS.**—Part Performance does not take a contract out of the statute of frauds. (Ky.) *Waters v. Cline*, 215.

2. **STATUTE OF FRAUDS.**—A Defendant Who Relies on the statute of frauds must restore what he has received under the contract. (Ky.) *Waters v. Cline*, 215.

3. **STATUTE OF FRAUDS**—Contract to Make Will.—When a girl leaves her parents, goes to live in her uncle's family, and there performs the duties of a daughter, under his oral promise to devise her land, she is entitled, upon his dying intestate, to recover from his estate the value of the land which he promised to will her, notwithstanding specific performance cannot be had because of the statute of fraud. (Ky.) *Waters v. Cline*, 215.

4. **STATUTE OF FRAUDS**—Contract to Make Will—Evidence.—In an action to enforce an alleged oral contract to make a will in consideration of personal services, evidence that the promisor paid the promisee wages while performing the services is admissible to disprove the contract. (Ky.) *Waters v. Cline*, 215.

GARNISHMENT.

1. **GARNISHMENT, Property Subject to.**—A draft is property, and as such subject to garnishment under a writ against the payee. (Wash.) *Washington Brick etc. Co. v. Traders' National Bank*, 912.

2. **GARNISHMENT, Draft, When Remains the Property of the Payee so as to be Subject to.**—If a draft is deposited in a bank by the payee, and he is credited with the amount thereof under an understanding or custom that if it is not paid, the amount shall be charged back to the depositor, he remains the owner of the draft, and it is subject to garnishment under a writ issued against him, though he has the right to check against his account until the draft is so charged back. (Wash.) *Washington Brick etc. Co. v. Traders' National Bank*, 912.

GOOD CHARACTER.

See Homicide, 20, 21.

HABEAS CORPUS.

1. **HABEAS CORPUS**—Jurisdiction—Custody of Children.—Under a constitutional provision that district courts and their judges "shall have power to issue writs of habeas corpus on petition by, or on behalf of, any person in actual custody in their respective districts," the jurisdiction is an unqualified one lodged in the district

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judge, to hear and determine upon habeas corpus questions as to the right to the custody of children arising within the limits of his district, and is as broad in its scope as that of a court which has the power to exercise jurisdiction in a like proceeding. (Wyo.) *Tytler v. Tytler*, 1067.

2. **HABEAS CORPUS—Custody of Children.**—The right to the custody of minor children may be litigated in habeas corpus proceedings. (Wyo.) *Tytler v. Tytler*, 1067.

3. **HABEAS CORPUS—Custody of Children.**—In a habeas corpus proceeding to determine who shall have the custody of a minor child, the question of personal freedom is not involved, except in the sense of a determination as to which custodian shall have charge of one not entitled to be freed from restraint. (Wyo.) *Tytler v. Tytler*, 1067.

4. **HABEAS CORPUS—Appeal—Custody of Children.**—On appeal in a habeas corpus proceeding to determine the custody of a minor child, the case will not be tried anew, and the record will be examined only to ascertain if it discloses an abuse of discretion by the trial court in awarding the custody of the child. (Wyo.) *Tytler v. Tytler*, 1067.

HEALTH.

CONSTITUTIONAL LAW—Due Process of Law.—If a city board of health, in the exercise of its authority under a charter and ordinances, determines, after a hearing, that an owner is maintaining a nuisance in operating a plant as then operated within the city and notifies him to abate it or suffer a prosecution, the board does not thereby deprive such owner of his property without due process of law, nor does it deprive him of any other constitutional right. (Mo.) *State v. City of St. Louis*, 376.

See *Municipal Corporations*, 6-9.

HIGHWAYS.

HIGHWAYS Over Public Lands, When Established by Adverse User.—Under the act of Congress granting a right of way for the construction of highways over public lands, no right to the use of lands as a public highway is created until there has been an adverse use of such land as such highway for at least seven years, that being the shortest period within which a highway can be established by prescription in that state. (Wash.) *Vogler v. Anderson*, 932.

See *Dedication*.

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HOMESTEADS.

Entry and Inchoate Title.

1. **HOMESTEAD ENTRY—Inchoate Title.**—An original homestead entry amounts to nothing more than a declaration of intention, and while the entryman thereby obtains an inchoate title, he does not acquire any vested right against the government or any ownership in the land until final proof is made. (Wyo.) *Waisner v. Waisner*, 1081.

Rights of Surviving Spouse.

2. **HOMESTEAD—Rights of Surviving Spouse.**—While a homestead exemption cannot originate without the existence of a family,

that is, a household consisting of more than one person, still when the homestead character has once attached, it may persist for the husband or wife alone, who is the sole surviving member of the family. (Kan.) *Weaver v. First Nat. Bank*, 155.

3. HOMESTEAD—Rights of Surviving Spouse.—Where a woman after the death of her husband continues to reside alone on the family homestead, it is exempt against her creditors as well as against his, whether her indebtedness was incurred before or after the death, and whether the legal title to the property was in her or in him during coverture. (Kan.) *Weaver v. First Nat. Bank*, 155.

HOMICIDE.

In General.

1. HOMICIDE.—In Order that One may be Guilty of homicide, the act must be done by him actually or constructively, and that cannot be, unless the crime is committed by his own hand, or by the hands of some one acting in concert with him, or in furtherance of a common purpose. (Ky.) *Commonwealth v. Moore*, 189.

2. HOMICIDE—Accidental Killing of Bystander.—Where one, in defending himself against robbery, accidentally shoots an innocent bystander, the robbers are not guilty of homicide. (Ky.) *Commonwealth v. Moore*, 189.

3. MANSLAUGHTER, What Necessary to Reduce Homicide to. To reduce an intentional blow, stroke or wounding, resulting in death, to voluntary manslaughter, there must be sufficient cause of provocation and a state of rage or passion without time to cool, placing the prisoner beyond the control of reason, and suddenly impelling him to the deed. (Pa.) *Commonwealth v. Paese*, 699.

4. HOMICIDE, Provocation for, Question of, When for the Court. When there is no dispute as to facts, the question of whether there was sufficient provocation to reduce a homicide to manslaughter is generally for the court. (Pa.) *Commonwealth v. Paese*, 699.

5. HOMICIDE, Provocation for from Attack upon a Friend.—It is proper for the court on a trial for murder to refuse to instruct the jury that if the decedent made a violent assault and battery on a friend of the accused in his presence, and this assault and attack so excited the passion of the accused as to destroy all self-control, and in this condition of ungovernable rage and without sufficient cooling time, he shot and killed the decedent, the grade of the homicide is clearly manslaughter. (Pa.) *Commonwealth v. Paese*, 699.

6. HOMICIDE—Manslaughter.—To reduce a homicide to voluntary manslaughter, it is necessary that the evidence should take away every evidence of cool depravity of heart or wanton cruelty. (Pa.) *Commonwealth v. Paese*, 699.

7. HOMICIDE, Consent to by the Person Killed.—The fact that the person killed consented to the killing and that it was in the execution of a joint agreement between the slain and the slayer will not remove the case from murder in the first degree. (Tenn.) *Turner v. State*, 758.

8. HOMICIDE, Malice or Ill-will not Essential to.—Hatred, ill-will or malevolence on the part of the slayer toward the slain is not essential to the express malice necessary to support a conviction for murder in the first degree. (Tenn.) *Turner v. State*, 758.

9. HOMICIDE.—Insanity on the Part of a Slayer is not Established on a trial for murder by showing that he entertained no ill-will toward the slain, and the enormity of the crime, as that it was

committed under an agreement between the parties that the one should kill the other. (Tenn.) *Turner v. State*, 758.

10. **HOMICIDE—Deadly Weapons.**—An Instruction under article 717 of the Penal Code is not called for unless the weapon is of a nondeadly character; but if the weapon is unquestionably of a deadly character, it ordinarily is not error to give such article in the charge. (Tex. Cr.) *Early v. State*, 889.

11. **HOMICIDE—Animus from Former Difficulty.**—Where a homicide case is supported mainly by proof of the animus of the accused toward the deceased growing out of a former difficulty between them, evidence is admissible to show that such difficulty had been settled and the parties had become friendly. (Tex. Cr.) *Early v. State*, 889.

Self-defense.

12. **MURDER—Self-defense.**—In a case of homicide all that is necessary for the accused to show to make out a case of self-defense is that the conduct of his assailant induced in him a reasonable and well-grounded belief that he was at the time of the killing in apparent danger of losing his life or suffering great bodily harm, and he is not required to show that he acted as a man of "ordinary judgment and courage would have acted under the circumstances." (Ill.) *People v. McGinnis*, 73.

13. **MURDER—Self-defense.**—In a prosecution for murder the question whether the accused fired the fatal shot while acting under the fears of a reasonable person or those of a coward is not a question for the court, but for the jury, and an instruction which intimates to the jury that the accused was a coward, and in consequence of such cowardice fired the fatal shot is error. (Ill.) *People v. McGinnis*, 73.

14. **MURDER—Self-defense—Instructions.**—In a prosecution for murder it is error for the court in its instructions to refer to the defense set up by the accused as "what is claimed to be this self-defense." (Ill.) *People v. McGinnis*, 73.

15. **HOMICIDE—Self-defense—Provoking Difficulty.**—One has a right, whether in a peaceable manner or not, to go and seek out another and obtain from him an explanation of any conduct that reflects upon him; it is not necessary that he should go in a friendly spirit. (Tex. Cr.) *King v. State*, 881.

16. **HOMICIDE—Self-defense—Violation of Law.**—It is error to instruct the jury in a homicide case that when the defendant's "own original act was in violation of law, then the law takes that fact into consideration in limiting his right of defense and resistance while in the perpetration of such unlawful act." (Tex. Cr.) *King v. State*, 881.

17. **HOMICIDE—Instruction on Self-defense.**—Where there is evidence in a homicide case showing that the deceased made, or was about to make, an attack on the companion of the accused, an instruction on self-defense is not reversible error. (Tex. Cr.) *Yardley v. State*, 869.

18. **HOMICIDE—Attack on Companion—Self-defense.**—Where the evidence in a homicide case shows that the deceased made an attack with a deadly weapon on the companion of the accused, the duty of the court is imperative to instruct the jury that if such were the case, it is presumed that the deceased intended to kill such companion, and that the accused had a right to slay him. (Tex. Cr.) *Yardley v. State*, 869.

19. HOMICIDE—Self-defense—Instruction.—If the evidence in a homicide case shows that the accused did not actually kill the deceased, and does not call for a charge on self-defense, an instruction on the law of self-defense is error. (Tex. Cr.) *Early v. State*, 889.

Evidence of Good Character.

20. MURDER—Evidence of Good Character and Its Effect.—Evidence as to good character of the accused on a trial for murder is admissible as tending to establish innocence, and may, in some cases, create a reasonable doubt which will entitle him to an acquittal. (Pa.) *Commonwealth v. Cate*, 683.

21. MURDER—Good Character of the Accused, Misleading and Erroneous Instruction Concerning.—To add to an instruction that evidence of good character is entitled to the same consideration as other evidence and may give rise to a reasonable doubt where such doubt might not otherwise arise, the further clause that where the jury is satisfied beyond a reasonable doubt of the defendant's guilt under all the evidence, evidence of previous good character is not to overcome the conclusion which follows from that view of the case, is to render the instruction confusing to the jurors and may lead them to disregard the evidence of good character altogether, and is therefore prejudicially erroneous. (Pa.) *Commonwealth v. Cate*, 683.

Trial.

22. MURDER—Removing the Accused from the Penitentiary for the Purpose of Trial.—A person placed on trial for murder cannot complain of such trial or his subsequent conviction on the ground that he was illegally taken from the penitentiary for the purpose of being tried. (Pa.) *Commonwealth v. Ramunno*, 653.

23. MURDER—Conduct of Accused During Trial.—In a prosecution for murder, where the evidence is close, it is error for the court to instruct the jury that it has a right to take into consideration the demeanor and conduct of the accused "during the trial" when passing upon the weight which should be given to his testimony as a witness in his own behalf. (Ill.) *People v. McGinnis*, 73.

See Descent and Distribution.

HOSPITAL RECORD.

See Evidence, 2.

HUSBAND AND WIFE.

In General.

1. HUSBAND AND WIFE—Presumption of Her Assent to an Assignment to Her.—If a policy of insurance is assigned to a wife for her benefit, her consent to and acceptance of the assignment will be presumed. (Mich.) *Kaufman v. State Savings Bank*, 259.

2. HUSBAND AND WIFE—Her Right to Affirm on Act of His for Her Benefit.—If a draft which ought to have been made in favor of a wife is by the direction of her husband, made to him and her, she has the right to avail herself of the draft by affirming her husband's receipt of it. (Mich.) *Kaufman v. State Savings Bank*, 259.

3. HUSBAND AND WIFE—His Indorsement of Commercial Paper Payable to Both on Its Face, but in Fact Belonging to Her.—If checks or drafts purporting to be payable to a husband and wife in fact belong wholly to her and are sold by him, he forging her name to the

indorsement, this is a conversion by him and also by the person to whom they are indorsed and who subsequently receives the money thereon, making him liable to her for the amount so received. (Mich.) *Kaufman v. State Savings Bank*, 259.

4. HUSBAND AND WIFE—Conflict of Laws as to Property Rights of.—Personal property acquired by either husband or wife in a foreign jurisdiction which is by the law of the place where acquired the separate property of either, continues to be such property when brought within this state, and if invested in or exchanged for real property, such property becomes separate estate also. (Wash.) *Brookman v. Durkee*, 944.

Community Property.

5. HUSBAND AND WIFE—Community Property.—Moneys Borrowed by a Wife, though their payment is secured by a mortgage on her separate estate, are community property. (Wash.) *Heintz v. Brown*, 937.

6. HUSBAND AND WIFE—Property Partly Community and Partly Separate Estate.—Where property is purchased partly with the separate funds of a wife and partly with community funds, it belongs to the separate and community property in the proportion in which the moneys came from each. (Wash.) *Heintz v. Brown*, 937.

Estates by Entireties—Condemnation.

7. ESTATES BY ENTIRETIES—Condemnation—Right of Wife.—If a husband and wife have an estate by the entirety in land, she has such an interest in the property as must be paid for prior to its seizure and use for a public purpose. (Mo.) *Holmes v. Kansas City*, 495.

8. ESTATES BY ENTIRETIES—Condemnation—Right of Wife—Injunction.—If husband and wife have an estate by entirety in land which is sought to be condemned for a public purpose, service upon the husband alone in the condemnation proceeding and his appearance therein and the payment of the damages assessed to him alone do not make her a party, nor bind her interests in the property, nor prevent her from maintaining a suit by injunction to protect it from seizure. (Mo.) *Holmes v. Kansas City*, 495.

9. ESTATE BY ENTIRETIES—Right of Wife to Sue.—If husband and wife have an estate by the entirety in land, she has such an interest in the property that, without joining her husband, she may sue for the possession thereof as against all persons except him. (Mo.) *Holmes v. Kansas City*, 495.

10. ESTATES BY ENTIRETIES—Condemnation—Rights of Wife not Made a Party—Intervention.—If a city, in proceeding to condemn property for a public use belonging to husband and wife as tenants by the entirety, proceeds to assess the amount of the damages, and then by a separate suit by interpleader, to which the wife is not made a party, brings the money into court, asking it to determine whether the husband or a third party, or both, are entitled to such damages, and the court determines that the husband is entitled to the whole fund, and no money is paid into court for the benefit of the wife, the city has no right to take the property nor to interfere with her possession, and she is entitled to an injunction to prevent it. (Mo.) *Holmes v. Kansas City*, 495.

Libel by Wife.

11. HUSBAND AND WIFE, Joinder of in an Action for Her Libel.—A husband's joinder with his wife in an action to recover

for a libel published by her is not required on the ground that her misconduct is imputable to him, but for conformity's sake, and because the marriage relation makes it impossible for the injured person to sue the wife alone. (Tenn.) *Price v. Clapp*, 730.

12. HUSBAND AND WIFE—Damages Against for Libel Published by Her Only—Punitive and Vindictive.—In an action against husband and wife for libel published by her, there may be an assessment or verdict showing what the jury holds as punitive and what as vindictive damages. For the latter she may be held liable, and both for the amount fixed as punitive damages. (Tenn.) *Price v. Clapp*, 730.

See Libel and Slander.

INDICTMENTS.

See Larceny, 6-8.

INJUNCTIONS.

When may be Granted.

1. INJUNCTION—Commission of Crime.—A court of equity has no jurisdiction to enjoin the commission of crime generally. (Mo.) *State v. Canty*, 393.

2. AN INJUNCTION will Issue to Prevent the Transfer of Negotiable Notes against which the maker has a good defense where the payee is insolvent. (W. Va.) *Atkinson v. Cain*, 984.

3. AN INJUNCTION will Issue to Prevent a Corporation from Taking Possession of Property for a Public Use, as for railway purposes, without first making compensation therefor, although the bill does not allege that the injury which would be sustained by the complainant is irreparable or that the trespassing corporation is insolvent. (W. Va.) *Harman v. Caretta Railway Co.*, 985.

4. INJUNCTION—Power to Restrain Traffic in Railroad Tickets. The sale of nontransferable railroad tickets may be enjoined, and persons violating the injunction may be punished for contempt. (Tex. Cr.) *Ex parte Cash*, 865.

Against Trespass to Church Property.

5. INJUNCTION—Trespass Against Church Property.—An injunction will lie against strangers to a church organization, to prevent them from forcibly entering the church edifice, changing the locks thereon, and the threatened disturbance of and interference with the rights of the church trustees in their management, control and possession of the church property, and of peaceful and orderly worship in the church building. (Ala.) *Christian Church v. Sommer*, 27.

6. INJUNCTION—Trespass Against Church Property.—An injunction will lie to restrain a threatened trespass against church property, when the wrongful act, if committed, would work irreparable injury which could not be atoned for in damages in a court of law. (Ala.) *Christian Church v. Sommer*, 27.

7. INJUNCTION, Issuing of to Prevent Trespass Though the Injury Being Done is Slight.—An injunction will not issue to prevent the defendants from resisting the complainants in entering upon waters and lands of the former for the purpose of assorting and booming logs in the streams thereon, though the damage which will be done by the complainants if an injunction issues is slight and capable of being compensated by damages. (Mich.) *Garth Lumber etc. Co. v. Johnson*, 262.

Dissolution of Injunction.

8. **INJUNCTION—Dissolution.**—If the petition for an injunction is sworn to positively, the denials of the answer must be equally positive to warrant a dissolution of the temporary injunction upon the petition and answer alone. (Wyo.) *Collins v. Stanley*, 1022.

9. **INJUNCTIONS—Dissolution—Discretion.**—The dissolution of a preliminary injunction, like the granting of one, is a matter resting largely in the discretion of the court, to which the motion to dissolve is addressed, and, except in cases of palpable abuse of discretion, the action of the trial court will not be disturbed on appeal or otherwise restrained or controlled. (Wyo.) *Collins v. Stanley*, 1022.

See Contempt; Eminent Domain, 2; Nuisances.

Note.

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against production of offensive fumes and odors, 574, 575.

INNKEEPERS.

INNKEEPERS—Duty as to Furnishing Accommodations.—In the absence of a special contract an innkeeper has the sole right to select the apartment for a guest, and, if he finds it expedient, to change the apartment and assign the guest another, without becoming a trespasser in making the change, but if, having the necessary convenience, he puts the guest out of the apartment assigned to him, and refuses to afford him reasonable accommodations, he is liable to an action for damages. (Ala.) *Hervey v. Hart*, 67.

INSANE PERSONS.

1. **INSANE PERSONS.**—The Deeds and Contracts of a Person of Unsound Mind Who has not been Judicially Declared Incompetent are not absolutely void, but voidable only. (N. Y.) *Smith v. Ryan*, 609.

2. **INSANE PERSONS—Necessary for Resorting to Equity to Avoid Deeds of.**—Though a person of unsound mind has not been judicially declared to be such at the time he executes a conveyance, resort to equity is not necessary to avoid such conveyance, but it may be attacked and defeated in an action of ejectment. (N. Y.) *Smith v. Ryan*, 609.

INSPECTION OF BOOKS.

See Corporations, 2-4.

INSURANCE.*Life Insurance.*

1. **LIFE INSURANCE—Presumption Against Suicide.**—The law indulges a presumption that the death of an insured person was not self-inflicted. (Ky.) *Masonic Life Assn. v. Pollard*, 198.

2. **LIFE INSURANCE—Suicide of Insured.**—If an insured person intentionally takes his own life at a time when his mind is so far gone that he is unconscious that he is taking his life, the act is not deemed his but in law is regarded as an accidental killing; conversely, although his mind may be deranged, still if he has mind enough to know the act will probably result in death, and if he inflicts it with that intention, it is his act and absolves the insurance company from liability. (Ky.) *Masonic Life Assn. v. Pollard*, 198.

Accident Insurance.

3. INSURANCE, ACCIDENT.—Death from the Bite of a Dog is death from an accident, and not death from sickness or disease, within the meaning of a policy providing for certain payments in case of death from accident and for other and different payments in case of death from sickness or disease. (Pa.) *Farner v. Massachusetts Mutual Accident Assn.*, 621.

4. INSURANCE, ACCIDENT—"Immediately Disabled."—A man whose hand is bitten by a dog and thereupon at once bandages it, and its use is for the moment interfered with, and who continues to suffer increasing pain for two weeks, when death results, is "immediately disabled" within the meaning of those words as used in a policy of accident insurance. (Pa.) *Farner v. Massachusetts etc. Assn.*, 621.

INTEREST.

See Usury.

INTERVENTION.

1. INTERVENTION, Construction of Statute Allowing.—Statutes permitting an intervention by an outsider are liberally construed. (Minn.) *Walker v. Sanders*, 276.

2. INTERVENTION, Cumulative Remedy.—The right to intervene will be sustained though the intervener may have another remedy. (Minn.) *Walker v. Sanders*, 276.

3. INTERVENTION by a Transferee Pendente Lite.—If, during the pendency of a suit to set aside a conveyance of real property because procured by fraud, the complainant conveys the property, his grantee is entitled to intervene and thereby join in contesting the validity of a deed. (Minn.) *Walker v. Sanders*, 276.

4. INTERVENTION, When the Proper Remedy Rather than Substitution.—If, during the pendency of an action to set aside a conveyance of real property, the complainant transfers such property, the remedy of the grantee is by intervention and not by substitution, if the complainant still retains such a right or interest that he can be benefited by the final judgment, as where the conveyance contains covenants for title upon which, if it is permitted to stand, he may be held personally liable. (Minn.) *Walker v. Sanders*, 276.

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INTOXICATING LIQUORS.

1. CONSTITUTIONAL LAW—Local Option Laws—Elections.—A local option law providing for an election and making a person who forges a signature to a petition guilty of forgery, and one who swears falsely in verifying such petition guilty of perjury, is not void as creating new crimes. (Ill.) *People v. McBride*, 82.

2. CONSTITUTIONAL LAW—Local Option Laws.—A local option law specifying what shall be included in the term "intoxicating liquors," and providing that it shall not be necessary to a prosecution under the act to state the kind of liquor sold, nor the name of any person to whom it is sold, is not unconstitutional, but any prosecution under the act must be for selling intoxicating liquor, and it is necessary to allege such a sale. (Ill.) *People v. McBride*, 82.

3. LOCAL OPTION LAWS—Elections—Notice.—The question of the validity of a provision of a local option law providing that a failure to give notice of the election as specified in the act shall not affect the validity of the vote, can only arise in case no notice of the election is given. (Ill.) *People v. McBride*, 82.

4. INTOXICATING LIQUOR—Evidence.—The issue of an internal revenue special stamp or receipt for the sale of liquor to a person engaged in business, and the posting thereof in his place of business, tend to prove that such person is engaged in the sale of liquor at that place, but this merely establishes a presumption, and does not change the fundamental rule as to the burden of proof and quantum of evidence necessary to a conviction in a criminal case. (Ill.) *People v. McBride*, 82.

5. LOCAL OPTION LAWS—Suspension of Operation of License Ordinances.—A provision in a local option statute that during the time any territory is anti-saloon territory the operation of ordinances relating to sales of liquor and dramshop licenses therein shall be suspended, so far as inconsistent with the statute, does not render the statute void. (Ill.) *People v. McBride*, 82.

6. CONSTITUTIONAL LAW—Local Option Laws—Refunding Unearned Licenses.—A provision in a local option law requiring a municipality to refund the unearned portion of license fees received by it in certain cases is not unconstitutional as having the effect of compelling the municipality to incur a debt against its will. (Ill.) *People v. McBride*, 82.

7. LOCAL OPTION LAW—Title—Definitions.—The fact that a local option law defines certain words and phrases used in it and explains their meaning as they are employed therein does not leave it open to the constitutional objection that it gives new and unusual definitions to such words, and gives no hint or suggestion of that fact in the title. (Ill.) *People v. McBride*, 82.

8. LOCAL OPTION LAWS—Definition of Intoxicating Liquor.—A local option law is not invalid on the ground that in defining the term "intoxicating liquors" it does not state how much water may be mingled with such liquors and still leave them intoxicating liquors. (Ill.) *People v. McBride*, 82.

9. LOCAL OPTION LAWS—Sales of Liquor by Druggists.—The fact that a local option law exempts from its provisions the sale of liquor by druggists for certain purposes, under certain prescribed conditions, is not open to the constitutional objection that it provides for regulating the sale of intoxicating liquor by druggists, and that the title does not mention such regulation. (Ill.) *People v. McBride*, 82.

10. LOCAL OPTION LAWS—Refunding Unearned License Fees. A provision in a local option law requiring the refunding of unearned license fees for selling liquor by a municipality in certain cases does not render the law void, as giving voters outside the city the right to determine the use of money within the city. Such voters merely determine whether territory shall be anti-saloon territory, and do not make the law or determine whether the license fee shall be refunded or not. (Ill.) *People v. McBride*, 82.

11. LOCAL OPTION LAWS—Title of Act—Popular Vote.—The title of a local option law stating that it is an act for the creation of anti-saloon territory by popular vote, is not misleading, though the body of the law provides that a majority of the legal voters balloting upon the proposition shall govern, as such an election is by popular vote. (Ill.) *People v. McBride*, 82.

12. LOCAL OPTION LAWS—Amendment by Reference to Title Only.—A local option law, the only effect of which is to withdraw certain specified territory from the operation of existing laws by which the sale of liquor is licensed, regulated, or prohibited, and which adopts the provisions of the general election laws, and adds to existing laws certain conditions under which druggists may sell liquor in anti-saloon territory, and not purporting to amend or revive any law, is not void as an attempt to revive or amend a law by reference to the title only. (Ill.) *People v. McBride*, 82.

13. LOCAL OPTION LAWS—Interstate Commerce.—A local option law providing for the creation of anti-saloon territory, and prohibiting the taking of orders or the making of agreements in anti-saloon territory for the sale or delivery of intoxicating liquor, does not violate the interstate commerce clause of the national constitution. (Ill.) *People v. McBride*, 82.

14. LOCAL OPTION LAWS—When General Laws.—The legislature may enact a local option law which will become operative by a vote of the people of the district to be affected, provided the law contains an entire and perfect declaration of the legislative will. The law must be complete when it leaves the legislature, and require nothing to perfect it except the decision that it shall be operative in a certain district. (Ill.) *People v. McBride*, 82.

15. CONSTITUTIONAL LAW—Equal Protection of Law—Local Option Laws.—The offense of selling liquor in violation of a local option law providing for the creation of anti-saloon territory within which the sale of intoxicating liquor shall be prohibited is not identical with the offense created by another statute prohibiting the sale of such liquor in less quantity than one gallon, or in any quantity to be drunk in the premises, and therefore the local option law may impose a different penalty for its violation without denying to one the equal protection of the law, and the fact that one charged with violating the law may take a change of venue to a county where it is not in force does not affect its validity, as such change would not affect the degree of punishment. (Ill.) *People v. McBride*, 82.

16. INTOXICATING LIQUORS—Licenses—Police Power.—A license to sell liquor is not a contract, and creates no vested rights, but is a mere temporary permit to do what would otherwise be an offense against the law, and a statute may end the license, though paid for, and deprive the holder thereof of the right to continue the use of his bar fixtures for the sale of liquor, though he cannot put them to any other use. (Ill.) *People v. McBride*, 82.

17. LOCAL OPTION—Sale in Prohibited Territory—Subterfuge.—There must be a sale in the local option territory before a conviction can follow under the local option liquor law; and an instruction to the jury which complicates the question of sale with what constitutes a subterfuge, without clearly stating what constitutes a sale, is defective. (Tex. Cr.) *Brookman v. State*, 838.

18. LOCAL OPTION—Verdict by Lottery.—Where on a trial for the sale of liquor in violation of the local option law, the jurors agree each to write down on separate slips of paper the punishment to be assessed, and deposit the slips in a hat, then draw them out and divide the sum of the dollars fine and the sum of the days of imprisonment by the number of jurors, and make the result the verdict, and after this is done, they further agree to make even money and even days by striking off the fractions, the verdict is by lottery. (Tex. Cr.) *Brookman v. State*, 838.

19. LOCAL OPTION—Loan or Exchange of Liquor.—An exchange of liquor, or an accommodation loan of liquor with an understanding for a return of a like amount, is a sale within the meaning of the local option statute; and it makes no difference whether the accused is a member of a club or not. (Tex. Cr.) *Tombeaugh v. State*, 841.

20. LOCAL OPTION—Proof of Intoxicating Character of Liquor. The testimony of a witness that he bought from the accused a beverage called "lager beer" is not sufficient to sustain a conviction under the local option law; it must be shown that the beverage was of such alcoholic body as to produce intoxication if drunk in reasonable quantities. It is not the name by which the liquid is called, but its quality and strength as an intoxicant, which determine whether or not its sale is a violation of the law. (Tex. Cr.) *Potts v. State*, 847.

21. LOCAL OPTION LAWS—Petition—Qualified Voters.—The petition for a local option election is as much a part of the record as the order of court submitting the question of local option to the voters, and in determining whether the petitioners were qualified voters, the petition cannot be ignored, but must be considered. (Mo.) *State v. McCord*, 410.

22. LOCAL OPTION LAWS—Judgment of County Court—Collateral Attack.—The county court, upon presentation to it of a petition for a local option liquor election, has jurisdiction of the matter and the right to determine whether the petitioners are legal voters, and having so decided its judgment cannot be collaterally attacked. (Mo.) *State v. McCord*, 410.

23. LOCAL OPTION LAWS—Order for Election.—If the order of the county court submitting the question of local liquor option to the voters of a district recites that the requisite number of petitioners have signed and presented such petition for the consideration of the court, such order has reference to the petition signed and presented by the persons who represented themselves therein as legal voters and none others. (Mo.) *State v. McCord*, 410.

24. LOCAL OPTION LAWS—Order of County Court—Jurisdiction. In determining the jurisdiction of the county court to issue an order submitting the question of local liquor option to the voters of a district, the petition for the order and the order itself should be taken together for consideration, as they constitute but one record, and it is sufficient if jurisdiction appears from the entire record. It is not essential that such jurisdiction should appear from any particular part of the record. (Mo.) *State v. McCord*, 410.

25. LOCAL OPTION LAWS—Jurisdiction of County Court—Collateral Attack.—When a petition is presented to the county court by the requisite number of legal voters of a county asking such court to submit to the voters of the county the proposition to vote on the question whether or not intoxicating liquors shall be sold in the county, it acquires jurisdiction of the subject matter of the controversy and of the petitioners, and the validity of its proceedings thereafter with respect to the same matter is not subject to collateral attack. (Mo.) *State v. McCord*, 410.

26. LOCAL OPTION LAWS—Sufficiency of Petition—Jurisdiction of County Court.—It is not essential that the petition for a local liquor option election should be couched in the exact language of the statute, and a substantial compliance therewith is sufficient to authorize the county court to take jurisdiction of the matter and make the order for election. (Mo.) *State v. McCord*, 410.

JUDGMENTS.*In General.*

1. **CONFESSION OF JUDGMENT**—Absence of Jurisdiction.—If the maker of a note, before suit thereon is filed, signs an answer entering his appearance and confessing judgment, a judgment rendered thereon, without service of process or other appearance, is void. (Ky.) *Aultman etc. Co. v. Meade*, 193.

2. **JUDGMENT FOR PART Only of a Tract, Remedy for, How Must be Sought**.—If persons entitled to recover in ejectment a tract of land commence an action for a part only through accident and mistake, and recover judgment therefor, their only remedy is to seek relief in such action by opening the judgment, amending the pleadings, and trying anew the rights to the property, and not by an action to recover the part omitted from the first action. (Wash.) *Kline v. Stein*, 940.

3. **JUDGMENT**.—The Trial of an Action on a Plea of Former Action Pending, the sustaining of the plea, and the consequent dismissal of the action, do not amount to a determination of the action on the merits. (Wash.) *State Medical Examining Board v. Stewart*, 915.

4. **RES JUDICATA**.—An order sustaining a demurrer on the merits is conducive as *res judicata*. (Minn.) *Dohs v. Holbert*, 329.

Retraxit.

5. **JUDGMENT**—Retraxit, What is.—Where the parties to an action settle their dispute and agree to a dismissal, it is a retraxit, and amounts to a decision on the merits. (Wash.) *State Medical Examining Board v. Stewart*, 915.

6. **JUDGMENT**—Retraxit, Dismissal of Action on Stipulation, When is not a.—Under a statute providing that an action may be dismissed and a judgment of nonsuit entered by either party upon the written consent of the other, a judgment dismissing the action upon a stipulation that it may be dismissed without costs to either party does not amount to a retraxit, nor a decision on the merits, nor bar another action for the same cause. (Wash.) *State Medical Examining Board v. Stewart*, 915.

Foreign Judgments.

7. **JUDGMENT Against Executor**—Extraterritorial Effect of.—A judgment rendered in another state against an executor upon the indebtedness of the testator is not admissible as a valid claim against such defendant in another state in a suit commenced there by the same plaintiff to enforce a claim against lands in that state bequeathed to the defendant by the testator. (Tex.) *Webster v. Clarke*, 813.

8. **FOREIGN JUDGMENTS**—Full Faith and Credit.—While a court of one state must give full faith and credit to the decrees of the courts of sister states, it has the right to inquire whether they obtained jurisdiction of the person and the subject matter; and if it finds they did not, their judgments and decrees become of no force or effect. (N. Y.) *Olmsted v. Olmsted*, 585.

9. **JUDGMENT AND DECREE**—Privity Between an Administrator of a Decedent in One State and His Executors in Another.—There is no privity between an administrator with the will annexed appointed in a state of which the decedent was not a resident at the time of his death and his executors appointed in the state of his residence. Hence a decree against the former is not evidence to estab-

lish a claim against the latter, though such decree was entered upon the revivor of a suit in equity in which the decedent had appeared in his lifetime and wherein the court had acquired jurisdiction over him. (Mich.) *Brown v. Fletcher's Estate*, 233.

10. **DECREE, Extraterritorial Effect, Whether Enhanced by the Fact that It was Founded upon an Award and a Stipulation Agreeing to Perform It.**—The fact that the suit is submitted to arbitration, and the parties, in making the submission, agree to perform the award and pay any sum found due, and purport to bind their heirs, executors and administrators, does not enhance the effect of any decree which may subsequently be rendered on the revivor of the suit against an ancillary administrator with the will annexed of the estate of the decedent. (Mich.) *Brown v. Fletcher's state*, 233.

See Receivers.

JUDICIAL SALES.

1. **JUDICIAL SALE.**—A Parol Agreement Between Bidders at a judicial sale to buy the land in partnership and then divide it is not inimical to the statute of frauds. (Ky.) *Mallon v. Buster & Allin*, 201.

2. **JUDICIAL SALE—Contract to Chill Bidding.**—An agreement between bidders at a judicial sale, when each desires only a part of the tract on sale, made after they have bid the property to a price above its actual value, to stop competing and buy the land together, each taking and paying for the portion that he desires, is not against public policy. (Ky.) *Mallon v. Buster & Allin*, 201.

JURISDICTION.

See Courts, 1, 2.

JURORS.

1. **JURORS—When not Disqualified by Knowing of Former Conviction.**—The fact that jurors in a criminal case have heard of the previous trial and conviction of the accused does not disqualify them if they have not formed any opinion as to his guilt or innocence. (Tex. Cr.) *Early v. State*, 889.

2. **JURORS—Conversation with Third Persons Over Telephone.**—When some of the jurors in a homicide case converse over the telephone with third persons, the burden is on the state to show by the testimony of others than the jurors that the latter were not tampered with. (Tex. Cr.) *Early v. State*, 889.

3. **JURORS—Investigation of Bias.**—The fact that two of the state's witnesses in a homicide case may have been adverse to the accused because of previous local option cases does not authorize an investigation of how the jurors had voted at the last local option election, the contention of the accused being that the prosecution has arisen out of violation of the local option law. (Tex. Cr.) *Yardley v. State*, 869.

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LANDLORD AND TENANT.

1. LANDLORD AND TENANT—Leases—Renewals—Perpetuities.
 A renewal of a lease for all time to come is a perpetuity, and against the policy of the law, and unless it appears from the covenant in the lease, by express terms or clearly by implication, that the lessee is entitled to have the lease renewed for all time to come, a court of equity will not decree specific performance of the covenant for that purpose. (Mo.) Drake v. Board of Education, 448.

2. LANDLORD AND TENANT—Leases—Renewals.—A lease containing a general covenant to renew at its expiration with similar covenants, terms, and conditions, contained in the original lease, is fully carried out by one renewal without the insertion of another covenant to renew. Otherwise a perpetuity is provided for. (Mo.) Drake v. Board of Education, 448.

3. LANDLORD AND TENANT—Leases—Renewals.—A covenant for a second renewal of a lease will not be inferred from a general provision for a renewal of the lease with similar covenants, and in such case the lessee is entitled to but one renewal. (Mo.) Drake v. Board of Education, 448.

LARCENY.

In General.

1. LARCENY AND EMBEZZLEMENT, for the purposes of punishment, are uniformly recognized as distinct offenses. (Mo.) Casey, 367.

2. LARCENY—Elements of Offense.—In every larceny there must be a trespass in the original taking of the property. A fraudulent intent must have existed at the time of the taking. (Mo.) Casey, 367.

3. **LARCENY**.—A Railroad Ticket is a subject of theft. (Tex. Cr.) Patrick v. State, 861.

4. **LARCENY**—Subsequent Abandonment of Property.—Where one who has escaped from a convict farm appropriates a horse simply to steal a ride, but with no intent fraudulently to appropriate the animal, his subsequent abandonment of the horse is immaterial on the issue of whether he is guilty of theft. (Tex. Cr.) Carroll v. State, 851.

5. **LARCENY**.—A Promissory Note may be the Subject of theft under the Texas statutes, but it was not at the common law. (Tex. Cr.) Calentine v. State, 837.

Indictment.

6. **LARCENY**—Description of Promissory Note in Information.—An information for theft which describes the stolen property as a promissory note of the value of thirty-one dollars and eighty cents will be quashed as insufficiently describing the property. (Tex. Cr.) Calentine v. State, 837.

7. **LARCENY**—Description of Property in Indictment.—In charging larceny such general allegations are advisable as will embrace or comprehend the particular property alleged to be stolen, but always a sufficient description must be given such as will advise the defendant of the charge against him and furnish a bar against future prosecution. (Tex. Cr.) Patrick v. State, 861.

8. **LARCENY**—Description of Railroad Tickets in Indictment.—An indictment for the theft of railroad tickets should allege the name of the railroad issuing them, that it is incorporated, and that the tickets were issued by it, if such is the case; if the tickets have not been issued, this should be stated, and if they entitle the holder to transportation when stolen, that also should be stated. An indictment which alleges the taking of six railroad tickets, stating the value of each and also their aggregate value, stating the cities between which they read, is not sufficient. (Tex. Cr.) Patrick v. State, 861.

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LEGACIES.

See Wills.

LEGITIMATION OF CHILDREN.

See Bastards.

LIBEL AND SLANDER.

1. LIBEL, Damages for, When cannot be Regarded as Nominal Merely.—The fact that after the publication of a libel against an employé, he remained for some time in the service of his employer, does not entitle the libeler to have the damages regarded as nominal only, if it appears that a want of confidence on the part of the employer was immediately manifested and the employé was humiliated (Tenn.) Price v. Clapp, 730.

2. LIBEL, Punitive Damages, When may be Awarded all in any libel involving a charge of moral turpitude, the jury may, in discretion, award punitive damages. (Tenn.) Price v. Clapp, 730.

3. LIBEL—Damages Which may be Awarded Against Husband for a Libel by His Wife.—In an action against husband and wife to recover for libel published by her, not due to any fault of his, all damages recoverable against him must be compensatory only. (Tenn.) Price v. Clapp, 730.

4. LIBEL AND SLANDER in the Course of Judicial Proceedings. When libelous matter in pleadings is relevant and pertinent, there is no liability for uttering it. (Pa.) Kemper v. Fort, 623.

5. LIBEL AND SLANDER in Judicial Proceedings, Doubts Respecting, How to be Solved.—Where there is a question whether matter alleged in a pleading is material, the doubts should be resolved in favor of its relevancy and pertinency. (Pa.) Kemper v. Fort, 623.

6. LIBEL in Charging Illegitimacy in a Judicial Proceeding.—If the testator directs that in a specified contingency a fund shall be divided among the children of one of his daughters, and the guardian of one of these children petitions for the review of the accounts of the executors, and they, in response, deny the legitimacy of the child represented by such guardian, they are not liable for libel though the charge of illegitimacy is false, if they acted upon information received from a member of the family. (Pa.) Kemper v. Fort, 623.

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LICENSE TAX

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LIENS.

See Mechanics' Liens.

LIFE INSURANCE.

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LIFE TENANTS.

1. LIFE TENANCY—Action for Conversion of Trees.—A life tenant cannot maintain trover for the conversion of standing trees, nor trespass de bonis for the taking of them from the estate. (Ala.) *C. W. Zimmerman Mfg. Co. v. Daffin*, 58.

2. LIFE TENANCY—Trespass for Removal of Standing Timber.—A life tenant may maintain trespass quare clausum fregit for the cutting and removing of standing timber from the property, and recover such actual damages as he may sustain to his possession. (Ala.) *C. W. Zimmerman Mfg. Co. v. Daffin*, 58.

LIMITATION OF ACTIONS.*Actions Barred by Statute.*

1. LIMITATIONS—Mortgages.—Where a Note is Barred by the statute of limitations, no action can be maintained on the mortgage securing it. (Kan.) *Bruner v. Martin*, 172.

2. LIMITATION OF ACTIONS for Changing the Grade of a Street.—An action brought by an abutting property owner to recover damages resulting from changing the grade of a street is not an action for trespass, and falls within, and is barred by, a statute providing that "an action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued." (Wash.) *Denney v. City of Everett*, 934.

3. LIMITATION OF ACTIONS—Proceedings to Revoke a License to Practice Medicine.—Under a statute providing that an action for relief not hereinbefore provided for shall be commenced within two years after the cause shall have accrued, a proceeding to revoke a license to practice medicine is not barred though not commenced within two years after the conviction of the practitioner of an offense involving moral turpitude, where the statute under which the conviction was made makes such conviction evidence of unprofessional or dishonorable conduct. (Wash.) *State Medical Examining Board v. Stewart*, 915.

4. LIMITATIONS OF ACTIONS—Statute, When Creates a Rule of Evidence and not a Limitation of an Action.—Under a statute authorizing a proceeding to revoke a license to practice medicine when the practitioner has been guilty of unprofessional or dishonorable conduct, and making a conviction of any offense involving moral turpitude, evidence of unprofessional and dishonorable conduct, the statute creates a rule of evidence, and the statute of limitations does not apply to the proceeding in which such evidence is employed. (Wash.) *State Medical Examining Board v. Stewart*, 915.

Conflict of Laws.

5. LIMITATIONS.—The Words "Where the Cause of Action has Arisen in Another State," as used in the statute of limitations, mean when the cause of action has accrued in the foreign state, or when the plaintiff has the right to sue the defendant there; they do not refer to the origin of the transaction out of which the cause of action has arisen. (Kan.) *Bruner v. Martin*, 172.

6. LIMITATIONS—Conflict of Laws.—An Action on a Promissory Note cannot be maintained in Kansas under section 22 of the

Civil Code, if both parties were nonresidents when the cause of action accrued, and the defendant resided in a foreign state until the cause of action was barred by the law of that state. (Kan.) *Bruner v. Martin*, 172.

New Promise and Part Payment.

7. LIMITATION OF ACTIONS—New Promise.—To infer a new promise from the part payment of obligations all barred by the statute of limitations, the debt must be definitely and specifically pointed out and the intention to discharge it in part made manifest. (Minn.) *Anderson v. Nystrom*, 320.

8. LIMITATIONS OF ACTIONS, New Promise is Inferable Only from the Act of the Debtor.—No new promise can be inferred from the act of the creditor in applying a payment to one of several obligations. (Minn.) *Anderson v. Nystrom*, 320.

9. LIMITATION OF ACTIONS—Partial Payment.—If a debtor against whom his creditor holds three promissory notes, all outlawed, makes a payment without specifying upon which it is to be credited, this does not revive any of the notes, and the holder cannot accomplish such revivor by crediting the sum paid on two of the notes. (Minn.) *Anderson v. Nystrom*, 320.

See Adverse Possession.

LIQUORS.

See Intoxicating Liquors.

LIS PENDENS.

1. LIS PENDENS.—The Purpose of the Rule of *Lis Pendens* is to prevent third persons during the pendency of the litigation from acquiring interests in the land which would preclude the court from granting the relief sought. (Kan.) *Harrod v. Burke*, 179.

2. LIS PENDENS.—The Rule of *Lis Pendens* has no Application to independent titles not derived from any of the parties to the suit nor in succession to them. (Kan.) *Harrod v. Burke*, 179.

3. LIS PENDENS.—All Persons Entering upon the Possession of property pendente lite are presumed to enter under the defendant. (Kan.) *Harrod v. Burke*, 179.

LOCAL OPTION.

See Intoxicating Liquors.

LOCAL SELF-GOVERNMENT.

See Municipal Corporations, 2.

LOGS AND LOGGING.

CONSTITUTIONAL LAW—Statute Assuming to Confer the Right to Use Dams and Assort Logs on the Lands of Another.—A statute purporting to make it lawful for any person having logs, timber, ties, posts or poles in any stream navigable therefor to temporarily assort such logs, timber, ties, posts or logs in such stream and along the shore and at the mouth thereof is unconstitutional as against owners of lands through which such streams pass, because it in effect gives the right to enter on such lands without compensation. (Mich.) *Garth Lumber etc. Co. v. Johnson*, 262.

LOST INSTRUMENTS.

1. **ACTIONS on Lost Writings.**—To sustain an action on an instrument alleged to be lost, the evidence must be clear and satisfactory. (Minn.) *First National Bank v. McConnell*, 336.

2. **BANKS, Liability of on Lost Checks.**—A bank is not liable to an action on a lost check which has never been presented to it for payment, though the money with which to make payment still remains on deposit with it. (Minn.) *First National Bank v. McConnell*, 336.

3. **BANKING—Action on Lost Check by the Payee Against the Drawers.**—If the payee of a check loses it before presenting it to the bank on which it was drawn, his remedy is not by an action against such bank, but by an action against the drawer of the check. The loss of the check excuses the holder from presenting it to the bank for payment. (Minn.) *First National Bank v. McConnell*, 336.

4. **BANKING.—The Remedies of a Drawee of a Bank Check Which has been Lost** before presentation are, if it is not negotiable, by countermanding the order and stopping payment, and if it is negotiable and likely to reach the hands of a bona fide holder, to insist upon an indemnity before giving a check or otherwise paying the debt intended to be discharged by the check. (Minn.) *First National Bank v. McConnell*, 336.

MANDAMUS.

1. **MANDAMUS will Lie to Compel the entry of a judgment upon a verdict which settles a title to land when such entry has been erroneously refused on the ground that the verdict was void because returned after the expiration of the term of court.** (Tex.) *Texas Tram & Lumber Co. v. Hightower*, 794.

2. **MANDAMUS—Corporations—Inspection of Books to Enforce Right.**—If an unconditional right to inspect the books of a corporation is given to a stockholder by one of its by-laws, such right, when denied, may be enforced by mandamus. (Wyo.) *Wyoming Coal Min. Co. v. State*, 1014.

MAPS.

See Evidence, 1.

MARRIAGE.

EVIDENCE—Testimony Denying Marriage with a Deceased Person.—If the children of a woman who has lived with the defendant and passed as his wife sue him for her interest as his wife in the community property, his evidence that he was never married to her is properly excluded as being testimony of a party as to a transaction with a deceased person. (Tex.) *Edelstein v. Brown*, 816.

MASTER AND SERVANT.

Liability for Injury to Employé.

1. **NEGLIGENCE, When not Made Out by the Starting of Machinery.**—If a reeling machine at which a girl fourteen years of age is working suddenly starts, and thereby draws in and injures her hand, but there is no showing that the machinery was defective nor what caused it to start, no presumption of negligence on the part of her employer arises, and she cannot recover, there being no show-

ing that any lack of warning or of instruction was the proximate cause of the accident. (Pa.) *Hemscher v. Dobson*, 690.

2. MASTER AND SERVANT—Effect of Injury to Servant upon His Health—Damages.—The jury is authorized in a personal injury case to take into consideration, in assessing a servant's damages against his master, the effect of the injury complained of, if any, upon his health, if he was a strong, healthy man, under thirty years of age, at the time he was wrongfully injured, and, at the time of the trial, occurring several months subsequent thereto, he was unable to perform manual labor by reason of such injury. (Ill.) *Kennedy v. Swift & Co.*, 113.

3. MASTER AND SERVANT—Negligence.—If a servant is injured through the joint negligence of the master and a fellow-servant, the master cannot escape liability on the ground that the fellow-servants also contributed to the injury. (Ill.) *Kennedy v. Swift & Co.*, 113.

Minor Employés.

4. MASTER AND SERVANT—Minor Employés, Duty to—Capacity of Minor.—The duty of an employer in engaging and placing a minor at a dangerous employment is largely measured by the capacity of the minor to comprehend the dangers of the employment, when the employer has, or should have, notice of the minor's capacity. (W. Va.) *Bare v. Crane Creek Coal & Coke Co.*, 966.

5. MASTER AND SERVANT—Minor Employés—Capacity.—The questions of the assumption of risk, of the benefit of instruction by the employer, and of contributory negligence hinge upon the question of the capacity of the minor employé for the particular work in which he is engaged. (W. Va.) *Bare v. Crane Creek Coal & Coke Co.*, 966.

6. MASTER AND SERVANT—Notice of Lack of Capacity of Minor Employé.—The employer of a minor is charged with notice of such lack of capacity as is usual among minors of the same age, so far as his age is or should be known to the employer. (W. Va.) *Bare v. Crane Creek Coal & Coke Co.*, 966.

7. EVIDENCE—Burden of Proof of Capacity of Minor Employé.—The burden of proving that a minor employé had greater than the usual capacity of minors of the same age rests upon the employer, and the burden of proving that the minor had less than the usual capacity rests upon him or the person seeking to recover damages on account of his death. (W. Va.) *Bare v. Crane Creek Coal & Coke Co.*, 966.

8. MASTER AND SERVANT—Negligence in Engaging a Minor in a Dangerous Employment.—It is actionable negligence for an employer to engage and place at a dangerous employment a minor who, although instructed, lacks sufficient age and capacity to understand and avoid the dangers of the employment, if the employer has, or should have, notice of the minor's age and lack of capacity. (W. Va.) *Bare v. Crane Creek Coal & Coke Co.*, 966.

9. MASTER AND SERVANT—Minor Employés, Risks Assumed by.—A minor assumes the risks of all such apparent dangers as he is capable of comprehending and avoiding. The apparent dangers are those which he has capacity to comprehend and avoid. (W. Va.) *Bare v. Crane Creek Coal & Coke Co.*, 966.

10. MASTER AND SERVANT—Minor Employé, Test of Capacity of.—In determining the capacity of a minor to perform the work and avoid the dangers of the employment, the character of the

work, the circumstances under which it is performed, and his previous experience should be considered. (W. Va.) *Bare v. Crane Creek Coal & Coke Co.*, 966.

11. **MASTER AND SERVANT—Minor Employés, Negligence, When will not be Imputed to.**—The capacity of a minor employé is the measure of his responsibility. If he has not capacity to comprehend and avoid the dangers to which he may be exposed, negligence will not be imputed to him from the fact that he unwittingly exposed himself to such dangers. (W. Va.) *Bare v. Crane Creek Coal & Coke Co.*, 966.

12. **MASTER AND SERVANT—Minor Employés, Duty of Employer to is not Affected by the Statute Permitting Such Employment.**—The fact that a statute permits the employment of minors more than twelve years of age does not have any bearing on the duties of the employer to such minors. (W. Va.) *Bare v. Crane Creek Coal & Coke Co.*, 966.

13. **MASTER AND SERVANT—Minor Employés—Questions of Fact for the Jury.**—Age, capacity and discretion of a minor employé to observe and avoid dangers are questions of fact for the jury. (W. Va.) *Bare v. Crane Creek Coal & Coke Co.*, 966.

14. **MASTER AND SERVANT—Minor Employés, Negligence of, When a Question for the Court.**—The court should take from the jury the question of the contributory negligence of a minor employé when the clear weight of evidence shows that he had capacity for self-protection which he culpably omitted to use in the face of a danger which he knew and sufficiently apprehended, but otherwise not. (W. Va.) *Bare v. Crane Creek Coal & Coke Co.*, 966.

Assumption of Risks.

15. **EMPLOYER'S LIABILITY.**—The Doctrine of Assumption of Risks is not available as a defense in an action by an employé against his employer for injuries sustained because of the failure of the latter to comply with a statute requiring him to guard his machinery for the safety of employés. (Kan.) *Western etc. Mfg. Co. v. Bloom*, 123.

16. **MASTER AND SERVANT—Assumption of Risk.**—If a servant is taken from the work on which he is engaged and ordered by his master to stand upon a narrow plank and assist in raising a heavy "block and fall" and hold it in position until it can be fastened in place, and, unknown to such servant, the hook of such "block and fall" is defective and he has no time in which to examine it, he does not assume the risk of being injured while performing the work in which he is thus engaged. (Ill.) *Kennedy v. Swift & Co.*, 113.

17. **MASTER AND SERVANT—Assumption of Risk—Question for Jury.**—If a servant is taken from the work in which he is engaged and ordered by his master to stand upon a narrow plank and assist in raising a heavy "block and fall" and hold it in position until it can be fastened in place, the question whether the execution of the order of the master was attended with such danger that a man of ordinary prudence would not have incurred it is for the jury to determine. (Ill.) *Kennedy v. Swift & Co.*, 113.

18. **MASTER AND SERVANT—Assumption of Risk—Evidence.**—If a servant is injured while doing unusual work in a certain way under the master's orders, it is proper for the servant to show the usual and customary manner of performing such work, not for the purpose of showing that there was a safer manner in which the work could have been done, but for the purpose of answering the

master's contention upon the question of assumed risk. (Ill.) *Kennedy v. Swift & Co.*, 113.

Liability for Acts of Employé.

19. **MASTER AND SERVANT, Criminal Liability of the Former for an Act of the Latter Against His Instructions.**—Where an employé is engaged under the general supervision and direction of his employer, but discharges a blast in a manner prohibited by statute and contrary to the instructions of his employer, the latter is liable to the penalty imposed. (Wash.) *City of Spokane v. Patterson*, 921.

MECHANICS' LIENS.

1. **MECHANICS' AND MATERIALMEN'S LIENS, Subcontractor as Parties to Foreclosure of.**—In a suit to enforce a lien for materials and supplies furnished to a subcontractor, he should be made a defendant. (Tenn.) *Luttrell v. Knoxville etc. R. R. Co.*, 737.

2. **MECHANICS' AND MATERIALMEN'S LIENS, Waiver of Failure to Make Subcontractor Party.**—In a suit against a railroad company to establish and enforce a materialman's lien for supplies furnished a subcontractor, the failure to make him a party defendant is waived by the company's answering to the merits without objecting by demurrer or otherwise. (Tenn.) *Luttrell v. Knoxville etc. R. R. Co.*, 737.

3. **MECHANICS' AND MATERIALMEN'S LIENS—Objection to the Nonjoinder of a Subcontractor, What does not Amount to.**—In a suit against a railroad company to enforce a materialman's lien for supplies furnished a subcontractor, an answer by the company denying that the complainants have taken the steps to fix a lien in their favor on the property, or that they have acquired any lien on such property for the payment of their claim, does not amount to a plea or objection that a subcontractor has not been made a party defendant. (Tenn.) *Luttrell v. Knoxville etc. R. R. Co.*, 737.

4. **MECHANICS' AND MATERIALMEN'S LIEN, Defects in Parties, When cannot be First Made on Appeal.**—Where, from the pleadings and record on an appeal in a suit to enforce a materialman's lien, it does not appear that the failure to establish the claim by judgment against the subcontractor or to make him a party defendant was presented in any manner in the trial court, such failure cannot be urged on appeal. (Tenn.) *Luttrell v. Knoxville etc. R. R. Co.*, 737.

5. **MECHANIC'S LIEN—Law, Construction of.**—A mechanic's lien law will be given a liberal construction to carry out its purpose and to secure and protect those entitled to the lien. (Tenn.) *Luttrell v. Knoxville etc. R. R. Co.*, 737.

6. **MECHANICS' AND MATERIALMEN'S LIEN, Suit to Enforce—Jurisdiction Over the Property, When Acquired Without Attachment.**—In a suit to enforce a materialman's lien against the property of a railroad company for supplies furnished a subcontractor, it is not necessary to bring the property within the custody of the court by attachment or like process, if the bill is framed in conformity with the statute, describing the property upon which the lien is sought, the contract under which it is claimed, the subletting of a part of the work to the subcontractor, to whom the complainants furnished materials and supplies, and the portion of the road on which the work was done. (Tenn.) *Luttrell v. Knoxville etc. R. R. Co.*, 737.

7. **MECHANICS' AND MATERIALMEN'S LIEN—Explosives.**—Under a statute purporting to give a lien to every materialman or

other person for constructing or aiding in constructing sundry specified appliances of a railroad or delivering material for any of these purposes, one is entitled to a lien for furnishing explosives. (Tenn.) *Luttrell v. Knoxville etc. R. R. Co.*, 737.

8. **MECHANICS' AND MATERIALMEN'S LIEN**, Material for Shanties for Workmen.—A materialman is not entitled to a lien against a railroad company for material furnished to erect shanties adjacent to a right of way and used to shelter the workmen of a subcontractor. (Tenn.) *Luttrell v. Knoxville etc. R. R. Co.*, 737.

9. **MECHANICS' AND MATERIALMEN'S LIEN** for Materials not Used.—A materialman has a lien against a railroad company for materials furnished in good faith to be used in construction, but not in fact so used. (Tenn.) *Luttrell v. Knoxville etc. R. R. Co.*, 737.

10. **MECHANICS' AND MATERIALMEN'S LIEN**—Tools and Machinery.—A materialman is not entitled to a lien against a railroad company for tools and machinery furnished a subcontractor and used by him in his work, nor for gasoline and coal-oil, nor for torches used for lighting a tunnel while in process of construction. (Tenn.) *Luttrell v. Knoxville etc. R. R. Co.*, 737.

11. **MECHANICS' AND MATERIALMEN'S LIEN**.—A materialman has not a lien against a railroad company for tablewares and commissary supplies furnished to a subcontractor or to his workmen, nor for materials furnished them in part payment for their labor. (Tenn.) *Luttrell v. Knoxville etc. R. R. Co.*, 737.

12. **MECHANICS' AND MATERIALMEN'S LIEN**—Blasting Appliances.—A materialman has a lien against a railroad for furnishing to a subcontractor dynamite, fuse, blasting wire, wire fuse, nails, nuts, washers, bolts, and soft steel and iron which go into the construction of the lining and approaches to a railroad tunnel. (Tenn.) *Luttrell v. Knoxville etc. R. R. Co.*, 737.

MILK ORDINANCES.

See Municipal Corporations, 6-9.

MORTALITY TABLES.

See Evidence, 5.

MORTGAGES.

Deed Absolute.

1. **MORTGAGE—Deed Absolute**.—Parol Evidence is admissible to show that a deed to a husband and wife jointly was, as to her, intended as a mortgage. (Kan.) *Hubbard v. Cheney*, 129.

2. **MORTGAGE—Deed Absolute—Declarations**.—Where a deed has been executed to a husband and wife jointly, his declarations explanatory of ownership, while in possession of the land, including letters written by him which the evidence does not clearly show whether or when the addressee received them, are admissible to show that as to the wife, the deed was intended as a mortgage. (Kan.) *Hubbard v. Cheney*, 129.

Discharge of Tax Lien by Mortgagee.

3. **MORTGAGES—Discharge of Tax Lien by Mortgagee**.—A mortgagee who, to protect his mortgage, pays off a judgment foreclosing a tax lien against the land, without any request from the owner thereof, is entitled to include the sum thus paid in his fore-

closure but has no right to a personal judgment therefor. (Tex.) *Stone v. Tilley*, 819.

Foreclosure.

4. IRREGULAR FORECLOSURE—Accounting by Mortgagee.—If a mortgagee forecloses by virtue of a stipulation in the mortgage, when his action in so doing is prohibited by statute, he must account to the mortgagor for the actual value of the property. (Ky.) *Aultman etc. Co. v. Meade*, 193.

5. IRREGULAR FORECLOSURE—Action for Deficiency.—Where a mortgagee, by virtue of the mortgage contract, takes the property and does not apply it to the mortgage debt, his failure to so apply it is a defense to a suit for the balance of the debt. (Ky.) *Aultman etc. Co. v. Meade*, 193.

6. IRREGULAR FORECLOSURE.—The Mortgagor is not Estopped, as against the mortgagee, to question the validity of a foreclosure made in violation of the statute, on the ground that he did not object to the sale and even helped the purchaser to remove the property. (Ky.) *Aultman etc. Co. v. Meade*, 193.

7. MORTGAGE—Deed to Secure Purchase Price.—A deed to a husband and wife jointly, in which she is named as a grantee to secure the payment of money that she loans him to make up the purchase price of the land is a mortgage as to her, so that when the loan is paid, her interest ceases and his title becomes clear. (Kan.) *Hubbard v. Cheney*, 129.

See Limitation of Actions, 1; Trusts, 8-14.

MUNICIPAL CORPORATIONS.

In General.

1. MUNICIPAL CORPORATIONS are Creatures of the legislature, and their powers and privileges may be changed, modified, or taken away at any time by a general law. (Ill.) *People v. McBride*, 82.

2. MUNICIPAL CORPORATION, Right of to Self-Government.—Municipalities have the constitutional right to self-government, and it is an invasion of that right by the state for it to make the appointment of officers to perform the functions of a local governmental nature. (Mich.) *Davidson v. Hine*, 267.

3. BLASTING, What Amounts to.—An ordinance purporting to impose regulations for the blasting of rock or stone extends to "spring shots," though they are not so strong as regular blasts, if by such spring shots pieces of rock are thrown a great distance. (Wash.) *City of Spokane v. Patterson*, 921.

Ordinances.

4. MUNICIPAL CORPORATIONS—Ordinances—Arbitrary Power. A municipal ordinance providing that "no person shall set up or operate a steam engine, planing-mill or planing machine, foundry, blacksmith-shop, cotton-gin, bakery, an establishment for boiling soap, or any similar establishment within the city without first obtaining the consent of the council," is void, in not prescribing a general uniform rule of action, and as permitting an opportunity for the exercise of an arbitrary discrimination in favor of a few. (Ala.) *City Council of Montgomery v. West*, 33.

5. MUNICIPAL CORPORATIONS—Ordinances—Arbitrary Power. An ordinance which invests a city council or board of trustees with a

discretion which is purely arbitrary, and which may be exercised in the interest of a favored few, is unreasonable and void. (Ala.) City Council of Montgomery v. West, 33.

Milk Ordinances.

6. **MUNICIPAL CORPORATIONS—Milk Ordinance—Police Power.**—A municipal ordinance requiring that every glass bottle or jar in which milk is sold shall have its capacity legibly and permanently indicated thereon, and fixing a penalty for using such receptacles of less capacity than they purport to contain, is a valid exercise of the police power to prevent fraud in the sale of milk. (Ill.) City of Chicago v. Bowman Dairy Co., 100.

7. **MUNICIPAL CORPORATIONS—Milk Ordinance—Special Legislation.**—If an ordinance requires every glass bottle or jar in which milk is sold to have its capacity permanently indicated thereon and applies generally to all who sell milk in such receptacles it is not void as special legislation, although it does not apply to all who sell substances in liquid form, or to all who sell milk or cream within the city. (Ill.) City of Chicago v. Bowman Dairy Co., 100.

8. **MUNICIPAL CORPORATIONS—Milk Ordinance—Deprivation of Property.**—Although a municipal ordinance regulating the sale of milk in glass jars or bottles deprives a person of the use of such jars or bottles as he has on hand at the time when such ordinance goes into effect, this does not render it void if its enactment is within a proper exercise of the police power. (Ill.) City of Chicago v. Bowman Dairy Co., 100.

9. **MUNICIPAL CORPORATIONS—Milk Ordinance.**—Although a seller of milk does not know that the bottles in use in his business hold less than the markings on the outside thereof show, this is no defense to a prosecution for the violation of a municipal ordinance fixing a penalty for using such bottles. (Ill.) City of Chicago v. Bowman Dairy Co., 100.

Nuisances.

10. **MUNICIPAL CORPORATIONS—Nuisance—Power to Abate as Against City Contractor.**—A city has power to declare the acts of a contractor who holds a contract with it for the use of certain material in improving a street to be a nuisance, and stop him from mixing such material in the public street in such a way as to be injurious to the public health or destructive of the comfort of the inhabitants of the vicinity. (Mo.) State v. City of St. Louis, 376.

11. **MUNICIPAL CORPORATIONS—Public Nuisance.**—A city cannot itself lawfully commit a public nuisance, nor authorize another to do so. (Mo.) State v. City of St. Louis, 376.

12. **MUNICIPAL CORPORATIONS—Administrative and Governmental Powers—Nuisance—Estoppel.**—In its contracts for street improvement a city acts in its administrative capacity; but in the exercise of its police power to protect life and health, it acts in its governmental capacity, and is not estopped by its contract for street improvement to declare the acts of its contractor to be a nuisance. (Mo.) State v. City of St. Louis, 376.

13. **MUNICIPAL CORPORATIONS—Nuisance—Authorization of.** A city cannot by ordinance authorize the carrying on of an operation destructive of public health, or loading the atmosphere with offensive odors, to the serious annoyance of the surrounding inhabitants. (Mo.) State v. City of St. Louis, 376.

14. **MUNICIPAL CORPORATIONS—Nuisance—Acts of Boards of Health.**—The fact that a health commissioner, in discharge of a duty

imposed upon him by law, prior to the meeting of a board of health of which he is a member, has declared that as operated a certain plant, in his official judgment, constitutes a nuisance and has given notice to the offender to appear before such board of health and show cause why the nuisance should not be abated, does not disqualify him from sitting at the hearing as a member of such board. (Mo.) *State v. City of St. Louis*, 376.

Bicycles on Sidewalks.

15. **BICYCLES—Use of Sidewalk—Negligence.**—A bicycle is a vehicle and its proper place is upon the highway or the street proper, and not upon the sidewalk, and the riding of a bicycle upon the sidewalk is negligence per se. (Ala.) *Fielder v. Tipton*, 69.

16. **BICYCLES—Use of Sidewalk—Liability for Personal Injury.** One riding a bicycle upon a sidewalk is liable in damages to a pedestrian who is injured thereby while in the proper exercise of his rights in coming upon, or walking along the sidewalk, although there is no ordinance prohibiting the riding of bicycles thereon. (Ala.) *Fielder v. Tipton*, 69.

Defective Sidewalks.

17. **MUNICIPAL CORPORATIONS—Defective Sidewalks—Negligence.**—In an action against a city to recover for personal injury caused by a fall on a defective sidewalk, if it is shown that the city knew, or, in exercising ordinary care, should have known, of such defect, if any, in the sidewalk in time to have had reasonable opportunity to have repaired it, or had reasonable opportunity to have caused it to have been repaired in time to have prevented the accident, and neglected to do so, the city is liable. (Mo.) *Smart v. Kansas City*, 415.

18. **MUNICIPAL CORPORATIONS—Defective Sidewalks—Damages—Amputation of Leg.**—In an action against a city to recover for personal injury caused by a fall on a defective sidewalk, the jury, in estimating the damages, may take into consideration the fact that plaintiff's leg was amputated, if the amputation was caused by the fall, but not if it was rendered necessary by disease. (Mo.) *Smart v. Kansas City*, 415.

19. **MUNICIPAL CORPORATIONS—Defective Sidewalk—Instructions.**—If in an action against a city to recover for personal injury caused by falling over a coal-hole projecting above the sidewalk, the evidence as to the extent of the projection is conflicting, an instruction that if the city negligently allowed the coal-hole to remain in a dangerous condition for travel on the sidewalk, on account of its extending above the level thereof, the plaintiff could recover, is proper, although it ignores the distance of the projection. (Mo.) *Smart v. Kansas City*, 415.

Presentation of Claims Against City.

20. **MUNICIPAL CORPORATIONS—Presentation of Claims—Infancy.**—A provision in a city charter that claims for damages due to negligence must be presented to the common council within thirty days after the occurrence is not a statute of limitations which is suspended during the infancy of the claimant. (N. Y.) *Winter v. City of Niagara Falls*, 540.

21. **MUNICIPAL CORPORATIONS—Presentation of Claims—Pleading and Proof.**—A provision in a city charter that claims for damages founded upon negligence must be presented to the common council within thirty days after the occurrence is reasonable, and a

compliance therewith is a fact to be alleged and proved by a complainant, like any other condition precedent to the existence of a right of action. (N. Y.) *Winter v. City of Niagara Falls*, 540.

22. MUNICIPAL CORPORATIONS—Presentation of Claims—Infancy.—The fact that a person injured through the negligence of a city is an infant does not exempt him from the operation of a provision of the city charter that claims for damages founded upon negligence must be presented to the common council within thirty days or an action thereon will be barred. (N. Y.) *Winter v. City of Niagara Falls*, 540.

23. MUNICIPAL CORPORATIONS—Presentation of Claims—Waiver.—If the requirement of a city charter, that claims for damages based upon negligence must be presented to the common council within a specified time, may be waived (which is doubtful), a waiver cannot be relied upon when not pleaded or when no facts are alleged which constitute it. The fact that the mayor called on the claimant while in the hospital, or that his bill for hospital services was paid by the city, or that in response to a subpoena he appeared and was examined by the city attorney, does not establish a waiver. (N. Y.) *Winter v. City of Niagara Falls*, 540.

24. MUNICIPAL CORPORATIONS, Failure to Present Claim Against, When Excused by Mental and Physical Inability.—If a plaintiff suing a municipal corporation to recover damages for personal injuries alleged to be due to its negligence is met with the defense that his claim was not presented to the city within three months, as prescribed by law, he may nevertheless prevail if he shows that he was physically and mentally unable to prepare and present his claim, or to give directions for its preparation and presentation, during the whole of such three months, and that he did present it within a reasonable time thereafter. (N. Y.) *Forsyth v. City of Oswego*, 605.

25. MUNICIPAL CORPORATIONS—Time for Presentation of Claim When Claimant was Physically and Mentally Unable to Present It Within the Time Allowed by Statute.—If the time within which a claimant may present his claim against a city is limited to three months, and during that time he is unable to prepare and present such claim because of his mental and physical condition, he is not necessarily entitled to an additional three months after the cessation of his disability, but must present the claim within what, in the judgment of a jury, is a reasonable time thereafter, and an instruction that he is entitled to three months' additional time constitutes reversible error. (N. Y.) *Forsyth v. City of Oswego*, 605.

26. MUNICIPAL CORPORATIONS, Waiver of the Failure to Present Claim Against Within the Time Fixed by Statute.—The reference to a committee and an attorney of a claim against a city, and the examination of the claimant at the meeting of such committee and the giving of a hearing to him, do not amount to a waiver of his failure to present the claim within the time prescribed by statute, nor of any other defect in such claim. (N. Y.) *Forsyth v. City of Oswego*, 605.

Assessments for Improvements.

27. ASSESSMENTS AND ASSESSMENT DISTRICTS, Conclusiveness of Determination Concerning.—A municipal ordinance creating a district and directing an assessment upon all abutting property, according to frontage, is a legislative determination by the city council that all such property will be benefited, which, in the absence

of fraud or arbitrary action, is not subject to review by the courts, but is final. (Wash.) Northern Pac. Ry. Co. v. City of Seattle, 955.

28. ASSESSMENTS, Use of Property, When cannot Affect.—Abutting property cannot be relieved from the burdens of an assessment simply because its owner has seen fit to devote it to a use which may not be benefited by the local improvement. (Wash.) Northern Pac. Ry. Co. v. City of Seattle, 955.

29. ASSESSMENTS Against Property Used as the Right of Way for a Railroad.—Property abutting on a public street and used by a railroad company as its right of way is subject to an assessment for local improvement, and the company cannot successfully claim exemption of the property from such assessment on the ground that it cannot be benefited by the proposed improvement. (Wash.) Northern Pac. Ry. Co. v. City of Seattle, 955.

30. ASSESSMENTS for Local Improvements Against Abutting Property in proportion to frontage are valid and constitutional. (Wash.) Northern Pac. Ry. Co. v. City of Seattle, 955.

31. ASSESSMENT—Want of Lien.—The right and power to levy an assessment upon the right of way of a railroad is not dependent on the question whether a valid and enforceable lien can be created against the property. (Wash.) Northern Pac. Ry. Co. v. City of Seattle, 955.

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MURDER.

See Descent and Distribution; Homicide.

NEGLIGENCE.

In General.

1. **PERFORMANCE OF DUTY, When Excused Because It has Become Impossible.**—A person may be relieved from a duty imposed upon him by law where the performance has been rendered impossible by reason of causes for which he is not responsible, as where it becomes impossible for him to present a check because of its loss. (Minn.) *First National Bank v. McConnell*, 336.

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2. **NEGLIGENCE—Question for Jury.**—The questions of negligence and contributory negligence are usually questions of fact for the jury to determine. (Ill.) *Kennedy v. Swift & Co.*, 113.

3. **NEGLIGENCE—Burden of Proof.**—In an action for the death of a child alleged to have been due to the defendant's negligence, the burden of proving that such negligence was the proximate cause of such death must be assumed by the plaintiff. (W. Va.) *Bare v. Crane Creek Coal & Coke Co.*, 966.

4. **NEGLIGENCE Consists of a Breach of Duty Either of Omission or Commission.** (W. Va.) *Bare v. Crane Creek Coal & Coke Co.*, 966.

5. **CHILDREN, Contributory Negligence of, When a Question for the Jury.**—A boy seven years of age cannot be held guilty of contributory negligence by the court as a matter of law. (Pa.) *Henderson v. Continental Refining Company*, 668.

6. **PARENTS, When will not be Guilty of Contributory Negligence.**—Parents of a boy seven years of age cannot be held guilty of contributory negligence as a matter of law because they allowed him to go around upon the streets in the vicinity of his home and to visit a neighbor's house, though near by was machinery attractive to children and which might prove dangerous to him. (Pa.) *Henderson v. Continental Refining Co.*, 668.

Duty to Persons on Adjoining Premises.

7. **NEGLIGENCE—Duty to Persons on Adjoining Premises.**—When an owner or occupier of land uses upon it appliances, devices or methods that may cause injury to persons on adjoining premises, or in public places, he owes to them the duty to take reasonable precautions to avoid injury. (N. Y.) *Weitzmann v. Barber Asphalt Co.*, 560.

Trespassers—Dangerous Premises.

8. **NEGLIGENCE—Policeman as Trespasser.**—A police officer detailed to guard the wagon of an express company against strikers and who accompanies such wagon to a building, entering therein not on business, nor on an invitation, express or implied, from the owner thereof, but as a matter of convenience and for reasons unconnected with his duties as a police officer, is a trespasser and cannot recover from the owner of the building for injuries received in falling down an open elevator shaft. (Ill.) *Casey v. Adams*, 105.

9. **NEGLIGENCE—Policeman as Licensee.**—A police officer detailed to guard the wagon of an express company against strikers, who goes with it to a building and enters therein to perform his duties as a policeman, but without any invitation, express or implied, from the owner of such building, is a mere licensee, and such owner owes him no duty except to refrain from inflicting willful or wanton injury upon him, and is not liable for injuries received by him in falling down an open elevator shaft. (Ill.) *Casey v. Adams*, 105.

10. **TRESPASSER upon the Lands of Another, Who is not.**—If a company owns and operates a refinery on the west side of a public road and also owns land on the east side thereof, upon which are two houses occupied by its tenants, fronting upon the road and separated by a vacant lot, and the side door and approach to one of the houses opens upon the vacant lot, and opposite to such door is a gate entering on the yard of the other house, and the children of the neighborhood use the lot as a playground, a boy seven years of age who undertook to visit a playmate whose parents lived in one

of the houses, and kept along and over the vacant lot, there being over it a path which had been used for years as a playground for children, cannot be regarded as a trespasser. (Pa.) *Henderson v. Continental Refining Co.*, 668.

11. **LAND OWNERS, Liability of for Injuries Inflicted on a Child by Dangerous Machinery.**—In an action by the parents of a boy who, at the age of seven years, was killed by coming in contact with dangerous machinery operated and unguarded on the premises of the defendant on a lot where children were accustomed to gather and play, a compulsory nonsuit is erroneous. The cause should be submitted to the jury under proper instructions. (Pa.) *Henderson v. Continental Refining Co.*, 668.

12. **NEGLIGENCE—Duty of Land Owner to Trespasser.**—The only duty of the owners or occupiers of land toward mere trespassers or bare licensees is to abstain from inflicting intentional, wanton or willful injuries. (N. Y.) *Weitzmann v. Barber Asphalt Co.*, 560.

See Death; Master and Servant.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

1. **NEW TRIAL—Practice on Appeal.**—The appellate court will not reverse a judgment granting a motion for a new trial unless the evidence plainly and palpably supports the verdict. (Ala.) *Hervey v. Hart*, 67.

2. **NEW TRIAL—Grounds for Considered on Appeal.**—A party obtaining an order for a new trial from which an appeal is taken, the record showing the grounds for the new trial, is not precluded from showing by such record that he was entitled to a new trial on some one of the grounds stated, although the trial court specified only one, and that one not a sufficient reason for granting the new trial. (Mo.) *Smart v. Kansas City*, 415.

3. **NEW TRIAL—Impeaching Testimony.**—A new trial will not ordinarily be granted on account of impeaching testimony. (Tex. Cr.) *Early v. State*, 889.

NUISANCE.

1. **NUISANCE, PUBLIC.—Suit to Enjoin a public nuisance** is properly brought in the name of the state at the relation of the attorney general in the circuit court of the county wherein the nuisance exists. (Mo.) *State v. Canty*, 393.

2. **NUISANCE, PUBLIC—Definitions.**—Any act which is an offense against the public order, common good and public decency or morals, or any public exhibition which tends to corrupt the morals, to disturb the peace or the general good order and welfare of society is a public nuisance, and this includes all exhibitions, the natural tendency of which is to pander to vicious and disorderly members of society. (Mo.) *State v. Canty*, 393.

3. **NUISANCE, PUBLIC—Bullfights.**—A public bullfight is a public nuisance, and may be enjoined. (Mo.) *State v. Canty*, 393.

4. **NUISANCE, PUBLIC—Bullfight Arena.**—An arena erected for the purpose of conducting bullfights therein, and in which bullfighting is actually carried on, is a public nuisance, and its use for that purpose may be enjoined. (Mo.) *State v. Canty*, 393.

5. NUISANCE, PUBLIC—Injunction.—A court of equity has jurisdiction to restrain an existing or threatened public nuisance by injunction. (Mo.) *State v. Canty*, 393.

6. NUISANCE Including Crime—Injunction.—A court of equity has jurisdiction to restrain an existing or threatened public nuisance by injunction, although the offender or offenders are amenable to the criminal laws of the state. (Mo.) *State v. Canty*, 393.

7. NUISANCE, PUBLIC—Injunction.—Property Rights need not be involved in the litigation before a court of equity will grant injunctive relief to abate a public nuisance. (Mo.) *State v. Canty*, 393.

8. NUISANCE, PUBLIC—Bullfights—Injunction.—A corporation its managers, performers, and employes may be perpetually enjoined from using certain premises for the purpose of holding bullfights, although such bullfight is a crime and the participants therein may be punished as criminals. (Mo.) *State v. Canty*, 393.

9. NUISANCE, PUBLIC—Injunction—Right to Jury Trial.—One who has not yet acted, but who merely proposes to commit an act which is not only criminal in its character, but also flagrantly offensive as a public nuisance, has no constitutional right to commit the act in order that he may thereafter enjoy the right of a trial by jury, and may be enjoined from committing such act. (Mo.) *State v. Canty*, 393.

See Municipal Corporations, 10-14.

OFFICERS.

PUBLIC OFFICER, Resignation of, Necessity for Acceptance of.—The acceptance of his resignation is necessary to relieve a public officer from responsibility and to create a vacancy in the office. This remains true notwithstanding a statute declaring that every office shall become vacant on the death of the incumbent, his resignation or removal. (Wash.) *State v. Superior Court*, 948.

PARENT AND CHILD.

Action for Enticing Child.

1. MOTHER'S ACTION for Enticing Child from Home.—While the father and mother of a child reside together, she cannot maintain an action against one who entices the child from home. (Ky.) *Soper v. Igo, Walker & Co.*, 212.

Custody of Child.

2. PARENT AND CHILD—Custody of Child.—In a controversy between parents for the custody of their minor child the court will regard the welfare of the child as the paramount consideration, notwithstanding the statute provides that "the father of the minor, if living, and in case of his decease the mother, whether remarried or not, being themselves respectively competent to transact their own business, and not otherwise unsuitable, must be entitled to the guardianship of the minor." (Wyo.) *Tytler v. Tytler*, 1067.

3. PARENT AND CHILD—Custody of Child, Father's Right.—The right to the custody of minor children is a joint one, to be enjoyed by their parents so long as the latter live together and exer-

cise the right, but the father has no paramount right to the custody of his infant child. (Wyo.) *Tytler v. Tytler*, 1067.

4. **PARENT AND CHILD—Custody of Children—Separation of Parents.**—Upon the separation of parents the right to the joint custody of their minor child is severed, and must then go to one or the other. (Wyo.) *Tytler v. Tytler*, 1067.

5. **PARENT AND CHILD—Custody of Children—Law of Forum.** In a controversy between parents for the custody of their minor child, the law of the place where the question is litigated controls, regardless of the law of the domicile of the parties. (Wyo.) *Tytler v. Tytler*, 1067.

6. **PARENT AND CHILD—Custody of Children—Desertion by Parent.**—In a controversy between parents for the custody of their minor children, there should be some good, substantial reason to warrant the court in giving the custody to the parent who is guilty of violating the marital duty and of deserting the other spouse. (Wyo.) *Tytler v. Tytler*, 1067.

7. **PARENT AND CHILD—Custody of Children—Separation Between Parents.**—If a separation of a wife from her husband is rendered necessary by her physical ailments, compelling a cessation of the marriage relation, her refusal to live with him as his wife is not such willful desertion or disregard of her duty toward him as to deprive her of the right to the custody of their minor children, when she is otherwise a suitable person to have such custody. (Wyo.) *Tytler v. Tytler*, 1067.

8. **PARENT AND CHILD—Custody of Children.**—If husband and wife are living apart through necessity, caused by her physical ailments, the fact that she takes their minor children from the custody of the father, peaceably, but without his knowledge or consent, being moved thereto by pure motives and acting out of love and affection for such children, in an effort to do what she believes will better their condition, does not stamp her as an unsuitable person to have their custody, and require that they be returned to their father. (Wyo.) *Tytler v. Tytler*, 1067.

9. **PARENT AND CHILD—Custody of Children—Testimony of Child.**—In a controversy between parents for the custody of their minor child, it is competent for the child, who is bright and intelligent and thirteen and one-half years old, to make a statement, based on substantial reasons, as to whom she prefers to live with. In many cases such expressed wish should be controlling. (Wyo.) *Tytler v. Tytler*, 1067.

See Adoption; Domicile; Negligence, 5, 6.

PARKS.

See Dedication.

PAROL EVIDENCE.

See Evidence, 6.

PARTIES.

1. **PLEADING, Amending by Adding a New Plaintiff—Limitation of Actions.**—The limitation upon the right of amendment is that no new cause of action shall be introduced and no new parties brought in after the statute of limitations has become a bar. (Pa.) *Holmes v. Pennsylvania R. R. Co.*, 685.

2. PLEADING—Amendment by Adding Mother of the Decedent as a Party Plaintiff.—If an action is brought by a father to recover for the death of his minor son, when by the statute a cause of action exists in the father and mother, she may, by amendment, be added as a party plaintiff after the period of the statute of limitations. (Pa.) *Holmes v. Pennsylvania R. R. Co.*, 685.

PARTNERSHIP.

1. PARTNERSHIP SETTLEMENT—Parol Evidence to Vary Date. In an action to correct a partnership settlement on the ground of mistake or fraud, parol evidence is admissible to show that the true date of the transaction is other than the date written in the instrument of settlement. (Ky.) *Ehrmann v. Stitzel*, 224.

2. PARTNERSHIP SETTLEMENT—Relief in Case of Fraud.—Where one partner sells his interest in the firm to his copartner, and in so doing relies implicitly on the integrity and superior knowledge of the latter to calculate the value of the property, he may maintain an action to surcharge the settlement to the extent of errors committed in arriving at the amount of the consideration, which are the result of fraud or mistake on the part of the purchasing partner. (Ky.) *Ehrmann v. Stitzel*, 224.

3. PARTNERSHIP, Criminal Liability of Member of.—A partner in the general supervision of blasting in a city, being prosecuted for blasting contrary to the provisions of a municipal ordinance, is not entitled to an instruction that if he was a member of a copartnership conducting business at the place of blasting, he should be found not guilty unless, as such partner, he participated in the act or assented thereto. There can, in such cases, be no distinction between his assent as a partner and his assent in his individual capacity. (Wash.) *City of Spokane v. Patterson*, 921.

4. PARTNERSHIP—Assets—Government Land.—Although a partnership may have used land entered by one of the members of the firm under homestead and desert land laws, but upon which final proof has not been made, such land cannot be considered as partnership assets upon a dissolution and winding up of the partnership affairs. (Wyo.) *Waisner v. Waisner*, 1081.

5. PARTNERSHIP—Assets—Homestead Entry.—An Agreement, Express or Implied, that a partner's homestead entry, upon which final proof has not been made, is made for, or inures to, the benefit of the partnership, is void as against public policy, and the land embraced therein is not an asset of the firm to be considered on a dissolution and accounting of the partnership. (Wyo.) *Waisner v. Waisner*, 1081.

See Arbitration, 8, 9.

PASSENGERS.

See Carriers.

PAYMENT.

1. THE ACCEPTANCE OF A CHECK for a Sum Conceded to be Due by the Drawer, the drawee claiming a larger amount, does not prevent the latter from applying the proceeds of the check upon the sum he claimed to be due, and then maintaining an action to recover the balance. (Minn.) *Demeules v. Jewel Tea Co.*, 315.

2. PAYMENT, Burden of Proof Respecting.—The introduction in evidence of a check given by the defendant to the plaintiff does not make a prima facie case of payment in full so as to impose on

the plaintiff the burden of proving that he had not collected and retained other sums for which defendant claimed he should account. (Minn.) *Demeules v. Jewel Tea Co.*, 315.

See Accord and Satisfaction.

PERJURY.

PERJURY, What Constitutes.—An official may be convicted of perjury for the doing of either of these three acts: Asking, receiving or agreeing to receive a bribe upon an understanding or agreement that his vote or other official action should be influenced thereby, or that he will do or omit some act or proceeding, or in some way neglect or violate some official duty, but he cannot be separately convicted of each of these several acts. (N. Y.) *People v. Gibson*, 597.

PERPETUITIES.

1. PERPETUITIES, Definition of.—A perpetuity is “a future limitation, whether executory or by way of remainder, and either of real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future interests, and which is not destructible by the persons for the time being entitled to the property subject to the future limitation.” (W. Va.) *Starcher Bros. v. Duty*, 990.

2. PERPETUITIES, Equitable Interest Subject to.—Whenever a contract raises an equitable right to property which the obligee can enforce in chancery by a decree for specific performance, such equitable right is subject to the rule against perpetuities. (W. Va.) *Starcher Bros. v. Duty*, 990.

3. PERPETUITIES, What will not Take the Case Out of the Rule Against.—The mere fact that a contingent interest may be released by the persons in being and that a good title may thus be made is not enough to take the case out of the rule against perpetuities. (W. Va.) *Starcher Bros. v. Duty*, 990.

4. PERPETUITIES, Options to Purchase Land with Provisions for Annual Renewals.—A contract which gives the right to purchase land within a specified time, and also contains an agreement that it may be extended yearly on the payment of a sum designated and that its terms and stipulations shall extend and apply to the heirs, assignees, executors and administrators of the parties, attempts to create an interest which is within the rule against perpetuities, and is therefore void. (W. Va.) *Starcher Bros. v. Duty*, 990.

5. PERPETUITIES, Contracts Which are Void Because of, Cannot be Made Valid by Estoppel or Partial Performance.—A contract which attempts to create an interest forbidden by the rule against perpetuities does not become enforceable upon one of the contracting parties accepting a payment thereunder according to its provisions, nor can he be estopped from urging that it is void. (W. Va.) *Starcher Bros. v. Duty*, 990.

See Landlord and Tenant.

PHYSICIANS AND SURGEONS.

PHYSICIAN AND PATIENT.—The relation of physician and patient is one of contract, either express or implied, and can be created in no other way. (Mo.) *Smart v. Kansas City*, 415.

See Limitation of Actions, 3, 4; Witnesses, 9-16.

PLEADING.

1. **PLEADINGS—Amended Petition.**—An amended petition which sets up no cause of action takes the place of the original petition, and relates back to the time of the institution of the suit, and the claim which it asserts is to be regarded as if asserted when the suit was brought. (Tex.) *Fort Worth etc. Ry. Co. v. Underwood*, 806.

2. **TRIAL—Practice—Amendment of Complaint.**—A complaint may be amended after verdict and pending a motion for a new trial, when the amendment is made to conform to the proof already introduced without objection. (Ill.) *Kennedy v. Swift & Co.*, 113.

See Parties.

POWER OF ATTORNEY.

See Deeds, 1.

PRINCIPAL AND AGENT.

AGENT—Undisclosed Principal—Purchase in Agent's Name. If an agent buys property in his own name with his principal's money, though the name of the principal is undisclosed, the property becomes that of the principal, and the intent of the agent to defraud the principal does not change the effect of the transaction. (Tex.) *Kempner v. Dillard*, 822.

See Deeds, 1; Evidence, 3.

PROHIBITION.

1. **PROHIBITION.—The Scope and Purpose of the Writ of prohibition** is to keep inferior courts within the limits of their own jurisdiction, and to prevent them from encroaching upon the jurisdiction of other tribunals. (Mo.) *State v. Reynolds*, 468.

2. **PROHIBITION—Conflict of Jurisdiction.**—A writ of prohibition will lie to prevent one court from intermeddling or entertaining a suit, the subject matter of which is pending and in process of litigation in another court of co-ordinate jurisdiction, with jurisdiction both of the subject matter and of the parties. (Mo.) *State v. Reynolds*, 468.

PUBLIC OFFICERS.

See Officers.

RAILROADS.**In General.**

1. **RAILROAD—Joint Liability with Engineer for Negligence.**—When the negligence of a railroad engineer results in injury to a mail clerk on the train, the railroad company and the engineer are jointly liable and may be sued jointly or severally. (Ky.) *Illinois Cent. Ry. Co. v. Houchins*, 205.

2. **CONFLICT OF LAWS—Foreign Contract.**—A contract by a railroad employé made in one state that he will give notice within thirty days from receiving an injury of his claim for damages and that his failure to do so shall bar any suit for their recovery, is not avoided by bringing action in another state, where such contract is invalid. (Tex.) *Chicago etc. Ry. Co. v. Thompson*, 798.

Liability for Fires.

3. **RAILROADS—Liability for Fires—Contributory Negligence.**—Farmers through whose premises a railroad is operated are not required to take unusual precautions against fires set out by the railroad company, but may use and cultivate their lands in accordance with the customary methods of farmers, without being open to a charge of contributory negligence. (Kan.) *Walker v. Chicago etc. Ry. Co.*, 119.

4. **RAILROADS—Fires—Combustibles on Adjacent Farms.**—A farmer who permits dry grass or cornstalks to remain in the field near a railroad track, where they are grown, as is customary with farmers, is not chargeable with contributory negligence nor deprived of his right of action against the railroad company for its negligence in setting out a fire. (Kan.) *Walker v. Chicago etc. Ry. Co.*, 119.

Passengers on Freight Trains.

5. **RAILROADS—Passengers on Freight Trains—Collusion with Conductor.**—If one obtains permission from a conductor of a freight train to ride thereon for less than the regular fare, he cannot claim the rights of, or expect the treatment due to, a passenger on a regular train. (Tex.) *Grahn v. International etc. R. R. Co.*, 767.

6. **RAILROADS—Passengers on Freight Trains—Liability for Reckless Act of Conductor.**—One who obtains permission of a conductor of a freight train to ride thereon acts in collusion with such conductor, especially when he rides for less than the regular fare, and cannot recover of the railroad company for the act of the conductor in compelling him to leave the train while in motion, and in ejecting him therefrom in reckless and negligent manner. (Tex.) *Grahn v. International etc. R. R. Co.*, 767.

See Carriers.

RAPE.

1. **RAPE—Female Under Age of Consent.**—The offense of assault with intent to rape on a female under the age of fifteen years may be complete with or without her consent. (Tex. Cr.) *Taylor v. State*, 844.

2. **RAPE—Instruction on Aggravated Assault.**—Where the evidence, in a prosecution for assault to commit rape, raises the issue of aggravated assault and battery, the court errs in failing to charge on the same. (Tex. Cr.) *Taylor v. State*, 844.

3. **RAPE—Indictment—Allegation of Sex.**—An indictment for an assault to commit rape need not allege that the defendant is a male person. (Tex. Cr.) *Taylor v. State*, 844.

4. **RAPE—Indictment—Allegation of Force and Sex.**—An indictment charging that "Lee Taylor" unlawfully made an assault upon "Pearl Wright, a female, then and there under the age of fifteen years; and she, the said Pearl Wright, not then and there being the wife of the said Lee Taylor, and the said Lee Taylor did then and there ravish and have carnal knowledge of the said Pearl Wright, against the peace and dignity of the state," is not objectionable on the ground that it does not allege force or the sex of the parties. (Tex. Cr.) *Taylor v. State*, 844.

RECEIVERS.

1. **JUDGMENT Against Receiver, Effect of upon Creditor.**—If a receiver representing creditors brings suit to set aside a transfer of

the debtor's property as in fraud of his creditors, and such suit is terminated by a decree against the receiver, the creditors are bound thereby, and one of them cannot subsequently maintain proceedings against the debtor on the ground that the sum transferred was in fraud of his rights. (Minn.) *Dohs v. Holbert*, 329.

2. **RECEIVERS—Conflict of Jurisdiction.**—When a court of competent jurisdiction has appointed a receiver, who is in the possession of and administering the property under its orders, another court of co-ordinate jurisdiction has no power to entertain a bill to administer the same property and to take it from the possession of the former receiver and to appoint its own receiver. (Mo.) *State v. Reynolds*, 468.

3. **RECEIVERS—Conflict of Jurisdiction.**—If the court first appointing a receiver has jurisdiction, its receiver will not be dispossessed of the property at the suit of a receiver subsequently appointed by a court of co-ordinate jurisdiction, regardless of whether the original appointment was or was not erroneous. (Mo.) *State v. Reynolds*, 468.

4. **RECEIVERS—Property in Custodia Legis.**—A receiver is an officer of the court which appoints him, and whatever he does under the order of the court regarding the property involved is the act of the court, and such property is in custodia legis. (Mo.) *State v. Reynolds*, 468.

5. **RECEIVERS—Removal and Reappointment—Property in Custodia Legis.**—If property is once in the possession of a receiver, and thus in the possession of the court appointing him, the legal custody thereof is not disturbed or changed by an order of the court removing him and appointing another as receiver in his stead. (Mo.) *State v. Reynolds*, 468.

6. **RECEIVERS—Removal—Appeal.**—The granting of an appeal from an order appointing a receiver in the place of one removed and the approval of an appeal bond does not remove the receiver last appointed, nor warrant the court in granting an order against such receiver to turn over the property and money in his hands, and he must still be allowed to retain possession, notwithstanding the appeal. (Mo.) *State v. Reynolds*, 468.

7. **RECEIVERS—Power to Remove.**—A court of equity has power to remove or discharge a receiver whom it has appointed at any stage of the litigation, and to substitute another in his stead. (Mo.) *State v. Reynolds*, 468.

REMOVAL OF CAUSES.

REMOVAL OF CAUSES—Resident and Nonresident Parties.—When a complaint states a cause of action in tort against a nonresident and a resident jointly, the nonresident is not entitled to a removal of the cause to a federal court. (Ky.) *Illinois Central Ry. Co. v. Houchins*, 205.

RENEWAL OF LEASE.

See Landlord and Tenant.

RESIDENCE.

See Domicile.

RES JUDICATA.

See Judgments, 4.

RESTRAINT OF TRADE.

See Contracts, 6-13.

RETRAXIT.

See Judgments, 5, 6.

RIPARIAN RIGHTS.

See Waters and Watercourses.

ROBBERY.

1. **ROBBERY.—Distinction Between Robbery and Larceny** from the person lies in the force or intimidation used, and if the article is so attached to the person or clothes as to create resistance, however slight, or if there is a struggle to keep it, the taking is robbery. (Ill.) *People v. Campbell*, 107.

2. **ROBBERY—Retaining Possession.**—While there must be an actual severance of the property from the person to constitute robbery, still the crime is consummated if the thief retains possession of the property but a short time. It is no less robbery because ineffectual in its consequences. (Ill.) *People v. Campbell*, 107.

3. **ROBBERY—Evidence Justifying Conviction.**—On a prosecution for robbery, evidence that one of the two defendants charged with the robbery assisted the other in his efforts to retain possession of a diamond pin which he had jerked from the person of its owner, and that the defendants together waited for a street-car, which they boarded with the owner of the diamond just before it was taken from him, is sufficient to show that both defendants were present and justifies their conviction. (Ill.) *People v. Campbell*, 107.

4. **ROBBERY of Sick or Drunken Man.**—Robbery is committed where a liquor seller, without the consent of a patron of the saloon who is vomiting from the effects of liquor, takes hold of the latter, runs his hand in his pocket, and steals money therefrom, and afterward denies having it. (Tex. Cr.) *Williams v. State*, 884.

5. **ROBBERY—Variance Between Indictment and Proof.**—Where an indictment for robbery charges that the accused took from the prosecutor one ten dollar bill, and the evidence shows that he took ten dollars but returned two, there is no variance. (Tex. Cr.) *Fannin v. State*, 874.

6. **ROBBERY—Proof of Prior Crime.**—It cannot, as original evidence against one accused of robbery, be proved that he told the witness he had been previously charged with crime. (Tex. Cr.) *Fannin v. State*, 874.

7. **ROBBERY—Coercion of Payment.**—Robbery may be committed by compelling one, at the point of a pistol, to pay money which the assailant claims is due him for wages. (Tex. Cr.) *Fannin v. State*, 874.

SALES.

1. **CONDITIONAL SALE, Contract, When Deemed to be and not a Lease.**—If a contract, though called a lease, declares that the person designated as lessee received certain road rollers and is to pay for their hire a sum designated in installments, and that the possession and ownership of the property shall remain in the lessor and at the expiration of the lease shall be returned to him, and that in case of the nonpayment at maturity of any of the notes given

for such installments, the lessor shall have the right to enter the premises of the lessee and take possession and remove the property, and that if the notes are all paid, the lessee may purchase the property for one dollar and receive a bill of sale, the transaction is not a leasing. (Pa.) *Kelly Springfield Road Roller Co. v. Schlimme*, 707.

2. SALE, CONDITIONAL, Remedies Under do not Include the Retaking of the Property and the Enforcement of the Notes Given Therefor.—Under a contract by which property is placed in the hands of a person designated as lessee and his notes are given payable at different times during the period of thirteen months, and when all are paid the lessee is entitled to the property on the payment of the additional sum of one dollar, the lessor has two remedies. He may, on default of payment of any of the installment notes, affirm the contract and recover upon it and upon subsequent installment notes as they become due, or he may rescind the contract by taking possession of the property as therein provided; but these remedies are not cumulative. Hence, if the property remains in the possession of the lessee for the whole thirteen months, yet if the lessor elects to take and retain possession of the property, he cannot maintain an action upon the promissory notes given therefor, though the contract is named as a lease and the installments represented by the notes designated as rent. (Pa.) *Kelly Springfield etc. Co. v. Schlimme*, 707.

SEAL.

See Deeds, 2, 3.

SELF-DEFENSE.

See Homicide, 12-19.

SHEEP-KILLING DOGS.

See Animals.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE of a Contract will not be Refused on the ground of misrepresentation and fraud, if the persons against whom the relief is sought accepted, a year after entering into the contract, a sum agreed to be paid for extending the time for its performance. (W. Va.) *Starcher Bros. v. Duty*, 990.

2. SPECIFIC PERFORMANCE will not be Decreed if to decree it will create inequality resulting from old age, mental weakness, poverty, inexperience, ignorance, sex, etc., or where the terms of the contract are so indefinite or assented to with such lack of caution that the enforcement will produce an inequality not foreseen by the defendant, although the complainant was free from any intention to take an unfair advantage. (W. Va.) *Starcher Bros. v. Duty*, 990.

STARE DECISIS.

See Courts, 3, 4.

STATE.

1. STATE—Payment of Claims Founded on Moral Obligation.—The legislature may provide for the payment of private claims

against the state which are not legal but which are founded on justice and supported by moral obligation. (N. Y.) *Wheeler v. State*, 555.

2. **STATE—Claims Against on Cancellation of Land Patent.**—A statute authorizing the court of claims to determine claims arising out of the cancellation of letters patent, and to render judgment against the state therefor, is not unconstitutional as providing for the allowance of private claims not founded upon legal liability. An award thereunder to a claimant who has been evicted from lands which he has purchased may properly be made for the purchase price of the land, with interest, and for expenses incurred in resisting eviction; but the award should not include the increased value of the land at the time of eviction. (N. Y.) *Wheeler v. State*, 555.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

Title of Act.

1. **CONSTITUTIONAL LAW—Statutes.**—Plurality of Title is not an objection to a statute which deals with but one subject, and if there is but one subject in the act and the title expresses more than one, the subject expressed in the title and not embraced in the act may be regarded as surplusage. (Ill.) *People v. McBride*, 82.

2. **CONSTITUTIONAL LAW—Statutes—More than One Subject.** The constitutional requirement that no act shall embrace more than one "subject" does not mean one provision, and any number of provisions may be contained in an act, however diverse they may be, so long as they are not inconsistent with or foreign to the general subject, and may be considered in furtherance thereof. (Ill.) *People v. McBride*, 82.

3. **CONSTITUTIONAL LAW—Statutes—More than One Subject.** A constitutional requirement that an act shall embrace but one subject is merely intended to prevent incorporating into an act matters not related to the subject of legislation, and of which the title gives no hint, and such prohibition is directed against the act itself, and not against its title. (Ill.) *People v. McBride*, 82.

4. **CONSTITUTIONAL LAW—Local Option Law—More than One Subject.**—A statute which merely enables particular communities to determine by popular vote whether sales of liquor may be licensed or not, and if certain territory is made anti-saloon territory, prescribing methods for restoring it to its former condition so that the question of license shall be left to municipal authorities, is not void as embracing more than one subject. (Ill.) *People v. McBride*, 82.

5. **CONSTITUTIONAL LAW—Title to Statutes.**—If a statute embraces some matter not expressed in its title, it is unconstitutional and void only as to that part, unless the provisions are so connected together in subject matter, meaning, or purpose that it cannot be presumed that the legislature would have passed, or the people have voted for, the one without the other. (Ill.) *People v. McBride*, 82.

6. **CONSTITUTIONAL LAW—Title to Statutes.**—If the title of an act fairly indicates the general subject, and reasonably covers all

the provisions of the act, and is not calculated to mislead the legislature or the people, it is a sufficient compliance with the constitutional requirement that the subject of the act must be stated in its title. (Ill.) *People v. McBride*, 82.

7. **CONSTITUTIONAL LAW**.—Titles of Statutes need be neither an abstract, a synopsis, nor an index of their contents. (Ill.) *People v. McBride*, 82.

8. **CONSTITUTIONAL LAW**.—Titles to Statutes.—In determining whether a provision is embraced within the title of an act, a liberal construction is to be given to the constitution, and, unless the act contains matter having no proper connection or relation to the title, it is valid, and the constitution is obeyed if all the provisions relate to one subject indicated in the title, and are parts of, or incident to, or reasonably connected with it. (Ill.) *People v. McBride*, 82.

9. **CONSTITUTIONAL LAW**.—Title to Statute.—In determining whether the subject matter of a statute is sufficiently stated in its title, it makes no difference whether the statute is to become operative with or without a vote of the people. (Ill.) *People v. McBride*, 82.

Extraterritorial Effect.

10. **CONFLICT OF LAW**.—Extraterritorial Operation of Statutes. Statutes of a state have no extraterritorial operation and cannot invalidate contracts made and to be performed in other jurisdictions. (Tex.) *Chicago etc. Ry. Co. v. Thompson*, 798.

Construction.

11. **A STATUTE** will not be Considered as Contradictory, nor as imposing impossible conditions, where such construction can be avoided. (Minn.) *Hyvonen v. Hector Iron Co.*, 332.

12. **STATUTORY CONSTRUCTION**.—Common Law.—Whether a statute affirms a rule of the common law upon the same subject, or whether it supplements it, supersedes it, or displaces it, the legislative enactment must be construed with reference to the common law, and the latter must be allowed to stand unaltered as far as is consistent with a reasonable interpretation of the new law. (Mo.) *Perry v. Strawbridge*, 510.

13. **STATUTORY CONSTRUCTION**.—Common Law.—Statutes in derogation of the common law are to be strictly construed, especially if the statute is in derogation of common right and common decency as well. (Mo.) *Perry v. Strawbridge*, 510.

14. **STATUTES Adopted from Other States**.—Construction.—A decision by the courts of one state construing a provision of a statute, rendered subsequently to the adoption of such statute by another state, is not binding upon the courts of the latter. (Wyo.) *Wyoming Coal Min. Co. v. State*, 1014.

See Constitutional Law.

STREET RAILWAYS.

See Carriers, 14-21.

SUCCESSION.

See Descent and Distribution.

SUICIDE.

See Insurance, 1, 2.

TAXATION.

TAXATION—Exemption of Corporation.—The Power of the Legislature to amend a corporate charter, whether by virtue of a state constitution or a general law of the state reserving such right, includes the power to repeal a provision exempting the property of the corporation from taxation. (N. Y.) *People v. Gass*, 549.

TELEGRAPH COMPANIES.

1. TELEGRAPH COMPANIES—Delivery of Telegram.—A telegraph company does not perform its obligation to deliver a telegram by merely attempting to deliver it in the suburb of a city to which it is directed, if its office is in the city and the true address which is within its delivery limits can be ascertained by the exercise of reasonable diligence. (Tex.) *Klopf v. Western Union Tel. Co.*, 831.

2. TELEGRAPH COMPANIES—Duty to Deliver Message.—If a telegraph company fails to deliver a telegram which is misdirected to a particular place, within delivery limits, but which address could be ascertained from the telegraph directory, the telegraph company does not use due diligence in attempting to deliver the telegram. (Tex.) *Klopf v. Western Union Tel. Co.*, 831.

TENANCY IN COMMON.*In General.*

1. TENANTS IN COMMON, Purchasers from One of Several, Notice to.—Purchasers or lessees from a cotenant are bound by the rules of law respecting the acquisition of an adverse title by him, where the original deed showed that he once held the property as a cotenant, for they are chargeable with notice of his title and of the law. (W. Va.) *Reed v. Bachman*, 996.

2. TENANTS IN COMMON—Laches.—The title of a tenant in common cannot be lost by laches when it is not barred by the statute of limitations. (W. Va.) *Reed v. Bachman*, 996.

3. TENANT IN COMMON—Jurisdiction in Equity to Compel an Accounting.—Equity has jurisdiction to entertain a suit for partition by a tenant in common and also for an accounting of rents and profits. This rule applies against one who has, without lawful right, under one cotenant, taken oil from the property of the cotenancy. (W. Va.) *Reed v. Bachman*, 996.

Acquisition of Outstanding Title.

4. TENANT IN COMMON.—The Purchase of an Outstanding Title to the Common Property by one of the cotenants is by law deemed to be for the benefit of all. Hence, such purchase cannot be set up by one against another. (W. Va.) *Reed v. Bachman*, 996.

5. COTENANTS, Heirs of cannot Set up an Adverse Title.—Where one of the cotenants purchases an outstanding title and is incapacitated by law from setting it up against his fellow-tenants, his heirs, on his death, are subject to the same incapacity. (W. Va.) *Reed v. Bachman*, 996.

6. A TENANT IN COMMON Purchasing the Property of the Cotenants at a Sale Under a Deed of Trust given to secure the payment

of an indebtedness from all the cotenants cannot hold the title against the others, especially when they have paid their share of the indebtedness and he has not paid his. (W. Va.) *Reed v. Bachman*, 996.

Redemption by Cotenant.

7. **COTENANCY—Redemption by Cotenant—Effect of.**—A cotenant cannot, by redeeming from a mortgage sale, invest himself with an absolute indefeasible title to the joint property. Such act of redemption inures to the benefit of all of the cotenants, provided within a reasonable time they elect to contribute and reinstate their title. (Ala.) *Savage v. Bradley*, 30.

8. **COTENANCY—Redemption by Cotenant—Effect of—Laches.**—If a cotenant has redeemed from a mortgage of the joint property, two years thereafter, under ordinary circumstances, by analogy to the statutory right of redemption, is the limit of time in which the other cotenants may exercise the right of election to contribute and reinstate their title, and a longer delay constitutes laches. (Ala.) *Savage v. Bradley*, 30.

Ouster and Adverse Possession.

9. **TENANT IN COMMON, Ouster of.**—The actual ouster of one tenant in common by another cannot be presumed where the possession has become tortious and wrongful by the disloyal acts of the cotenant, which must be open, continuous and notorious, so as to prevent all doubt of the character of his holding or the want of knowledge thereof by a cotenant. This conduct must amount to a clear, positive and continued disclaimer and disavowal of his cotenant's title and an assertion of an adverse right; and knowledge must be brought home to his cotenant. (W. Va.) *Reed v. Bachman*, 996.

10. **TENANT IN COMMON—Ouster.**—The Taking of All the Rents and Profits by one cotenant will not amount to an ouster of another. (W. Va.) *Reed v. Bachman*, 996.

11. **TENANT IN COMMON—Ouster.**—Mere Silent Possession by One Cotenant, however long continued, will not work an ouster and cause the statute to bar another cotenant. (W. Va.) *Reed v. Bachman*, 996.

12. **TENANT IN COMMON—Ouster.**—Knowledge by a Cotenant of an Adverse Claim made by another cotenant is essential to an ouster. The cotenant not in actual possession is not bound to inquire respecting the possession held by his cotenant, because each can repose confidence in the other's good faith. (W. Va.) *Reed v. Bachman*, 996.

13. **TENANT IN COMMON—Ouster.**—Neither Taking a Deed for Real Property nor the exclusive receipt of rents and profits by one of the cotenants amounts to an ouster of the other. (W. Va.) *Reed v. Bachman*, 996.

14. **TENANT IN COMMON—Adverse Possession.**—A conveyance to a cotenant without possession taken under it can never amount to an ouster, as where he is in possession before such purchase. (W. Va.) *Reed v. Bachman*, 996.

TICKET-SCALPING.

See Contempt, 4; Injunctions, 4.

TIMBER.

See Deeds, 8-10; Life Tenancy; Logs and Logging.

TIME.

TIME, HOW COMPUTED—Solar or Standard.—If a term of court terminates by law on a certain night, its close is fixed at midnight of that day, according to solar time and not by the standard or railroad time of the place. (Tex.) *Texas Tram and Lumber Co. v. Hightower*, 794.

TITLE OF STATUTE.

See Statutes.

TRESPASS.

See Injunctions, 5-7.

TRESPASSERS.

See Negligence, 8-12.

TRIAL.

1. **TRIAL**—Instructions.—A person cannot complain of error in instructions which he adopts as his own. (Mo.) *Smart v. Kansas City*, 415.

2. **PRACTICE**—Special Findings of Facts.—If a judge trying a cause without a jury files written findings of fact, he may thereafter, on the request of a party, make further findings, and the appellate court may, upon such request being made, review the evidence at large, when other material facts are found in the record, not included in the findings made. (Tenn.) *Rogers v. Ayers*, 725.

See Criminal Law; Homicide.

TROVER AND CONVERSION.

1. **THE MEASURE OF DAMAGES** in Actions for Conversion, as a general rule, is the value of the property at the place where converted. (N. Y.) *Wallingford v. Kaiser*, 600.

2. **THE MEASURE OF DAMAGES** in Actions for Conversion Where There is No Market Value for the property converted or like property at the place of conversion is found by resorting to evidence of its value at the nearest place where there is a market, less the expense of taking it to that place. (N. Y.) *Wallingford v. Kaiser*, 600.

3. **MEASURE OF DAMAGES** for the Conversion of Property in the Hands of a Carrier for Transportation—Place of Destination.—If property in the course of transportation is converted at an intermediate point, the measure of damages is its value at the place of destination, less the cost of carriage and of effecting a sale in that market. (N. Y.) *Wallingford v. Kaiser*, 600.

4. **DAMAGES** for the Conversion of Property in the Course of Transportation—Mitigation of by Want of Knowledge of the Destination.—Where property in the hands of a carrier and in course of transportation is converted at an intermediate point, the want of knowledge on the part of the person guilty of the conversion of the place of destination is not available to him in mitigation of damages. (N. Y.) *Wallingford v. Kaiser*, 600.

See Life Tenancy.

TRUSTS.*In General.*

1. TRUST, DECLARATIONS OF and Their Sufficiency.—The essential elements of a declaration of trust are the subject matter of the trust and the designation of the cestui que trust and of his right or interest in the subject matter. (Pa.) *Ranney v. Byers*, 660.

2. TRUST, DECLARATION OF—Writing.—A trust need not be created by a writing, but is required by statute to be manifested by a writing, signed by the party holding the title thereof. If in writing, it need not be expressed in any particular form of words, nor need the word "trust" or "trustee" be used, but the language used must be such as to disclose with certainty the purpose to create the trust. (Pa.) *Ranney v. Byers*, 660.

3. TRUST, DECLARATION OF, Instance of Sufficient.—A paper showing the place and date of its execution, purporting to be a memorandum and agreement and stating that the agreement with Mr. B. is that the money invested by him in "the place" is to be placed to his credit and bear interest until paid, and when the principal and interest are paid, the residue of the property is to belong to C. W. R. and W. B. R., and duly signed, is sufficient to satisfy the requirements of the statute respecting declarations of trust. (Pa.) *Ranney v. Byers*, 660.

4. TRUST, DECLARATION OF—Parol Evidence to Identify Subject Matter of.—A declaration of trust specifying the "Byers Place" as the subject matter thereof is sufficient, and parol evidence is admissible to show what was included in the place so named. (Pa.) *Ranney v. Byers*, 660.

Following Trust Funds.

5. TRUST FUNDS—Right to Follow.—A Statute changing the rule that a constructive trust arises where a deed is made to one person when the consideration is paid by another does not affect the equitable doctrine that equity follows a fund and compels restitution to the true owner as long as it can be identified. (Ky.) *Board of Trustees v. Postel*, 184.

6. TRUST FUNDS—Right to Follow.—The True Owner of a fund may pursue it in equity where it is clearly identified, equally whether it has been transmuted by the holder into personalty or realty. (Ky.) *Board of Trustees v. Postel*, 184.

7. TRUST FUNDS—Right to Follow as Against Municipality.—The right of the true owner of a fund to pursue it in equity, so long as it can be clearly identified, obtains as against municipalities. Hence, the holders of school bonds, void because issued in violation of the constitutional provision limiting municipal indebtedness, are entitled to relief, on showing that the proceeds of the bonds have been invested in a lot, schoolhouse and school furniture. (Ky.) *Board of Trustees v. Postel*, 184.

Trust Deed.

8. TRUST DEED to Secure an Indebtedness, When does not Show a Fraudulent or Void Trust.—To establish that a deed of trust is fraudulent and void on its face as to creditors, it is not sufficient to show that such deed does not authorize the trustee to sell until maturity of the note secured where it is only four days from the execution of the deed to such maturity, and the deed does not postpone the right of the trustee to take immediate possession. (W. Va.) *Weaver v. Neal*, 972.

9. **A DEED OF TRUST to Secure Any Future Indorsement** of the promissory note described therein is not void as containing a badge of fraud. (W. Va.) *Weaver v. Neal*, 972.

10. **A TRUSTEE cannot Deny the Trust and Plead the Statute of Limitations** without a disavowal of the trust, with notice to the beneficiary. (W. Va.) *Reed v. Bachman*, 996.

Trustee's Sale.

11. **TRUSTEE'S SALE, Notice of, Service of on the Grantee of the Trustor.**—Under a statute requiring notice of a sale under a deed of trust to be served on the grantor, if within the county, it is not necessary to make such service on his assignee or grantee, though the grantor is not in the county. (W. Va.) *Shea v. Ballard*, 981.

12. **TRUSTEE'S SALE, When will not be Set Aside.**—A grantee of property which is subject to a deed of trust to secure the payment of indebtedness is not entitled to have the sale set aside on the ground that he was not served with notice thereof, when the statute does not require such service. (W. Va.) *Shea v. Ballard*, 981.

13. **PURCHASER OF PROPERTY at a Sale Made by a Trustee** under a trust deed to secure the payment of indebtedness is not required, if he is not the person whose debt was so secured, to assume the burden of proving that the notice of sale was given as required by law or the deed of trust. (W. Va.) *Shea v. Ballard*, 981.

14. **A TRUSTEE'S SALE Made Without Giving the Notice Required by Law or by the provisions of the trust deed** will be set aside. (W. Va.) *Shea v. Ballard*, 981.

USURY.

1. **USURY, Defense of by One Who has Assumed the Payment of a Debt.**—One who purchases land, and, as part of the consideration therefor, agrees to pay a debt infected with usury but secured by a trust deed, will not be relieved against such debt or deed. (W. Va.) *Stuckey v. Middle States Loan etc. Co.*, 977.

2. **USURY—Purchase by National Banks of Paper Infected by.**—If Negotiable Paper, Based on a Consideration Partly Usurious, is Purchased by a National Bank with Knowledge of Its Consideration, it is subject to the defense of usury to the same extent as if it remained in the hands of the original payee. (N. Y.) *Schlesinger v. Lehmaier*, 591.

Note.

Vendor and Purchaser, damages for misrepresentations inducing the purchase of land. See Damages.

VOLUNTARY ASSOCIATIONS.

See Associations.

WATERS AND WATERCOURSES.

1. **RIPARIAN OWNERS, Rights of.**—By the common law each riparian owner has the right to ordinary use for domestic purposes of the water in a definite stream passing through or over his land. (Wash.) *Nielson v. Sponer*, 910.

2. **RIPARIAN OWNERS, Constitutionality of Statute Interfering with Rights of in the Waters of a Spring.**—A statute purporting

to authorize a land owner to use all the spring water rising on his own land, and therefore destroying the right to use such water by a lower riparian proprietor, is unconstitutional as a taking away or destruction of property rights without due process of law. (Wash.) *Nielson v. Sponer*, 910.

3. **WATERCOURSES**—**Waters of a Spring, Right of Lower Riparian Proprietor to.**—A land owner has no right to use all the waters of a spring rising on his land for irrigation, so as to prevent a lower riparian proprietor from having the use of any for domestic purposes. (Wash.) *Nielson v. Sponer*, 910.

See Logs and Logging.

WILLS.

1. **WILLS**, **Presumption of Undue Influence, When Arises Where the Provisions of the Will Favor a Stranger.**—If a testator, though not without some mental capacity to make a will, is aged and infirm, with his mental faculties impaired, and makes a will in favor of a confidential adviser, there is a presumption of fact that undue influence was brought to bear on the mind of the testator, and the burden is on the beneficiary to rebut this presumption. (Pa.) *Adams' Estate*, 721.

2. **BENEFICIARIES.**—**The Issue of Devisavit Vel Non must be Awarded** and submitted to the jury, though there is other evidence sufficient to rebut the presumption of such influence. (Pa.) *Adams' Estate*, 721.

3. **ISSUES Means Legitimate Issue.**—Under a will directing the disposition of property among the issue of a specified person, legitimate issue only are included. (Pa.) *Kemper v. Fort*, 623.

4. **WILL, Construing, When of Conflicting Intent.**—In construing wills, the effort is to discover the actual principal intent of the testator, and when it is clear, it will not be departed from. (Pa.) *Allen v. Hirlinger*, 617.

5. **WILLS**—**Presumption When There is a Gift and a Subordinate Inconsistent Disposition.**—The tendency of the decisions is to construe the first gift as a fee, and the subsequent words which appear to be repugnant as merely precatory or as expressive of a subordinate intent which must fail as an attempt to deprive the estate given of its legal attributes. (Pa.) *Allen v. Hirlinger*, 617.

6. **WILLS**—**Devise and Bequest of a Fee, When Cut Down by Subsequent Provisions as to Disposition.**—A devise and bequest to the testator's widow of all his estate, real and personal, to be the real owner thereof and for her proper use and benefit during her natural life, or so long as she remains his widow, with full permission to use therefrom as her necessities may require the same as the testator has had during his life, followed by a direction that, on her death, whatever remains is to be given his daughter, does not give the widow the fee. (Pa.) *Allen v. Hirlinger*, 617.

7. **WILLS**, **Power of the Devisee to Convey Though She does not Acquire the Fee.**—Where the person to whom property is devised for life is also given unlimited power to consume it, this includes the power to convey the fee. (Pa.) *Allen v. Hirlinger*, 617.

WITNESSES.

Examination.

1. **CRIMINAL LAW**—**Evidence—Improper Questions.**—The asking of improper questions by the prosecution, even if done from an

improper motive, does not necessarily call for a reversal of the case, unless the jury was improperly influenced thereby. (Ill.) *People v. Campbell*, 107.

2. CRIMINAL TRIAL—Repetition of Questions to Witnesses.—In a criminal prosecution it is within the sound discretion of the court to control the examination of witnesses and prevent the repetition of questions and answers. (Tex. Cr.) *Williams v. State*, 884.

Credibility and Impeachment.

3. WITNESSES, Presumption as to Whether They Speak the Truth.—There is no presumption that a witness speaks the truth, and a statement to the jury that there is such presumption is both erroneous and presumably prejudicial. (Minn.) *State v. Halverson*, 326.

4. CREDIBILITY OF WITNESS, Instruction Concerning, When Prejudicial.—If, in a prosecution for bastardy, the court instructs the jury that it is to be taken for granted that a witness speaks the truth, and consequently that the prosecuting witness tells the truth, unless the force of surrounding circumstances and the attendant facts are such as compel a belief in the minds of the jury that falsehood instead of truth was spoken, such instruction is erroneous and must be presumed to have been prejudicial to the defendant. (Minn.) *State v. Halverson*, 326.

5. WITNESS, Credibility of, Instructions Concerning.—The question of the credibility of a witness is solely for the jury, and is not a matter upon which they should be guided or controlled by general statements or instructions from the court. (Minn.) *State v. Halverson*, 326.

6. EVIDENCE to Discredit Witness.—The Court Should Tell the Jury that evidence introduced to discredit a witness is not to be considered as substantive testimony. (Ky.) *Illinois Cent. Ry. Co. v. Houchins*, 205.

7. WITNESSES — Credibility — Instructions.—An instruction to the jury that they were the sole judges of the credibility of each witness, and the fact that a witness was a policeman or a detective, or engaged in any other lawful business, did not render him incompetent to testify or furnish ground for arbitrarily rejecting his testimony, which should be considered with candor and fairness, and be given such weight as the jury thought it entitled to, is improper, as calling special attention to a particular witness, and should not be given. (Ill.) *People v. Campbell*, 107.

Attorney and Client.

8. ATTORNEY AND CLIENT—Privileged Communications.—When the accused in a homicide case testifies in open court as to facts which had been a privileged communication with his attorney, the privilege ceases, and in a subsequent trial of the case the attorney may be compelled to testify as to the statements thus made in court. It would be better practice, however, to prove them by some other witness than the attorney. (Tex. Cr.) *Yardley v. State*, 869.

Physician and Patient.

9. WITNESSES — Physicial and Patient — Waiver by Bringing Suit.—A person by bringing suit and asking damages for personal injury inflicted by a third person does not thereby waive the incompetency of his physician or surgeon to testify regarding information acquired from him while attending him in a professional capacity for such injury. (Mo.) *Smart v. Kansas City*, 415.

10. **WITNESSES—Physician and Patient.**—A physician or surgeon is disqualified to testify in all cases regarding information acquired by him from a patient while attending him in a professional capacity, and which information is necessary to enable him to prescribe for such patient. (Mo.) *Smart v. Kansas City*, 415.

11. **WITNESSES—Physician and Patient.**—Assistant Physicians or Surgeons in a hospital to which a person is taken for treatment are incompetent to testify, over objection, as to anything connected with the treatment or condition of such person while there. (Mo.) *Smart v. Kansas City*, 415.

12. **WITNESSES—Physician and Patient.**—It makes no difference, so far as the physician's disqualification to testify against his patient is concerned, whether he acquires the confidential communications from a poor or pay patient, in a private residence or in a hospital, or from a charity patient in a public hospital. (Mo.) *Smart v. Kansas City*, 415.

13. **WITNESSES—Physician and Patient.**—A physician rightfully in a hospital exercising authority over patients therein, examining their persons, advising treatment, and removing patients from their wards to the operating-room for clinical purposes, with the knowledge and consent of those in charge of the institution, is incompetent to testify, over objection, as to anything connected with the treatment or condition of a patient while in such hospital. (Mo.) *Smart v. Kansas City*, 415.

14. **PHYSICIAN AND PATIENT—Creation of Relation—Confidential Communications.**—It is not necessary, to create the relation of physician and patient, that the physician should actually treat the patient, and if he makes an examination of the patient with the knowledge and consent of the latter, he believing that the examination is being made for the purpose of treating him, the relation is created by implication, and it is wholly immaterial what the secret object or purpose of the physician was in making it in so far as it affects his right to disclose the conditions or communications of the patient. (Mo.) *Smart v. Kansas City*, 415.

15. **WITNESSES—Physician and Patient—Confidential Communications.**—A patient in a hospital has the right to assume, and rely upon the assumption that a physician apparently in charge of the hospital is rightfully there, and as such has authority to examine and prescribe for him, and the physician will not afterward be heard to say that he was not connected with the institution and had no authority to treat the patient, for the purpose of allowing him to disclose the physical condition of such patient while in the hospital. (Mo.) *Smart v. Kansas City*, 415.

16. **WITNESSES—Physician and Patient—Privileged Communications.**—Information acquired by a physician by looking at the patient or by examination is as much within the rule excluding as evidence confidential communications as are the verbal communications which take place between them. (Mo.) *Smart v. Kansas City*, 415.

See Evidence; Marriage.

WORDS AND PHRASES.

DEFINITIONS—"At."—The preposition "at," when used to denote local position, may mean "in" or "near by," according to the context, denoting usually a place conceived of as a mere point. Primarily the word "at" expresses the relations of presence, nearness in place. (Ala.) *Harris v. Theus*, 17.

[illegible]

